

ICTR-98-44-T
18-02-2009
(45155-45153)

45155
A



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: 18 February 2009

THE PROSECUTION

v.

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

JUDICIAL RECORDS/ARCHIVES
RECEIVED

1 2009 FEB 18 1 P 4: 44

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

Rules 68(D) and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

45154

INTRODUCTION

1. In October 2008, the Prosecution, after redacting identifying information, disclosed to the Defence a number of statements made in 2001 and 2002 by witnesses concerning RPF activities in government controlled areas during the genocide ("Statements").
2. On 11 November 2008, Joseph Nzirorera filed a motion with respect to four of the Statements, claiming that the Prosecution violated Rule 68(A) of the Rules of Procedure and Evidence by failing to disclose them in a timely manner, and also seeking their disclosure in un-redacted form.¹ In response to the Rule 68 Motion,² the Prosecutor indicated that he had filed an *ex parte* application to the Chamber pursuant to Rule 68(D) to be relieved of his obligation to disclose identifying information for a number of the Statements, including those at issue in the Rule 68 Motion ("Rule 68(D) Application").
3. In the present motion, filed on 19 November 2008, Joseph Nzirorera requests that the Chamber order disclosure of the Rule 68(D) Application, or order the Prosecution to file an *inter partes* version of it, in order for the Defence to be heard before the Rule 68(D) Application is decided.³ The Prosecution opposes the Motion.⁴

DELIBERATIONS

4. As a general rule, motions must be filed *inter partes*. However, *ex parte* applications may be necessary in the interests of justice and when the disclosure of the information contained in the application would likely prejudice the persons related to the application.⁵ When a chamber renders a decision on an *ex parte* application, it considers whether the *ex parte* nature of the filing is appropriate.⁶
5. In respect of materials that the Prosecutor is otherwise obligated to disclose to the Defence, Rule 68(D) provides that, in order to be relieved of that obligation, the Prosecutor

¹ Joseph Nzirorera's 12th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes, filed 11 November 2008 ("Rule 68 Motion").

² Prosecutor's Response to Joseph Nzirorera's 12th Notice of Rule 68 Violation: Evidence of RPF Infiltration and Crimes, filed 17 November 2008.

³ Joseph Nzirorera's Motion for Disclosure of Secret Prosecution Filings, filed 19 November 2008 ("Motion").

⁴ Prosecution's Response to Joseph Nzirorera's Motion for Disclosure of Secret Filings, filed 24 November 2008.

⁵ *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-T, Decision on *ex parte* and Confidential Application for Subpoenas (TC), 1 October 2007; *The 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.

⁶ *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.

45153

"shall apply to the Chamber *sitting in camera*". Thus, the Rule does not allow for the Prosecutor's pleadings be disclosed to the Defence prior to the Chamber's ruling on the matter. That part of the Motion, therefore, falls to be rejected.

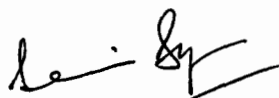
6. Joseph Nzirorera also complains that the Prosecution filed its Rule 68(D) Application without providing any notice to the Defence.⁷ Nzirorera submits that while Rule 68(D) allows the Prosecution to make an *ex parte* application, there is no requirement that the fact of the filing be hidden from the Defence.⁸ The Chamber finds, however, that such a notification would serve no purpose unless it specifies the subject matter of the application to a degree that would enable the Defence to make submissions. Such specification might in itself "prejudice further or ongoing investigations, or for any other reasons be contrary to the public interest or affect the security interests of any state".


7. However, in the present case, the Prosecutor has already disclosed to the Defence the Statements that are the subject matter of the Rule 68(D) Application. The Chamber therefore finds that it is in the interest of justice to allow the Defence to make submissions as to whether the non-disclosure of identifying information in the redacted Statements is justifiable pursuant to Rule 68(D).

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS Joseph Nzirorera's Motion in part, allowing the Defence to make submissions on the subject matter in question no later than five days from the date of this Decision.

Arusha, 18 February 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



⁷ Motion, para. 5.

⁸ Motion, para. 8.