



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-PT
29-8-2005
(23623-23619)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

23623
23619

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 29 August 2005

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-PT

2005 AUG 29 P 5:12
ICTR
JUDICIAL RECORDS/ARCHIVES

**DECISION ON THE DEFENCE MOTIONS FOR RECONSIDERATION OF
PROTECTIVE MEASURES FOR PROSECUTION WITNESSES**

Rule 73 of the Rules of Procedure and Evidence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam (the "Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Modification of Protective Order," filed on 13 July 2005 (the "First Motion"); and **CONSIDERING** the Prosecutor's Response filed on 21 July 2005 (the "First Response");

BEING ALSO SEIZED of "Joseph Nzirorera's Motion to Withdraw Witness Pseudonyms at Trial," filed on 14 July 2005 (the "Second Motion"); and **CONSIDERING** the Prosecutor's Response filed on 20 July 2005 (the "Second Response") and the Defence Reply filed on 22 July 2005;

HEREBY DECIDES the Motions pursuant to Rule 73(A) of the Rules of Procedure and Evidence ("Rules").

ARGUMENTS OF THE PARTIES

1. The Accused, Joseph Nzirorera, seeks modification of the Protective Measures ordered by this Chamber on 10 December 2004.¹ In the First Motion he requests that the Chamber order the Prosecution to immediately disclose the identities of new witnesses AWE, BDW, BDX, BGD, BIS, BIT, and HH, and reverse the Order to withhold identification information of the Prosecution's witnesses or potential witnesses until 30 days before the commencement of the trial session since the identities of all the witnesses who testified in the prior trial were already disclosed to him in November 2003.

2. The Accused contends that the Prosecution neither provided any justification to the Chamber to order the extraordinary protective measures nor has it shown a reasonable fear for the safety of the witnesses if the identifying information is disclosed earlier than 30 days before trial. He submits that the late disclosure of the identification will prejudice his investigations and preparation to cross-examine the witnesses.

3. In the Second Motion, the Accused requests the Chamber to withdraw the use of pseudonyms for Prosecution witnesses who will testify at trial. The Accused submits that to justify the use of pseudonyms at trial, the Prosecution must show good cause and a real fear for the safety of the witness. He asserts that, because most of the Prosecution Witnesses are

¹ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba, ("Karemera et. al."),* Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

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already involved in *Gacaca* proceedings in Rwanda, their identities as witnesses are already known in their communities. The Accused further adds that the practice of the Tribunal regarding the use of pseudonyms should be re-evaluated, and he proposes a new procedure to establish the level of fear in a witness upon his or her arrival in Arusha, which would then determine if a witness could proceed to testify under his or her own name.

4. The Prosecution opposes the Motions on the ground that they are improperly asking the Chamber to reconsider its Decision of 10 December 2004. It also invites the Chamber to dismiss the Motions on the merits. It contends that the *Gacaca* hearings are fundamentally different from cases before the Tribunal and the political situation in Rwanda and its neighbouring countries are not yet stable. These substantial differences could still lead the Chamber to conclude that the witnesses fear for their safety and security.

5. Furthermore, it contends that the Accused breached the conditions of the Decision by failing to provide Witnesses and Victims Support Section with a list of his investigators, and because those investigators tried to independently contact the Prosecution witnesses.

6. The Defence replies that a Chamber can always reconsider a prior decision if there is a material change in circumstances or if the previous decision appears erroneous and prejudicial to one of the parties.

DELIBERATIONS

7. The Chamber finds that the two Motions are seeking reconsideration of the same Protective Order of 10 December 2004 and decides to adjudicate on them together. It reminds the parties of the undesirability of making unnecessary multiple applications. This is an example of such a situation as both these Motions are essentially seeking the same relief.

8. The Chamber notes its “inherent power” to reconsider its own decisions² and recalls that some Trial Chambers have reconsidered Decisions granting protective measures for witnesses and victims.³ However, it reminds itself that reconsideration is an exceptional

² *Karemera et. al.* Decision on Motion to Vacate Sanctions (TC), 23 February 2005, para. 9. See also: *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-AR72, Decision (Motion for Review or Reconsideration) (AC), 12 September 2000; *Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva (“Bagosora et. al.”) v. The Prosecutor*, Case No. ICTR-98-41-A, Appeals Chamber, Interlocutory Appeal from refusal to Reconsider Decisions relating to Protective Measures and Application for a Declaration of “Lack of Jurisdiction” (AC), 2 May 2002, para. 10; See also *The Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo (“Mucic et. al.”)*, Case No. IT-96-21-A, Decision on Hazim Delic’s Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999, para. 4.

