



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
30-06-2010
(51611 - 51608)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 30 June 2010

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THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR DISCLOSURE OF
WITNESS T MATERIALS AND COOPERATION FROM BELGIUM**

Article 28 of the Statute; Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
Sunkarie Ballah-Conteh
Takeh Sendze
Jean Baptist Nsanzimfura

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

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INTRODUCTION

1. In its decision of 15 February 2006, the Chamber ruled on the disclosure of documents related to Prosecution Witness T by the Prosecution and State A named in a confidential annex to this order.¹ This included the second of three CD-ROMs of information provided to the Prosecution by the State. The documents were withheld by the Prosecution and State A from the Defence because of concerns over potential impacts on domestic legal proceedings against Witness T. Following the close of the domestic proceedings, Nzirorera moved for disclosure of these documents.² On 16 April 2010, the Chamber ordered the release of all previously withheld materials related to Witness T.³ The State has since responded, noting the recent death of Witness T. The Prosecution has also provided a copy of the remaining CD-ROM to the Court Management Services, with instructions to delay its release to the Defence until either the State or the Chamber have determined whether its disclosure would be prejudicial to any on-going proceedings, domestic or otherwise.⁴

2. Additionally, Nzirorera has moved the Chamber to request the cooperation of The Kingdom of Belgium in providing the *procès-verbaux* (PVs) for Eugène Mbarushimana and Dieudonné Niyitegeka.⁵ The Chamber granted this request on 29 January 2010.⁶ After concerns were raised by the Kingdom of Belgium regarding the propriety of this request, Counsel for Nzirorera was requested to provide an explanation of how he had obtained this confidential information.⁷ After Counsel for Nzirorera had responded to the inquiry the Belgian government on 27 May disclosed the PV for Mbarushimana, suggesting that the Chamber contact the State hosting Niyitegeka ("State B") in order to release his PV.⁸ The Registry has since contacted State B and Niyitegeka, both of whom have withheld consent for release of the PV.

DELIBERATIONS

3. Article 28 of the Statute imposes an obligation on States to "cooperate with the [Tribunal] in the investigation and prosecution of persons accused of committing serious violations of international

¹ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motion under Rule 66(C) of the Rules (TC), 15 February 2006 ("Decision of 15 February 2006").

² Joseph Nzirorera's Motion for Disclosure of Witness T Material, filed on 7 Dec. 2009.

³ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Witness T Material (TC), 16 April 2010.

⁴ Memorandum from Don Webster, Senior Trial Attorney to Constant Hometownu re: Disclosure of Previously Withheld Witness T Materials, 3 June 2010, para. 4.

⁵ Joseph Nzirorera's Second Motion for Request for Cooperation to Belgium, filed on 15 January 2010; Joseph Nzirorera's Third Motion for Request for Cooperation to Belgium, filed on 12 April 2010.

⁶ *Karemera et al.*, Décision sur la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Royaume de la Belgique (TC), 29 January 2010 ("Decision on Second Motion").

⁷ *Karemera et al.*, Decision on Joseph Nzirorera's Third Motion for Request for Cooperation to Belgium (TC), 5 May 2010.

⁸ Demande d'entraide judiciaire, Tribunal pénal international pour le Rwanda, affaire "Procureur contre *Karemera et consorts*", Collecte de procès-verbaux d'audition de MM. Mbarushimana et Niyitegeka, 27 May 2010.

