

ICTR-98-44-T
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(23965-23962)

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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
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 20 September 2005

2005 SEP 20 P 4: 27
S. H. K. R. M.

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON DEFENCE WRITTEN REQUEST TO INTERVIEW PROSECUTION
WITNESSES**

Rule 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Gregory Lombardi
Iain Morley
Gilles Lahaie
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

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 (“Chamber”);

BEING SEIZED of a “Written Request to Interview Persons with Information Concerning Witness ‘T’” (“Motion”), filed by the Defence for Joseph Nzirorera (“Defence”) on 26 July 2005;

CONSIDERING the Prosecution’s Response thereto filed on 11 August 2005;

DECIDES as follows pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”).

1. The present trial has commenced on 19 September 2005. In the instant Motion, the Defence for Nzirorera requests permission to contact 13 persons who have information concerning Witness T and whose identities were disclosed pursuant to this Chamber’s Decision of 5 July 2005.¹ Of the 13 witnesses, 9 are from *Bagosora* case and 2 from *Seromba* Case. In both cases, the Prosecution has completed its case without calling them. Additionally, one witness is from our case and does not appear on the Prosecution’s witness list for the trial. The Defence requests therefore to be allowed to meet with these witnesses without the Prosecution or Registry being present. With respect to Witness HAF, who appears to be the only active potential witness for the *Ndindiliyimana* case, the Defence has no objection to the Prosecution being present if it represents that it still intends to call this witness.
2. Additionally, the Defence queries whether the Chamber’s Decision of 5 July 2005 is consistent with the provisions of Rule 75(G) of the Rules. In that Decision, the Chamber directed the Defence to make its written request to meet the witness to this Chamber. If the current request to meet the witness is considered as “seeking to rescind, vary, or augment protective measures”, Rule 75(G)(i) of the Rules would appear to require an application directed to the Chambers in *Bagosora*, *Seromba* and *Ndindiliyimana* cases. In the event that the Chamber determines that the application is more properly made to the other Chambers, the Defence requests that the Chamber directly refers its request to those Chambers.
3. While the Prosecution acknowledges Nzirorera’s request to meet with the said 13 witnesses, it claims that under the protective orders, the Prosecution has first to determine whether each of these protected witnesses consents to meet with Nzirorera’s Defence Counsel. It however agrees to delegate such a responsibility to the Witnesses and Victims Support Section (“WVSS”). If any of these witnesses consents to meet Defence Counsel for Nzirorera, the Prosecution claims a right to be present during the meeting. It relies on the Protective Orders. It contends furthermore that the fact that a witness is listed as a witness in a particular case and not called to testify does not change the fact that he/she remains a potential prosecution witness. Finally, the Prosecution declares that it is unclear about the Chamber’s Decision of 5 July 2005 which has given the Defence the option of submitting a request to the Chamber itself. It awaits guidance from the Chamber as to whether it should comply with the Protective Orders or follow any other course of action.

¹ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT (“*Karemera et al.*”), Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure (TC), 5 July 2005.

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4. Contrary to the Defence's contention, the removal of a witness from a Prosecution's list of witness does not necessarily imply that the protective measures do not apply anymore. In the present case, the Chamber recalls its Decision of 5 July 2005 where it found that:

These measures [protective Orders] continue to apply since these Orders explicitly provide that they apply to all "potential" Prosecution Witness. Nothing in the Protective Orders implies that their application cease upon the Witness' removal from the Prosecution Witness list.²

5. With respect to Witness GMT, who was initially on the Prosecution's Witness List for the instant case, and COB and CBO, who were potential Prosecution witnesses in the *Seromba* Case, in accordance with the respective protective measures ordered,³ the Defence must notify the Prosecution of its intention prior to contact these persons. While the Prosecution shall undertake all necessary arrangements to facilitate the interview, with the assistance of Witnesses and Victims Support Section of the Tribunal, it has no right to attend the meeting.

6. The Chamber observes that the remaining witnesses whom the Defence request authorization to meet, are potential Prosecution witnesses in two other ongoing cases, namely *Bagosora* and *Ndindiliyimana* cases. Under the protective orders issued in those cases, the Defence has to submit a written request, on reasonable notice to the Prosecution, to the Chamber which ordered the measures, to contact the witness or any relative of such person.⁴ The Chamber concurs with the Defence that its instant Motion must be submitted to Trial Chamber I with respect to Witnesses ADD, AHP, APA, APB, APC, APD, APE, DCY, FBU, who are potential Prosecution Witnesses in *Bagosora* case and Trial Chamber II concerning Witness HAF who is on the Prosecution's list in *Ndindiliyimana* case.

² *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, par. 21.

³ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004, par. 8:

The Defence shall 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.

Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003: "Defence Counsel shall notify Prosecution prior to any contact with any witness and the Prosecution shall make arrangements for such contacts".

⁴ *Prosecutor v. Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses (TC), 19 May 2000:

[...] Written request, on reasonable notice to the Prosecution, to the Trial Chamber of a Judge thereof, to contact the Witness or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such Protected Person or the parents or guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

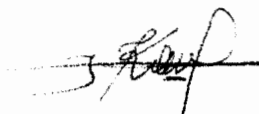
Prosecutor v. Ndindiliyimana et al., Order for Protective Measures for Witnesses (TC), 12 July 2001, f):

[...] for all potential prosecution witnesses residing in Rwanda:
(f) the Accused or Defence Counsel make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of these witnesses whose identity is known to the Defence or any relative of such person. At the direction of the Trial Chamber and with the consent of such person, or the parents or guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER**GRANTS** the Motion as follows:

- I. **ALLOWS** the Defence to meet with Witnesses GMT, COB and CBO without the presence of any representative of the Prosecution;
- II. **INSTRUCTS** the Witnesses and Victims Support Unit to make all the necessary arrangements to facilitate the interview with the above-mentioned witnesses;
- III. **INSTRUCTS** the Registrar to refer the remainder of the Motion to Trial Chamber I in *Bagosora* case with respect to Witnesses ADD, AHP, APA, APE, APC, APD, APE, DCY, FBU, and Trial Chamber II in *Ndindiliyimana* for Witness HAF.

Arusha, 20 September 2005, done in English.

Dennis C. M. Byron
PresidingEmile Francis Short
JudgeGberlao Gustave Kam
Judge