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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
Gberdao Gustave Kam
sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence

Registrar: Adama Dieng

Date: 22 March 2007

THE PROSECUTOR

v.

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

JUDICIAL RECORDS ARCHIVES
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**DECISION ON PROSECUTION'S MOTION TO UNSEAL AND DISCLOSE TO THE
CANADIAN AUTHORITIES THE TRANSCRIPTS OF WITNESS CEA**

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INTRODUCTION

1. A first trial against Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba started in November 2003 before Trial Chamber III composed of Judges Andrésia Vaz, presiding, Florence Arrey and Flavia Lattanzi.¹ During that first trial, Witness CEA was called to give evidence as a Prosecution witness. The witness testified, among other things, in a closed-session hearing on 4 December 2003 in accordance with prior protective orders requiring that those parts of a Prosecution witness's testimony which might reveal his or her identity be heard in closed session and that the transcripts thereof be put under seal.²

2. On 19 September 2005, a trial against Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera started afresh before a new composition of Trial Chamber III, including Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. However, on 19 January 2007, Judge Short decided to withdraw from this case. In accordance with Rule 15 *bis* (D) of the Rules of Procedure and Evidence ("Rules"), the remaining Judges decided on the continuation of the proceedings with a substitute judge.³ The President also authorized the Trial Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.⁴

3. On 8 March 2007, responding to a request made by the Canadian authorities, the Prosecution filed a confidential motion seeking a variance of the witness protection measures

¹ On 14 May 2004, Judge Vaz withdrew from the case. On 16 July 2004, the remaining Judges decided that it would be in the interests of justice to continue the trial with a substitute Judge. The Appeals Chamber quashed this Decision (*Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-AR15bis.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; Reasons For Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004). As a result a rehearing of the case was necessary. Judges Byron, presiding, Short and Kam were then assigned to this trial. At the Prosecution's request, the Chamber granted the severance of André Rwamakuba and ordered that he be tried separately (*Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File an Amended Indictment (TC), 14 February 2005).

² *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses (TC), 7 October 2003; *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-I, Decision on the Prosecutor's Request for Special Protective Measures for Witnesses G and I (TC), 20 October 2003; *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

³ *Karemera et al.*, Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation of the Proceedings").

⁴ See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

for Witness CEA and leave to disclose the closed session transcript of the testimony of the witness of 4 December 2003 to the Canadian authorities.⁵

DISCUSSION

4. Although the Defence for Nzirorera has no objection to the proposed disclosure, it submits three preliminary issues that the Chamber will address before discussing the merits of the Motion.⁶

Preliminary Issues

5. The Defence for Nzirorera firstly argues that there is no reason why this Motion should have been filed confidentially and requests that it be filed as a public document.⁷ In this regard, the Chamber finds that there is a clear reason why the Prosecution motion was filed confidentially as the Annexes to this motion reveal the identity of Witness CEA and this witness, as explained above, remains subject to protective measures.

6. The Defence for Nzirorera secondly submits that the remaining Judges, before which this motion is filed, do not have the authority to take any actions with respect to this Motion as it argues that this Motion is not a routine matter within the meaning of Rule 15 bis (F). It has, however, no objection to the matter being referred to and decided by the Judges of Trial Chamber III, even if it notes that in relation to Joseph Nzirorera's Motion for Subpoenas to Prosecution Witnesses, the Prosecution opposed such suggestion.⁸ In a related argument, it thirdly indicates that it would have no objection to the matter being referred to Trial Chamber III so long as equal treatment is given to Joseph Nzirorera's Motion for Subpoenas to Prosecution Witnesses, filed on 1 March 2007.⁹

7. Rule 15 bis (F) of the Rules provides that "[i]n case of illness or an unfilled vacancy or any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members."

8. This provision does not give much guidance as to the meaning of the expression "routine matters" or "delivery of decisions." So far, neither Trial Chambers nor the Appeals

⁵ Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA, filed on 8 March 2007 ("Prosecutor's Motion").

⁶ Joseph Nzirorera's Response to Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA, filed on 12 March 2007 ("Nzirorera's Response").

⁷ *Ibid.*, para. 2.

⁸ *Ibid.*, paras. 3 and 4.

