

ICTR-98-44-PT  
19-4-2005  
(19330-19326)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

**Registrar:** Adama Dieng

**Date:** 19 April 2005

THE PROSECUTOR

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

Case No. ICTR-98-44-R46

JUDICIAL RECORDS/ARCHIVES  
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DECISION ON THE PROSECUTION MOTION FOR SANCTIONS AGAINST COUNSEL  
FOR NZIRORERA FOR VIOLATION OF WITNESS PROTECTION ORDER AND FOR AN  
INJUNCTION AGAINST FURTHER VIOLATIONS

*Rule 46(A) of the Rules of Procedure and Evidence*

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**Defence Counsel for Joseph Nzirorera**  
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dh

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

**SITTING** as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam (“Chamber”);

**BEING SEIZED** of the “Prosecutor’s Urgent Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction against Further Violations”, filed on 8 September 2004 and served on the Defence for Joseph Nzirorera (“Defence”) on 14 September 2004;

**CONSIDERING** the “Response to Urgent Motion for Sanctions” filed by the Defence on 20 September 2004;

**HEREBY DECIDES** the Motion, pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”).

**INTRODUCTION**

1. While the appeal on continuation of the trial was pending before the Appeals Chamber,<sup>1</sup> the parties continued to file Motions. Those Motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that the Prosecution Motion was still pending.<sup>2</sup> Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera,<sup>3</sup> the Chamber may now address the said Motion.

**ARGUMENTS OF THE PARTIES**

*Prosecution*

2. The Prosecution submits that the Defence Counsel has written a letter to the Government of a State in which a protected Witness resides. In its letter, the Defence Counsel asked the said Government to provide information regarding the benefits that the protected Witness has received. The Prosecution argues that the contentious letter breaches the Decision on protective measures of 20 October 2003<sup>4</sup> (“Decision of 20 October 2003”) by disclosing the whereabouts of a Witness to the public and by revealing information that relates to the Witness outside the Defence team. It submits that knowingly violating a court order is professional misconduct and that sanctions are warranted under Rule 46(A) of the Rules. In the Prosecution’s view, the said Decision on protective measures would constitute a

<sup>1</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-AR15bis.2 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material (AC), 22 October 2004.

<sup>2</sup> See Oral Decision, T. 26 November 2004, pp. 1-2.

<sup>3</sup> *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

<sup>4</sup> *Karemera et al.*, Decision on the Prosecutor’s Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor’s Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence’s Motion for Immediate Disclosure (TC), 20 October 2003, IV<sup>th</sup> and VI<sup>th</sup> orders.

warning within the meaning of Rule 46(A) of the Rules. Accordingly, the Prosecution requests a formal withdrawal of the letter, sanctions against the Defence Counsel and an injunction against this conduct.

#### *Defence*

3. The Defence contends that its letter seeking information from the respective Government did not identify the protected Witness. It argues that the location of the protected Witness was only revealed to the Government of a State in which the protected Witness resides, not to the public. It alleges furthermore that there is no disclosure of the actual whereabouts, but only an indication of the country in which the Witness resides. It contends that it did not reveal any information received from the Prosecution, since the Defence would have addressed the Government of the respective State on the basis of information about the Witness' location which it had previously known from its own sources.

4. The Defence submits that it needed to send the contentious letter since it intended to move the Chamber for a request for governmental cooperation. In compliance with the Tribunal's jurisprudence, it first had to deploy its own efforts to receive the desired information. Counsel argues that neither does the Decision on protective measures of 20 October 2003 constitute a warning, nor are the further prerequisites that Rule 46(A) of the Rules stipulates for sanctioning the Defence met.

#### **DELIBERATIONS**

5. The Chamber observes that although the present Motion is linked to the "Motion for Request for Cooperation to Government X", filed by the Defence on 20 September 2004, the two Motions will be separately decided.

6. The Prosecution Motion is based on the Trial Chamber's Decision of 20 October 2003 granting special protective measures for Witnesses G and T<sup>5</sup>. The Chamber notes that the said Decision has been superseded by the Order of 10 December 2004 providing protective measures for Prosecution Witnesses.<sup>6</sup> That circumstance nevertheless does not affect the Defence's obligation to comply with the Decision of 20 October 2003 while it was in force.

7. The Chamber is also aware of the Defence's view, presented in another Motion,<sup>7</sup> that the above mentioned Decision should be given no effect pursuant to the Appeals Chamber's Decision of 22 October 2004.<sup>8</sup> The Defence's obligation to comply with it stems from the fact that it was in force when the letter was written. The Appeals Chamber's finding that a Judge of the prior Bench who participated in the Decision of 20 October 2003 does not affect that conclusion. It is clear that a party could not act contrary to a Tribunal's order on the assumption that the said order could be revised or is no longer binding.

