



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: 15 October 2009

THE PROSECUTOR

v.

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

DECISION ON RECONSIDERATION OF PROTECTIVE MEASURES ORDERS

Rules 34, 54 and 75 of the Rules of Procedure and Evidence

Office of the Prosecution:

Don Webster
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Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Moussa Félix Sow

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

INTRODUCTION

1. On 28 July 2009, the Prosecution filed a motion requesting the Chamber to reconsider and amend the protective measures currently in place for Prosecution witnesses in these proceedings because of two material changes in circumstances.¹
2. Joseph Nzirorera opposes the motion in its entirety.² Neither Édouard Karemera nor Matthieu Ngirumpatse have responded to the Motion.

DELIBERATION

3. It is established jurisprudence that a Chamber has the inherent power to reconsider its decisions when there has been a material change in circumstances since it made its original decision.³
4. On 30 October 2006, the Chamber ordered the following protective measures.⁴

[T]he Defence shall notify the Witnesses and Victims Support Section of the Tribunal and the Prosecution in writing, on reasonable notice, of its wish to contact a protected Prosecution witness or potential Prosecution witness or a relative of such person. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, WVSS shall immediately make all necessary arrangements for the witness to meet with the Defence and provide sufficient notice to the Prosecution of the time and place of the meeting. Except under exceptional circumstances, such meeting shall not take place at the outset of the witness' testimony in court. Where appropriate, WVSS may facilitate the interview.

¹ Prosecutor's Motion for Reconsideration of Protective Measures Orders, filed 28 July 2009 ("Prosecutor's Motion"); Prosecutor's Reply to "Joseph Nzirorera's Response to Prosecutor's Motion for Reconsideration of Protective Measures Orders", filed 6 August 2009 ("Prosecutor's Reply").

² Joseph Nzirorera's Response to Prosecutor's Motion for Reconsideration of Protective Measures Orders, filed 31 July 2009 ("Nzirorera's Response").

³ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006, para. 2; *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 Appelant Brief (AC), 11 March 2004, p. 2.

⁴ *Karemera et al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006, p. 6.

5. The Prosecution submits that, due to two changes in circumstances, the protective measures currently in place fail to sufficiently protect the integrity of evidence before this Tribunal, the safety of witnesses, and judicial efficiency in the interest of the rights of the Accused to be tried without undue delay. The Prosecution requests the Chamber to reconsider and amend its Protective Measures Order of 10 December 2004 as revised on 30 October 2006⁵ to address these concerns.

6. The Chamber recalls that the 2006 Protective Measures Order was premised on Joseph Nzirorera's request to allow witnesses to be shown documents to be used during the cross-examination⁶ in order to save time in court. The presentation and cross-examination of Prosecution witnesses has now concluded. The Chamber agrees that the conclusion of all Prosecution witness testimony in this case constitutes a change in circumstances.

7. The second material change in circumstances advanced by the Prosecution concerns Witness BDW's recent withdrawal of cooperation with the Tribunal following a meeting with Joseph Nzirorera's Defence Team.⁷ The Prosecution argues that Witness BDW's change of position indicates that existing measures potentially fail to adequately ensure the continuing cooperation of protected witnesses with the Tribunal. The Chamber agrees that the issues raised following Prosecution Witness BDW's interview by Joseph Nzirorera's Defence Team constitute a material change in circumstances.

8. The Prosecution suggests two orders to alleviate the concerns arising from the changes in circumstances.⁸ The Prosecution asserts that the Chamber is entitled to know the basis for meeting with a protected witness beforehand, and notes that the requested measures are not disadvantageous to Joseph Nzirorera, as they apply to "any party".⁹

⁵ *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004; *Karemera et al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006 ("2006 Protective Measures Order").

⁶ Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order, filed 25 September 2006, para 16. *See also* 2006 Protective Measures Order, paras. 3, 10.

⁷ Joseph Nzirorera's Motion to Recall Prosecution Witness BDW, filed 3 June 2009.