⁹ *Ibid.*, para. 4. See also Prosecutor's Response to Joseph Nzirorera's Motion for Subpoenas to Prosecution Witnesses, filed on 6 March 2007, para. 2.

Chambers of this Tribunal have defined the expression "routine matters".¹⁰ While the President of the International Criminal Tribunal for Former Yugoslavia has authorised a Chamber composed of two remaining Judges to conduct routine matters,¹¹ no Trial Chamber has yet to make an order or render a decision under Rule 15 *bis* (F) authorization.

9. The meaning of "routine matters" and "delivery of decisions" must therefore be interpreted in accordance with the ordinary meaning of these terms, including the French use of these expressions, in the context of the Rules, and in particular of Rule 15 *bis* (F) and in light of its object and purpose.¹²

10. Nowhere else in the Rules, are the expressions "routine matters" or "delivery of decisions" used as such.¹³ Conversely, the French word for "delivery of decisions" in Rule 15 *bis* (F), namely "prononcé", is used in the Rules under various meanings: the act of orally pronouncing a decision,¹⁴ the moment from when a time-limit shall run when a decision is rendered orally,¹⁵ and the orders issued by a Chamber or a Judge.¹⁶ It therefore cannot be said that the expression is limited to the sole act of making public a decision which has already been deliberated by three Judges. This conforms with Rule 15 *bis* (F) when read in its context and as a whole. This Rule is set out under the general provision applicable in case of the absence of a Judge, including when a Judge withdraws from a case and the remaining Judges decide on the continuation of the proceedings; it moreover explicitly applies to cases where a vacancy is unfilled, and therefore where no deliberations between three Judges could take place. It must also be noted that in various cases, the Rules themselves provide for a single

¹⁰ In the *Niyiramaushuko et al.* case, the Appeals Chamber had to deal with a similar question but did not provide any definition (*Prosecutor v. Niyiramaushuko et al.*, Decision in the Matter of Proceedings under Rule 15 *bis* (D) (AC), 24 September 2003, para. 10).

¹¹ *Prosecutor v. Simic et al.*, Case No. IT-95-9, Order of the President Authorizing a Chamber to Conduct Routine Matters in the Absence of one of its Members, 1 March 2001; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8, Order of the President Authorizing a Chamber to Conduct Routine Matters in the Absence of one of its Members, 1 March 2001.

¹² See the principles of interpretation set out by articles 31 to 33 of the Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331. On various occasions, the Appeals Chamber has applied these principles as guiding principles for the interpretation of the Rules of Procedure and Evidence (*Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement (AC), 18 September 2000, para. 22; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43).

¹³ At Rules 102 and 119, the verb "to deliver" is used.

¹⁴ See for e.g. Rules 15 *bis* (F) (i), 65(D)(i), 88, 90, 100, 108, 118 and 102.

¹⁵ See for e.g., Rules 72(C), 73, 90 and 91(I). See also Rule 65(F) which does not necessarily only apply to oral decisions and may encompass written decisions.

¹⁶ See Rule 39 (iv): "Request such orders as may be necessary from a Trial Chamber or a Judge" ("In French: "Solliciter d'une Chambre de première instance ou d'un juge le prononcé de toute ordonnance nécessaire"); Rule 61(B): "Upon obtaining such an order [that the indictment be submitted by the Prosecutor to the Trial Chamber], ..." (In French: "Dès le prononcé d'une telle ordonnance [visant à ce que le Procureur présente l'acte d'accusation à la Chambre de première instance]").

Judge to rule upon motions or issue orders.¹⁷ That decisions should be taken by three Judges is therefore not an absolute rule as such. In that respect, the Chamber notes that the Defence for Nzirorera has not disputed the power of the present Judges to grant certification to appeal.¹⁸

11. Certainly, the Rule leaves the Trial Chamber with a measure of discretion to determine what constitutes routine matters in the proceedings before it. This must be done on a case-by-case basis and considering whether it is in the interests of justice to do.

12. The Chamber is of the view that the Prosecution Motion falls within the category of routine matters that can be dealt with in the absence of one of its members. The issue at stake relates to the application of protective measures previously granted to a Prosecution witness in another set of proceedings not pending before this Tribunal. The Chamber further notes that the Defence does not object to the disclosure sought. Consequently, the Chamber finds that it is competent to rule on the Prosecution Motion.

