



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  
Vagn Joensen  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 18 January 2008

**THE PROSECUTOR**

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR UNSEALING *EX PARTE*  
SUBMISSIONS AND FOR DISCLOSURE OF WITHHELD MATERIALS**

*Rules 66 and 68 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. This trial commenced on 19 September 2005. The Prosecutor closed its case on 4 December 2007. On 3 December 2007, Joseph Nzirorera moved the Chamber to unseal all *ex parte* submissions received from the Prosecutor during the course of this case, and to order the disclosure of any material previously withheld from disclosure pursuant to Rules 66(C) and 68(D) of the Rules of Procedure and Evidence ("Rules").<sup>1</sup> On 11 December 2007, the Prosecutor replied, opposing the motion.<sup>2</sup> On 20 December 2007, the Joseph Nzirorera filed his Reply Brief.<sup>3</sup> The two co-Accused did not make any submissions.

## DELIBERATIONS

### *Materials Previously Withheld from Disclosure Pursuant to Rules 66(C) and 68(D)*

2. The Chamber recalls that the possible prejudice to ongoing investigations is one of the reasons for which the Prosecutor may apply for relief from the obligation to disclose pursuant to Rules 66 or 68. Joseph Nzirorera argues that as all of the Prosecutor's witnesses have testified, disclosure can no longer prejudice any ongoing investigation of him by the Prosecutor.<sup>4</sup>

3. However, the exceptional relief from disclosure obligations afforded to the Prosecutor pursuant to Rules 66(C) and 68(D) of the Rules are not limited to the case or investigation of only one Accused, but refer to investigations in general conducted by the Prosecutor. Relief may be granted if there is a showing that disclosure may prejudice *any* further or ongoing investigations, may be contrary to the public interest, or may affect the security interests of any State.

4. An Accused moving a Chamber to order the disclosure of any material must first clearly and sufficiently identify the materials sought.<sup>5</sup> Joseph Nzirorera has failed to fulfil this basic requirement, referring vaguely to "all material withheld from disclosure on the grounds

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<sup>1</sup> Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials, 3 December 2007 ("Nzirorera's Motion").

<sup>2</sup> Prosecutor's Response to Joseph Nzirorera's Motion to Unseal *Ex Parte* Submissions, 11 December 2007 ("Prosecutor's Response").

<sup>3</sup> Reply Brief: Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials, 20 December 2007 ("Nzirorera's Reply").

<sup>4</sup> Nzirorera's Motion, para. 6.

<sup>5</sup> See e.g. *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Joseph Nzirorera Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 9; *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Célestin Mbonankira (TC), 20 September 2007.

that ongoing investigations would be prejudiced.”<sup>6</sup> Such a request cannot therefore be granted.

### **Ex Parte Submissions**

5. As a general rule, motions must be filed *inter partes*. Rule 73(E) contemplates the filing of motions *inter partes*, giving a “responding party” five days from the receipt of the motion to reply. However, *ex parte* applications may be necessary when they respond to the interests of justice and when the disclosure to the other party of the information contained in the application would likely prejudice the persons related to the application.<sup>7</sup> When a Trial Chamber renders a decision on an *ex parte* application, as a preliminary matter it considers whether the *ex parte* nature of the filing is appropriate.

6. Joseph Nzirorera has requested that the Chamber review all *ex parte* submissions made to it during the course of this case, and to order the disclosure of those submissions for which the reasons for making them *ex parte* no longer exist.<sup>8</sup> In the view of the Chamber, Joseph Nzirorera is requesting it to reconsider its prior decisions concerning the validity of the *ex parte* nature of prior Prosecutor’s filings.

7. Joseph Nzirorera has not identified which *ex parte* submissions it seeks to have disclosed, and argues that it is unable to do so because it did not receive any notice of *ex parte* submissions at the time of its filing.<sup>9</sup> However, Joseph Nzirorera eventually gains notice of all *ex parte* filings once the Chamber makes its decision, which the Chamber will nearly always file *inter partes* unless for an extremely compelling reason. The Chamber notes that in such manner, Joseph has identified an *ex parte* submission relating to Witness AMA.<sup>10</sup> As such and contrary to its assertion, Joseph Nzirorera is not unable to specifically identify the Prosecutor’s *ex parte* submissions that it seeks to have disclosed.

8. With regard to the *ex parte* submission related to Witness AMA, Joseph Nzirorera essentially requests that the Chamber reconsider its decision on the validity of the *ex parte* filing. Joseph Nzirorera submits that the closing of the Prosecutor’s case implies the end of any prosecutorial investigation of Joseph Nzirorera, and therefore any reasons for non-

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<sup>6</sup> Nzirorera’s Motion, para. 10.

<sup>7</sup> *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Confidential *Ex Parte* Motion for Subpoenas Directed to Defence Witnesses (TC), 20 January 2006, para. 2; *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-T, Decision on *Ex Parte* and Confidential Application for Subpoenas (TC), 1 October 2007, para. 3.

<sup>8</sup> See Nzirorera’s Motion, para. 7, and Nzirorera’s Reply, paras. 14-15.

<sup>9</sup> Nzirorera’s Motion, para. 5.

<sup>10</sup> Nzirorera’s Reply.

disclosure of the Prosecutor's *ex parte* submissions cease.<sup>11</sup> He submits that this is a change of circumstances justifying reconsideration of non-disclosure of *ex parte* applications.<sup>12</sup>

9. The Chamber recalls that it has inherent jurisdiction to reverse or revise a previous decision where new material circumstances have arisen that did not exist at the time of the decision, or when convinced that the decision was erroneous and has caused prejudice or injustice to a party.<sup>13</sup> Reconsideration is an exceptional remedy to be granted under exceptional circumstances. The closing of the Prosecutor's case is not such an exceptional circumstance.

10. Moreover, the Prosecutor's ongoing investigation of Joseph Nzirorera is not the only basis upon which a decision to allow a submission to be filed *ex parte* may have been made. The Prosecutor has indicated that information withheld from disclosure is not limited to Joseph Nzirorera's case.<sup>14</sup> The Prosecutor has also indicated its investigation of Joseph Nzirorera does not necessarily stop with the conclusion of its examination-in-chief.<sup>15</sup> The Chamber therefore considers that Joseph Nzirorera has failed to demonstrate the existence of any special circumstances that might warrant a reconsideration of any of the Chamber's decisions not to disclose an *ex parte* application filed by the Prosecutor.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Joseph Nzirorera's Motion in its entirety.

Arusha, 18 January 2008, done in English.

Dennis C. M. Byron  
Presiding Judge

Gberdao Gustave Kam  
Judge

Vagn Joensen  
Judge

[Seal of the Tribunal]

<sup>11</sup> Nzirorera's Motion, paras. 6 and 7.

<sup>12</sup> *Ibid*; see also Nzirorera's Reply, paras. 14 and 15.

<sup>13</sup> See e.g. *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Measures (TC), 3 June 2005, para. 3; *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005 (TC), 24 November 2005; *Karemera et al.*, Case No. ICTR-98-44-T) Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6.

<sup>14</sup> Prosecutor's Response, para. 2.

<sup>15</sup> *Ibid*.