



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
Vagn Joensen

Registrar: Adama Dieng

Date: 4 September 2008

THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISCLOSURE OF *EX*
PARTE PROSECUTION SUBMISSIONS**

Rules 54 and 73ter of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 31 July 2008, Joseph Nzirorera moved the Chamber to order the disclosure of all *ex parte* submissions filed by the Prosecution, which include: (1) the affidavits of Christian Baudesson and Richard Renaud, filed as *ex parte* annexes on 23 September 2003 and 8 July 2005, respectively, in support of Prosecutor's Motion for Special Protective Measures for Witnesses G and T; (2) a confidential and *ex parte* Prosecution motion to withhold disclosure of e-mail correspondence concerning Witness AMA, filed on 26 November 2007; and (3) an *ex parte* Prosecution filing concerning benefits to Witness T, which was submitted pursuant to the Chamber's Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T, issued on 29 May 2008.¹

2. Joseph Nzirorera claims that two new facts exist, which justify the granting of this motion, or the reconsideration of the Chamber's prior decisions to permit an *ex parte* filing by the Prosecution: (1) the Chamber's alleged double-standard regarding the disclosure of *ex parte* filings; and (2) the Prosecution's alleged change in position regarding notice of *ex parte* filings. The Prosecution opposes the motion in its entirety.²

DELIBERATIONS

3. Initially, the Chamber notes that it has already ordered the Registrar to file the Prosecution disclosure of payments to Witness T *inter partes* and confidentially.³ Accordingly, Joseph Nzirorera's request with regard to this document is moot.

4. The Chamber has the power to exercise its discretion and reconsider its decisions, when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision, or (3) there is reason to believe that its original decision was erroneous, or constituted an abuse of power on the part of the Chamber, which resulted in an

¹ Joseph Nzirorera's Motion for Disclosure of *Ex Parte* Prosecution Submissions, filed on 31 July 2008; Reply Brief: Joseph Nzirorera's Motion for Disclosure of *Ex Parte* Prosecution Submissions, filed on 6 August 2008.

² Prosecution's Response to Joseph Nzirorera's Motion for Disclosure of *Ex Parte* Prosecution Submissions, filed on 4 August 2008.

³ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on the Full Disclosure of ICTR Payments Made for the Benefit of Witness T (TC), 6 August 2008.

injustice that warrants the exceptional remedy of reconsideration.⁴ The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁵

5. Joseph Nzirorera has partly based his motion for reconsideration on the Chamber's decision to permit certain documents to be filed *ex parte*, while requiring that others be filed *inter partes*.

6. The Chamber notes that filings under Rule 73 *ter* should be made *inter partes*.⁶ However, the general rule is that *ex parte* submissions 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.⁷ This Chamber has also held that the principle of *audi alteram partem* requires that filings be disclosed to the opposing party, absent a compelling reason not to do so.⁸

Chamber's Alleged Double-Standard Regarding Disclosure of Ex Parte Filings

7. Joseph Nzirorera contends that the Chamber has applied a double-standard to *ex parte* submissions because it did not disclose Prosecution *ex parte* filings to the Defence, but has disclosed all *ex parte* Defence filings to the Prosecution since the Defence case started. Nzirorera claims that the Chamber's alleged double-standard concerning *ex parte* submissions constitutes a new fact, which necessitates the granting of this motion, or the reconsideration of the Chamber's prior decisions to permit an *ex parte* filing by the Prosecution.

8. The Chamber does not consider that it has applied a double-standard concerning *ex parte* submissions in this case; therefore, this cannot constitute a new fact that merits reconsideration. The Chamber's reasons are as follows.

⁴ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-PT ("*Karemera et al.*"), Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

⁵ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007.

⁶ *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Decision on the Prosecutor's Motion for Disclosure of Identifying Information Concerning Defence Witnesses Pursuant to Rules 69(C) and 73 *ter* (TC), 9 November 2005, para. 8.

⁷ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5.

⁸ *Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, paras. 11 and 13.