13. The Defence for Nzirorera finally suggests that as the testimony of Witness CEA related exclusively to André Rwamakuba, the latter should be given an opportunity to be heard before a decision on the Motion is rendered.¹⁹ The Chamber does not find that the Defence has shown the interest of Mr. Rwamakuba in being heard on the matter, or what prejudice could result from such disclosure for him. The issue at stake relates to the protective measures granted to a witness who testified before this Tribunal and whether or not to amend these measures. Should have the entire testimony of the witness have been in open session, the Chamber would not even be seized of the matter. The Defence's suggestion to provide Mr. Rwamakuba with an opportunity to be heard is therefore rejected.

On the Merits

14. While the Rules provide a mechanism for the routine disclosure of closed session testimony or of protected information between different proceedings before the Tribunal,²⁰

¹⁷ See for e.g., Rules 54, 73(A), 75.

¹⁸ See *Karemura et al*, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007; Joseph Nzirorera's Interlocutory Appeal on "Witness Proofing", filed on 19 March 2007.

¹⁹ *Ibid*, para. 5.

²⁰ See Rules 75(F) and (G):

"(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

this mechanism is not, as such, applicable in the present case as the request concerns a trial before Canadian authorities.²¹

15. In a number of previous decisions, Trial Chambers have granted similar orders for disclosure to national authorities on the basis of Article 28(1) of the Tribunal's Statute, which provides for cooperation and judicial assistance of States with the Tribunal.²² In the *Ndayambaje et al.* case, Trial Chamber II held that "the guiding principles of state cooperation under Article 28 (1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law" and that the investigation of crimes committed in Rwanda in 1994 by national authorities was "in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534."²³

16. According to the above jurisprudence, a request for disclosure of closed session testimony to national authorities may be granted when the following conditions are met: (1)

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings."

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seized of the first proceedings; or
- (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings."

²¹ See also *The Prosecutor v. Elie Ndayambaje, The Prosecutor v. Joseph Kanyabashi, The Prosecutor v. Pauline Nyiramasuhuko, The Prosecutor v. Sylvain Nsubimana*, 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. Elie Ndayambaje, The Prosecutor v. Joseph Kanyabashi, The Prosecutor v. Pauline Nyiramasuhuko, The Prosecutor v. Sylvain Nsubimana*, 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 and 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.

²² Article 28 reads as follows:

"1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda."

Prosecutor v. Ndayambaje et al., Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA (TC), 1 November 2006; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution Motion to Unseal and Disclose to Canadian Authorities the Transcripts of the Testimonies of Witnesses TA, QCB, TK, SJ, FAI, QY, and QBQ (TC), 19 March 2007. See also *Prosecutor v. Ntagurera et al.*, Case No. ICTR-99-46, Decision on Disclosure of Closed Session Testimony of Witness K1H (TC), 21 March 2007.

²³ *Prosecutor v. Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA (TC), 1 November 2006, para. 15.

such a request is in keeping with the Tribunal's objective of investigating and prosecuting persons accused of committing serious violations of international humanitarian law in Rwanda; (2) the witness concerned has consented to the disclosure of the closed session testimony; and (3) the Chamber has ascertained that there is no risk for the privacy and security of the witness concerned. In addition, when granting such a request, a Trial Chamber should guarantee that the protective measures granted to the witness concerned will continue to have effect *mutatis mutandis* in any proceedings before the national authorities. The Chamber is of the view that many of the above conditions mirror those set out for disclosure pursuant to Rule 75 (F) of the Rules and therefore that these conditions are in keeping with the spirit of Rule 75.

17. The Chamber finds that all three conditions are met in the instant case. First of all, the Prosecution explains that it received a request for the disclosure from both the Canadian Prosecution and the Defence Counsel in the trial of Désiré Munyaneza.²⁴ The Chamber finds that as this trial relates to crimes committed in Rwanda in 1994, disclosure is in keeping with the Tribunal's objective of investigating and prosecuting persons accused of committing serious violations of international humanitarian law in Rwanda as well as with the principles of state cooperation envisaged by the completion strategy set out in Security Council Resolutions 1503 and 1534.

