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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., Presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 7 October 2003

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THE PROSECUTOR

v.

**ÉDOUARD KAREMERA,
ANDRÉ RWAMAKUBA,
MATHIEU NGIRUMPATSE,
JOSEPH NZIRORERA *et al.***

Case No. ICTR-98-44-I

**DECISION ON THE DEFENCE MOTION FOR
MODIFICATION OF A DECISION OF 12 JULY 2000 ON
PROTECTIVE MEASURES FOR PROSECUTION WITNESSES**

Counsel for the Defence of Accused Nzirorera:
Peter Robinson
Dior Diagne

Office of the Prosecutor:
Don Webster
Tamara Cummings-John

Counsel for Co-Accused:
Didier Skornicki and John Traversi
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., Presiding, Andréia Vaz and Khalida Rachid Khan (“Chamber”);

BEING SEIZED of the “Motion for Modification of Decision on the Prosecutor’s Motion for Protective Measures for Witnesses”, filed on 4 August 2003 pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) by the Defence for Accused Joseph Nzirorera (“Motion”);

CONSIDERING the Prosecution Response to the Motion, filed on 23 September 2003 (“Response”) and the Defence Reply to the Response, filed on 30 September 2003 (“Reply”);

CONSIDERING the Decision on the Prosecutor’s Motion for Protective Measures for Witnesses rendered by Trial Chamber II of the Tribunal in the present Case, regarding Accused Nzirorera, on 12 July 2000 (“Nzirorera Decision of 12 July 2000”);

CONSIDERING, further, the Decisions on the Prosecutor’s Motions for Protective Measures for Witnesses rendered by Trial Chamber II of the Tribunal in the present Case, regarding Accused Karemera and Ndirumpatse, on 6 July 2000 (“Karemera Decision of 6 July 2000” and “Ndirumpatse Decision of 6 July 2000”), and regarding Accused Rwamakuba, on 22 September 2000 (“Rwamakuba Decision of 22 September 2000”);

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules, and, especially, Articles 20 and 21 of the Statute and Rules 66, 69 and 75 of the Rules;

NOW REVIEWS the Motion, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the Parties.

1. In the Nzirorera Decision of 12 July 2000, Trial Chamber II of the Tribunal, then seized of the present Case, *inter alia* ordered that the identity of each protected witness be disclosed no later than 21 days prior to their testimony (“Disclosure Order of 12 July 2000”).

2. In the Nzirorera Decision of 12 July 2000, Trial Chamber II further:

(i) Ordered that the Accused or his Defence Counsel make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential prosecution witness or any relative of such person; and

(ii) Required that, when such interview is granted, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, the Prosecution undertake all necessary arrangements to facilitate such interview (“Contact Order of 12 July 2000”).

3. The same orders were made in the Karemera and Ndirumpatse Decisions of 6 July 2000 and in the Rwamakuba Decision of 22 September 2000.

4. The Defence for Accused Nzirorera is presently requesting the Chamber to amend the Nzirorera Disclosure and Contact Orders of 12 July 2000, in the light of a change of circumstances since these Orders were rendered. The Defence emphasises that the Accused’s right to a fair and expeditious trial would be prejudiced by the continued application of these Orders.

I. Request for Modification of the Nzirorera Disclosure Order of 12 July 2000

A) Parties' Submissions

Motion

5. The Defence notes that, on 18 July 2003 in the *Military I* Case (*Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T), Trial Chamber I of the Tribunal amended a previous Order compelling the Prosecutor to disclose the identity of the protected prosecution witnesses' identity to 35 days prior to each of these witnesses' scheduled appearance. Trial Chamber I decided, according to the Defence, that disclosure of the protected prosecution witnesses' identity would be carried out by the Prosecutor 35 days prior to the commencement of each trial session.¹

6. The Defence requests that the same modification as above be made, in the Accused's case, to the Nzirorera Disclosure Order of 12 July 2000. The Defence emphasises that the reasons advanced by Trial Chamber I for the modification are equally relevant to the Accused's case, in that, (i) there will be fewer than 100 witnesses in the Accused's case and, (ii) the Accused's trial is likely to be conducted without significant breaks.

7. The Defence adds that the circumstances of the Accused's case have changed in two respects since the Chamber rendered the Nzirorera Disclosure Order of 12 July 2000, and that these new circumstances support the adoption of the same deadlines of disclosure of protected witnesses' identity as those presently in force in the *Military I* Case:

(i) The improvement, by all accounts, of the situation of witnesses, in view of the fact that no evidence was received of threats or reprisals to the prosecution witnesses having testified before the Tribunal;

(ii) The fact that the Defence intends to send an investigator to interview people who can corroborate or contradict the information provided by each protected prosecution witness once that witness' identity is disclosed, and that the Registry used to approve such requests within 7 days, but that it now takes 30 days to approve them. The Defence adds that it is essential that this investigation be completed before cross-examination, and that such cannot be the case under the current deadlines for disclosure of the protected prosecution witnesses' identity.

Response

8. The Prosecutor essentially responds:

(i) That the circumstances are different in the present Case from those of the *Military I* Decision of 18 July 2003, which was issued over a year after the commencement of trial, at the end of the third trial session, while the Accused's trial in the present Case has not commenced; and

(ii) That disclosure of the identities and un-redacted witness statements of all prosecution witnesses in advance of the commencement of trial will not significantly expedite matters at trial.