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humanitarian law." Moreover, Article 28(2)(b) prescribes that States shall comply without undue delay with any request for cooperation issued by a Trial Chamber for the production of evidence. A request to a Chamber to issue an order under this provision must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it.⁹ The scope of any assistance sought should also be narrowly defined.¹⁰

4. The Chamber recalls that it previously determined that the documents on the remaining CD-ROM may be of relevance to the defence of Nzirorera, and that the reason for delaying disclosure was the on-going domestic proceedings against Witness T.¹¹ Similarly, the Chamber ruled on the relevance of the PVs, having previously issued an order for their disclosure.¹² In both cases, the Defence met the requirements to specify the evidence sought, demonstrated its relevance to the trial and demonstrated the efforts made to obtain it.¹³

5. Given that the domestic proceedings against Witness T have ended, the remaining prejudicial value, if any, of the documents on the remaining CD-ROM is minimal. In its 2006 decision on this evidence, the Chamber made reference to these documents, noting that much of this information could be disclosed on the close of the domestic criminal proceedings.¹⁴ While mindful of the issues surrounding the confidentiality of the identity of Witness T, any objection on the grounds of on-going domestic legal proceedings is now moot, and the interests of justice would be best served by disclosing this information to the Accused.

6. The Kingdom of Belgium rests its nondisclosure of the PV for Niyitegeka on the lack of consent from either State B or from Niyitegeka himself. Such a requirement has not been the practice of this Tribunal¹⁵ and the Chamber finds no basis to begin such a practice now. Information taken by rogatory commissions in other states, but used in domestic proceedings, falls within the scope of consent for the State in which those proceedings occur.¹⁶ Pursuant to Article 28 of the Statute, states and not individuals, are the subject of disclosure obligations. In the present case, consent is not an

⁹ *Karemera et al.* Decision on Joseph Nzirorera's Motion for Cooperation of the Government of Rwanda: RPF Achieves (TC), 21 January 2008, para. 3; *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Extremely Urgent and Ex Parte Defence Motion for Cooperation of the Kingdom of Belgium (TC), 31 March 2009, para. 2; *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Request for Cooperation to Belgium (TC), 24 August 2009, para. 3; *Karemera et al.*, Decision on Second Motion, para. 3.

¹⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Request for Cooperation to Belgium (TC), 24 August 2009, para. 3; *Karemera et al.*, Decision on Second Motion, para. 3.

¹¹ *Karemera et al.*, Decision of 15 February 2006, para. 20.

¹² *Karemera et al.*, Decision on Second Motion.

¹³ *Ibid.*, at para. 4; *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Witness T Material (TC), 16 April 2010, para. 3.

¹⁴ *Karemera et al.*, Decision of 15 February 2006, para. 19.

¹⁵ See, e.g., *Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54-T, Decision for an Order Directed at the Kingdom of Belgium (TC), 28 April 2010, p. 4.

¹⁶ See, e.g., *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Kanyabashi's Confidential Motion for Disclosure of the Transcripts of Witness QA's Statement before Canadian Judicial Authorities (TC), 30 September 2008, para. 2.

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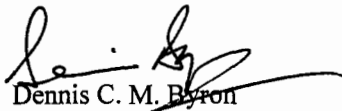
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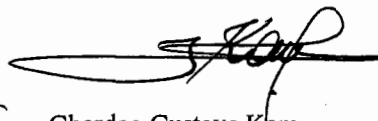
issue regarding the documents on the remaining CD-ROM as they do not fall within those protected under Rule 70(B) pursuant to the Chamber's 2006 decision. Similarly, the PVs in question were not provided with a presumption of confidentiality, and should not fall within such an exception. Consent for disclosure in any case should come not from the authorities of State B, nor from Niyitegeka, but instead from the Government of Belgium. The documents requested are judicial records of Belgium, and the production of those documents without undue delay will be in the interests of justice.

FOR THESE REASONS, THE CHAMBER:

- I. **ORDERS** the Prosecution and CMS to disclose all previously withheld material pertaining to Prosecution Witness T;
- II. **RESPECTFULLY REQUESTS** the Kingdom of Belgium to provide the necessary assistance in order to provide full disclosure of the PV of Dieudonné Niyitegeka;
- III. **DIRECTS** the Registry to immediately transmit this decision to the Government of the Kingdom of Belgium, and the States named in the Confidential Annexes, and inform the Chamber of any action taken in response thereto.

Arusha, 30 June 2010 done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joenser
Judge