18. Second of all, the Chamber notes that Witness CEA has consented to the disclosure of the closed session transcripts of his testimony to the Canadian authorities.²⁵ Third of all and in consequence of the preceding, the Chamber is of the view that there is no risk for the privacy and security of the witness concerned.

19. As a result, the Chamber finds that it is in the interest of justice to vary its order for protective measures for Witness CEA pursuant to Rule 75(A) for the purposes of disclosing the closed session transcripts of this witness to the Canadian authorities.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Prosecutor's Motion;

II. DIRECTS the Registry to unseal the closed session transcripts of Witness CEA of 4 December 2003, make copies and serve them upon the Prosecution for onward transmission to the Canadian authorities;

III. ORDERS that the protective measures granted to Witness CEA shall continue to have effect *mutatis mutandis* in any proceedings before the Canadian court.

²⁴ Annex 1 and Annex 2, respectively, to the Prosecutor's Motion.

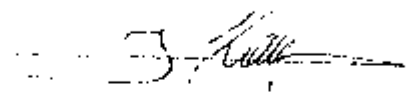
²⁵ See Annex 3 to the Prosecutor's Motion.

Arusha, 22 March 2007, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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(Art. 27 of the Directive for the Registry)

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Date: **23 March 2007** Case Name / Affaire: **The Prosecutor vs. - Joseph NZIRORERA
- Mathieu NGIRUMPATSE
- Edouard KAREMERA**

Case No / Affaire No.: **ICTR-98-44-T**

To: **TC1** received by / reçu par: **ALO:** received by / reçu par

A: Judge E. Mose, President
 Judge J. R. Reddy
 Judge S. A. Egorov
 Judge F. R. Arrey (Karera)
 SLO
 C. Gosnell, Co-ordinator

TC2

Judge W. H. Sekule
 Judge A. Ramarosan
 Judge K. R. Khan (Bizimungu et al.)
 Judge A. J. N. de Silva
 Judge S. B. Bossa (Nyiramasuhuku et al.)
 Judge L. G. Muthoga (Bizimungu et al.)
 Judge F. R. Arrey (Muvunyi)
 Judge E. F. Short (Bizimungu et al.)
 Judge T. Hikmet (Ndindiyimana et al.)
 Judge S. K. Park (Ndindiyimana et al.)
 SLO
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 A. Marong (Ndindiyimana et al.)

TC3

Judge A. Vaz (Seromba)
 Judge I. M. Weinberg de Roca (Ziganyirako)
 Judge K. R. Khan
 Judge D. C. M. Byron
 Judge L. G. Muthoga (Ziganyirako)
 Judge F. R. Arrey (Rukundo)
 Judge E. F. Short (Karemura et al.)
 Judge K. Hökberg (Seromba & Rwamakuba)
 Judge G. G. Kam (Seromba, Karemera et al. & Rwamakuba)
 E. O'Donnell, SLO
 C. Denis, Co-ordinator (Karemura et al. & Rwamakuba)
 H. Gogo, Co-ordinator (Seromba)

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 K. Ardault
 C. Duffy
 N. Ferraro
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OTP / BUREAU DU PROCUREUR

Senior Trial Attorney in charge of case: **D. Webster** received by

DEFENSE *Shirwa 201-1-1-1*

Accused / Accusé: **J. Nzirorera, M. Ngirumpatse & E. Karemera** complete / remplir "CMS4 FORM"

Lead Counsel / Conseil Principal: **P. Robinson, C. Hounkpatin & D. Diagne**

In / à Arusha Arusha (signature) by fax complete / remplir "CMS3bis FORM"

Co-Counsel / Conseil Adjoint: **P. N. M. Ngimbi, F. Weyl & F. Sow**

In / à Arusha Arusha (signature) by fax complete / remplir "CMS3bis FORM"

All Decisions: Appeals Chamber Unit, The Hague S. Chenault, Jurist Linguist

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Cc: A. Dieng A. Miller, OLA, NY D. Registrar S. Menon M. Niang S. van Driessche

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