9. The Chamber permitted the three Prosecution filings, which Joseph Nzirorera claims should have been disclosed to him, to be filed *ex parte* because each one of those documents contained sensitive information that could have jeopardized a witness's safety or willingness to testify if it had been disclosed *inter partes*. Those *ex parte* filings concerned affidavits in support of protective measures, and a motion to withhold disclosure of e-mail correspondence related to a witness. The Chamber properly withheld these submissions from the Defence in the interest of justice, and because disclosure to the other party of the information contained in the application would likely have prejudiced the persons related to the application.

10. Conversely, the Chamber recalls that the five decisions,⁹ where Joseph Nzirorera claims the Chamber unfairly ordered the *inter partes* disclosure of *ex parte*¹⁰ Defence submissions, each concerned the content of Rule 73 *ter* submissions, which had been filed *after the Defence case had started*. Rule 73 *ter* (B)(iii) states that a Trial Chamber may order the Defence to file a list of witnesses it intends to call with: (1) the name or pseudonym of each witness; (2) a summary of the facts on which each witness will testify; (3) the points in the indictment as to which each witness will testify; and (4) the estimated length of time required for each witness. It is axiomatic that the Prosecution and co-accused must receive Defence filings under Rule 73 *ter* so that they can continue to prepare their cases, especially if the Defence has already begun to present its case.¹¹ Accordingly, the Chamber finds that it was appropriate for it to disclose *inter partes* all of the Rule 73 *ter* submissions at issue in the five decisions.

11. Because the Chamber has not been operating under a double-standard for the disclosure of *ex parte* submissions, there is no new fact in this regard, which necessitates the granting of this motion, or merits reconsideration of its prior decisions to permit an *ex parte* filing by the Prosecution.

⁹ Joseph Nzirorera claims that the following decisions in this case prove that the Chamber has applied a double-standard to the disclosure of *ex parte* submissions: 1) Decision on Édouard Karemera's Motion to Modify Witness List and for Extension of Protective Measures, filed on 2 June 2008; 2) Decision on Édouard Karemera's Motion not to Communicate the Identity of his Witnesses, filed on 18 June 2008; 3) Order Concerning Ngirumpatse's Filing on the Decision of 17 April 2008 Concerning the Administration of the Defence Case, filed on 25 June 2008; 4) Order Concerning Ngirumpatse's Filing on the Order of 25 June to Precise the List of his Witnesses, filed 30 July 2008; and 5) Order to Joseph Nzirorera on the Presentation of his Defence Evidence, filed on 30 July 2008.

¹⁰ The Chamber temporarily permitted the documents at issue in these decisions to be filed *ex parte*, until protective measures could be put into place.

¹¹ *Karemera et al.*, Order to Joseph Nzirorera on the Presentation of his Defence Evidence (TC), 30 July 2008, para. 6.

Prosecutor's alleged change of position regarding disclosure of ex parte filings

12. Joseph Nzirorera contends that the Prosecution has changed its position regarding notice of *ex parte* filings because it objected to notifying the Defence of its *ex parte* filings in the past, but recently argued that it is entitled to notice of Defence *ex parte* filings. Nzirorera claims that this alleged change of position constitutes a new fact, which necessitates the granting of this motion, or merits reconsideration of the Chamber's prior decisions to permit an *ex parte* filing by the Prosecution.

13. The Chamber notes that the Prosecution has not objected to notifying the Defence of its *ex parte* filings in every instance. For example, the Prosecution indirectly notified Joseph Nzirorera of the *ex parte* affidavits of Christian Baudesson and Richard Renaud because it decided to file the motions to which they were attached *inter partes*. Moreover, the Chamber notes that parties frequently change their position on matters of importance to them as the landscape of their case changes. Therefore, even if it could be argued that the Prosecution did change its position regarding notice of *ex parte* filings, this is not a new fact, which necessitates the granting of this motion, or merits reconsideration of its prior decisions to permit an *ex parte* filing by the Prosecution.

FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's motion in its entirety.

Arusha, 4 September 2008, done in English.

Dennis C. M. Byron

Gberdao Gustave Kam

Vagn Joensen

Presiding Judge

Judge

Judge

(absent during signature)

[Seal of the Tribunal]