³ *Bagosora et. al.*, Decision on Modification of Special Protective Measures for Witness BY (TC), 15 March 2004; *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, Innocent Sagahutu, Francois-*

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measure available only in particular circumstances such as (i) when a new fact has been discovered that was not previously known to the Chamber,⁴ (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision,⁵ or (iii) where a party shows an error of law or the Chamber abused its discretion,⁶ and an injustice has been occasioned.⁷

9. The Chamber agrees with the Defence that the burden of proof for the grant of an order of protective measures lies on the party seeking such protection.⁸ However, the Chamber recalls the justification for its previous order as follows:

“CONSIDERING the general security status in the Great Lakes and the volatile security situation in Rwanda;

CONSIDERING that the evidence of the volatile security situation in Rwanda and neighboring countries, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security;

CONSIDERING also the documents filed by the Prosecution in support of its previous motion for special protective measures for witnesses G and T”.

10. The Chamber notes that the Defence received the identities of Prosecution witnesses for the previous trial, and that all the witnesses from the previous trial will be the same for the new trial apart from Prosecution witnesses AWE, BDW, BDX, BGD, BIS, BIT and HH. The

Xavier Nzuwonemeye (“Bizimungu et. al.”), Case No. ICTR-2000-56-I, *Décision sur la requête du Procureur aux fins de modification et d’extension des mesures de protection des victimes et des témoins*, 19 March 2004; *The Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-98-42-T-Joint Case No. ICTR-98-42-T, *Decision on Nyiramasuhuko’s Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK (TC)*, 15 June 2005, para. 28.

⁴ *Nyiramasuhuko*, *Decision on Nyiramasuhuko Motion for reconsideration of the “Decision on Defence Motion for Certificate to Appeal the ‘Decision on Defence Motion for a Stay of Proceedings and Abuse of Process’” (TC)*, 20 May 2004..

⁵ *Bagosora et al.*, *Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001 (TC)*, 18 July 2003; *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, *Decision on Ngeze’s Motion for reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief (AC)*, 11 March 2004, p. 2.

⁶ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, *Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003 (AC)*, 19 December 2003; *Niyitegeka*, *Decision on Eliézer Niyitegeka’s Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003 (AC)*, 4 February 2004; *Bagosora et al.*, *Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that order (TC)*, 1 March 2004, para. 11.

⁷ *Mucic et. al.*, *Judgment on Sentence Appeal (AC)*, 8 April 2003, para. 49; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, *Decision on Application for Reconsideration of Amicus Curiae Application of Paul Bisengimana (AC)*, 19 May 2004; *Bagosora et al.*, *Decision on Prosecutor’s Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to vary the Witness List Pursuant to Rule 73Bis (E)” (TC)*, 15 June 2004, para. 15.

⁸ *Bizimungu*, *Decision on Prosper Mugiraneza’s Motion for Protection of Defence Witnesses (TC)*, 2 February 2005, para. 13; *Nyiramasuhuko*, *Decision on Ex Parte Motion*, *supra*, para. 17.

Chamber has not been given any information, to establish that the Defence did not have enough time for investigations and preparation for cross-examination in the previous trial.

11. In this context the Chamber finds that the Prosecution's compliance with the Protective Order for disclosure of witness identities 30 days before the previous trial session, and the existence of *Gacaca* hearings do not constitute the discovery of such new facts or circumstances which could move it to reconsider the Protective Order of 10 December 2004. No error of law has been alleged, nor has it been shown that any injustice is being suffered as a result of the order.

12. The Chamber is still satisfied that the protective measures contained in its Order of 10 December 2004 will not prejudice the Defence and dismisses both Motions.

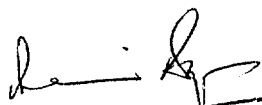
Enforcement of the Protective Order of 10 December 2004

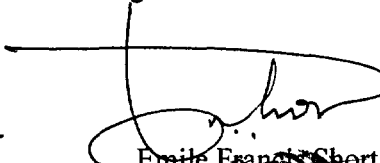
13. The Prosecution alleges that the Defence did not comply with paragraphs 6 and 8 of the Protective Order. The Chamber notes that the Prosecution did not adduce any evidence to support its bare allegations. The burden of proving that there has been any violation of the Protective Order has not been discharged and consequently no order can be made.

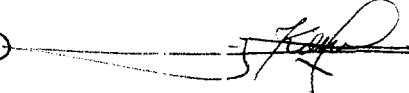
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motions in their entirety.

Arusha, 29 August 2005, done in English.


Dennis C. M. Byron
Presiding


Emile Francis Short
Judge


Gberdao Gustave Kam
Judge


[Seal of the Tribunal]