8. It is therefore necessary to assess whether the Defence has violated Orders IV and VI of the Decision of 20 October 2003 as the Motion asserts. The Chamber recalls that the Order IV declares that the whereabouts of the Witness shall never be disclosed to the public, the Defence or the Accused and that Order VI prohibits the Defence from disclosing information relating to the respective Witness "outside their teams".

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

<sup>7</sup> See Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of "No Effect", filed on 25 February 2005.

<sup>8</sup> *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

9. The Chamber is satisfied that, by writing the contentious letter, Defence Counsel has not disclosed the whereabouts of the respective Witness to the public, the Defence or the Accused<sup>9</sup>. The meaning of the word “public” is in common usage defined as “ordinary people in general”<sup>10</sup>. The Chamber holds that this meaning is congruent with the meaning given to the term in the Decision of 20 October 2003. The letter sent by the Defence Counsel was addressed to officials of the Government of the State that had assumed the charge of protecting the respective Witness and was transmitted by the Registrar through diplomatic channels. The information passed through the structure set up by the Tribunal and the respective State for the purpose of protecting the Witness. The addressee of the letter and the persons transmitting it do not involve any “ordinary people in general”. They do not fall within the meaning of “public”. Hence, Order IV of the Decision on protective measures of 20 October 2004 was not violated.

10. Order VI prohibiting the Defence from disclosing information relating to the respective Witness “outside their teams” does not differentiate according to the professional or social function of the persons receiving the information, or their prior involvement with Witness protection measures. The only criterion that the Order establishes with respect to the person receiving information is whether or not he or she is a member of the Defence team. The Order does not make any distinction as to when the Defence first learned about the disclosed information. The prohibition of disclosure is not limited to information that the Defence gathered from prosecutorial documents or records. The corresponding arguments submitted by the Defence have to be disregarded. The contentious letter stated that the Witness was located in the respective State. It therefore contained information relating to the protected Witness. The Defence does not dispute the Prosecution’s argument that the letter was addressed to persons outside the Defence team. The Chamber concludes that the Defence Counsel has violated protective Order VI by writing the letter which disclosed information relating to the Witness outside of its team. It would therefore be appropriate to make that declaration.

11. Pursuant to Rule 46(A) of the Rules, the Chamber may impose sanctions against Counsel if it has previously issued a warning and his conduct remains offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice.

12. The Chamber considers that the Prosecution’s contention that the Decision implied a warning, and any breach could immediately trigger sanctions contradicts the wording and spirit of the Rule. The Chamber finds that the Decision of 20 October 2003 does not contain any wording which can be construed as a warning. Although violations of Decisions delivered by the Tribunal could be contrary to the interests of justice in the sense of Rule 46(A) of the Rules, the Chamber observes that issuing a warning at this time would not be a proportionate response to the breach of the Decision on protective measures. The degree of misconduct deployed by the Defence needs to be seen in the light of the particular circumstances of the present incident. The Defence Counsel contended that he was of the opinion that he had to write the contentious letter as a prerequisite for his “Motion for Request for Cooperation to Government X”, filed on 20 September 2004. The Chamber observes that, the jurisprudence of this Tribunal<sup>11</sup> obliges the Defence to deploy its own efforts to obtain the desired information before it can seize the Chamber with a request for

<sup>9</sup> IV<sup>th</sup> order of the previously cited Decision of 20 October 2003.

<sup>10</sup> See *The Concise Oxford Dictionary*, Oxford University Press, 10th edition (2001), p. 1156. Cf. also *Collins English Dictionary*, HarperCollins Publishers, 5th edition (2000) p. 1247.

<sup>11</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, par. 32.

governmental cooperation. Consequently, the Defence Counsel might have acted in good faith and may have genuinely believed that he acted in the interest of justice.

13. The Chamber finds that no previous warning was issued, and that the conduct of Defence Counsel did not amount to conduct which is offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. The prerequisites of Rule 46 (A) of the Rules have not been met.

**FOR THE ABOVE REASONS,**

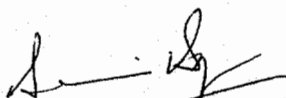
**THE CHAMBER**

**I. DECLARES** that the Defence has violated the VI<sup>th</sup> order of the Chamber's Decision on protective measures of 20 October 2003 by writing a letter to the Government of a certain State and therein disclosing information relating to a certain protected Witness outside its team.

**II. RECALLS** its Order of 10 December 2004 on protective measures.

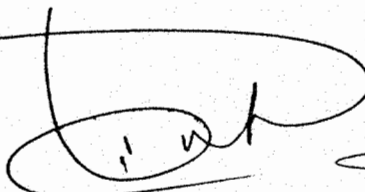
**III. DISMISSES** the remainder of the Motion.

Arusha, 19 April 2005, done in English.



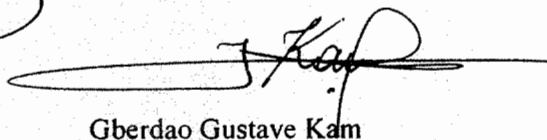
Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]