¹ Referring to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003.

Reply

9. The Defence essentially replies:

(i) That the 21-day rule was abandoned in the *Military I* Case after it resulted in delays caused by the Defence's lack of preparation, and that the modification sought would avoid such disclosure problems in the present Case;

(ii) That the Prosecutor has not shown that the new deadlines for full disclosure to the Defence in the *Military I* Case have resulted in security problems for prosecution witnesses, that, in opposing the modification, the Prosecution seeks to hamper the Defence's preparation to cross-examination of its witnesses and that such tactics should not prevail over the search for truth and the right to a fair trial.

B) Deliberations

10. The Chamber is prepared to modify the Order of 12 July 2000 to the extent that the disclosure of the identity of the prosecution witnesses should be made 21 days ahead of each Trial session rather than 21 days before the witness is called to testify.

11. Modification of the Nzirorera Disclosure Order of 12 July 2000 should equally apply to the Karemera and Ndirumpatse Disclosure Orders of 6 July 2000 and to the Rwamakuba Disclosure Order of 22 September 2000.

II. Request for Modification of the Contact Order of 12 July 2000

A) Parties' Submissions

Motion

12. The Defence notes that, under the Nzirorera Contact Order of 12 July 2000, it is to seek an authorisation from the Chamber to contact a protected prosecution witness. The Defence argues that this procedure has proved cumbersome and lengthy in the case of their request to interview Witness G, which the Chamber granted on 27 June 2003.² The Defence therefore requests that the Contact Order of 12 July 2000 be modified to provide that all requests to interview potential prosecution witnesses shall be made in writing to the Witnesses and Victims Support Section of the Tribunal ("WVSS"), and that this Section shall promptly make all arrangements to facilitate such an interview.

Response

13. The Prosecutor objects to the modification proposed, essentially, that the requirement of court approval, (i) has not been proved to have caused delays in making arrangements for meetings with protected prosecution witnesses; (ii) did not influence witnesses to decline invitations to meet with the Defence; (iii) is an effective means of monitoring the security of witnesses, in that it ensures the integrity of the proceedings and the protection of vulnerable witnesses.

² In the Chamber's Decision on the Defence Motion for Interview with Witness G.

Reply

14. The Defence essentially replies, (i) that the Prosecution has failed to explain how such a regime would pose a security problem for its witnesses; (ii) that the only change would be that the Chamber would not have to deal with the request; and (iii) that, as under the current regime, there would be no direct contact with the protected witness except through the WVSS.

B) Deliberations

15. In Decisions rendered by the Tribunal since July and September 2000, it was held that contact by a party with the other party's witnesses should remain an *inter partes* matter, save where a dispute arises.³ The Chamber subscribes to such a statement and decides that it will no longer be necessary for the Defence to notify the Trial Chamber when requesting to contact protected prosecution witnesses. However, the Chamber does not consider that it is desirable that requests to interview potential prosecution witnesses be made to the WVSS rather than to the Prosecutor. The WVSS may nevertheless facilitate such an interview.

16. Modification of the Nzirorera Disclosure Order of 12 July 2000 should equally apply to the Karemera and Ngirumpatse Contact Orders of 6 July 2000 and to the Rwamakuba Contact Order of 22 September 2000.

17. The Chamber adds that interviews with another party's witnesses or potential witnesses should as a general rule take place in the presence of the opposing party, to protect the integrity of the process.

18. The Chamber further emphasises that there can be no justification for the Defence wanting to interview every single prosecution witness in the present Case, as indicated in the Motion.⁴

³ See *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-I, *Décision (Requête du Procureur aux fins de mesures de protection des témoins à décharge)* (TC), 30 May 2002, § 20. See also *Prosecutor v. Nsengimana*, Case No. ICTR-2001-69-T, *Decision on Prosecutor's Motion for Protective Measures for Witnesses* (TC), 2 September 2002, para. 24.

⁴ See Defence Motion at para. 11: "It is the intention of the defence to interview before the trial each prosecution witness who claims to have information concerning Mr. Nzirorera."



FOR THE ABOVE REASONS,

THE TRIBUNAL,

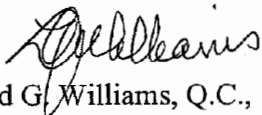
I. ORDERS the Prosecutor to disclose the identity of the protected witnesses he intends to call at trial at the latest 21 days in advance of the commencement of the trial session during which the concerned witnesses are scheduled to testify.

II. ORDERS the Defence to notify the Prosecution in writing, on reasonable notice, of its wish to contact a protected victim 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, the Prosecution shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.

III. DECLARES that the other party may attend any such interview, if it so wishes.

IV. DENIES the Motion in all other respects.

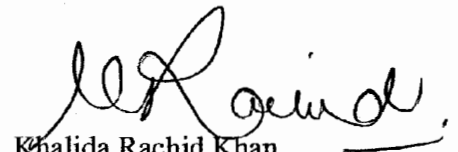
Arusha, 7 October 2003



Lloyd G. Williams, Q.C.,
Presiding Judge



Andréia Vaz
Judge



Khalida Rachid Khan
Judge