⁸ The Prosecution suggests the following orders:

1. Any party seeking to contact a protected witness who has already testified in this proceeding on behalf of another party shall make a written request to the Chamber, who shall only authorise such contact through an express Order.
2. The Chamber shall require any authorised meeting to take place in the presence of a representative of the Registry and/or, where appropriate, a representative of the party who originally called the witness.

⁹ Prosecutor's Reply, paras. 4, 6.

9. In the 2006 Protective Measures Order, the Chamber considered the rights of the Accused to a fair and expeditious trial as guaranteed by Articles 19 and 20 of the Tribunal's Statute, before recalling that, Witnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to them.¹⁰ The Chamber went on to note that

“[t]he right to contact and interview a potential witness is [...] not without limitation. The Chamber must ensure that there is no interference with the course of justice and that the witness does not feel coerced or intimidated.”¹¹

Given the circumstances at that time, the Chamber viewed the requirement of the witness's formal consent as a sufficient safeguard for their protection. Joseph Nzirorera contends that such measures remain sufficient in the present circumstances.¹²

10. The Chamber accepts that the two material changes raised by the Prosecution and which have taken place since its 2006 Protective Measures Order, warrant a reconsideration of that order.

11. If preparation for cross-examination of Prosecution witnesses was the sole reason for enabling the Defence to have access to protected witnesses, then the first change in circumstances raised by the Prosecution could necessitate stricter protective measures. However, other legitimate reasons for meeting with witnesses may arise.

12. Similarly, the Chamber accepts Joseph Nzirorera's contention that the Prosecution's proposed amendment would delay, rather than expedite, the proceedings.¹³

13. Finally, while the withdrawal of Witness BDW's cooperation with the Tribunal is a serious development, the Chamber must ensure that it does not unnecessarily restrict access to protected witnesses by other Parties while the trial is continuing. This is especially pertinent given that Witness BDW did not allege any misconduct or violation of protective measures by Joseph Nzirorera. At the same time the Chamber acknowledges the gravity of using illegitimate means to solicit recantations from witnesses who have already been cross-examined.

¹⁰ 2006 Protective Measures Order, para 7, quoting *Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003.

¹¹ Protective Measures Order, para. 8.

¹² Nzirorera's Response, para. 5.

¹³ Nzirorera's Response, para. 12.

14. The measures requested by the Prosecutor may reduce the likelihood of losing a witness's cooperation. However, there exist other solutions which are more in line with preserving the Accused's right to a fair and expeditious trial while ensuring that witnesses understand the trial process and continue their cooperation with the Tribunal.

15. In the 2006 Protective Measures Order, the Chamber was not persuaded that the presence of a representative of Witness and Victims Support Section ("WVSS") at each interview was necessary.¹⁴ However, the changes in circumstances, as found by the Chamber above, now necessitate such a presence. Increasing the supervisory role of WVSS is a suitable means of resolving the tension between allowing a Party to have access to witnesses, and ensuring that witnesses continue to cooperate with the Chamber and understand the trial process.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS in part the Prosecutor's Motion;

II. AMENDS the Protective Measures for Prosecution witnesses Order as follows:

Any Party in these proceedings seeking to contact a protected witness in this case who has already testified in this proceeding on behalf of another Party, shall: (i) notify the Witness and Victims Support Section ("WVSS") and all other Parties in writing, on reasonable notice, of its wish to contact the witness, stating the purpose for which it seeks to meet with the witness; and (ii) obtain the consent of that person or their legal guardian, if less than 18 years old, to an interview.

- A) WVSS shall then immediately undertake all necessary arrangements for the interview, and provide sufficient notice to the other Parties of the time and place of the meeting.
- B) A representative from WVSS shall attend the meeting.
- C) In the event that the WVSS representative reasonably apprehends that: (i) the Party is attempting to illegitimately solicit a recantation of testimony; or (ii) the witness feels coerced or intimidated, the WVSS representative may immediately terminate the meeting.

¹⁴ 2006 Protective Measures Order, para. 9.

D) The WVSS shall tender a report to the Chamber whenever a meeting is terminated by a WVSS representative as stated above.

and;

III. DENIES the remainder of the Motion.

Arusha, 15 October 2009, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]