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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: 30 October 2006

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THE PROSECUTOR

v.

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

DECISION ON RECONSIDERATION OF PROTECTIVE MEASURES FOR
PROSECUTION WITNESSES

Articles 19 and 20 of the Statute, Rules 33, 34, 54 and 75 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. The Defence for Nzirorera contends that throughout the trial, the Prosecution has repeatedly interfered with the right of the Accused to interview Prosecution witnesses who consent to meet with Counsel for the Accused before they give testimony.¹ To support its motion, the Defence refers to various events where it sought to meet, or met, with a Prosecution witness at a time immediately before the witness was called to testify in court. It therefore requests the Chamber to reconsider and amend its prior Order on Protective Measures for Prosecution Witnesses of 10 December 2004² to avoid these problems recurring in the future. In response, the Prosecution also expresses concerns regarding the current method that is employed by the Defence for interviewing of Prosecution witnesses and although it agrees with the Defence that the regime needs revision, it presents alternative suggestions.³

DELIBERATIONS

2. According to the established jurisprudence, a Chamber has the inherent power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision, (ii) there has been a material change in circumstances since it made its original Decision, or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in injustice thereby warranting the exceptional remedy of reconsideration.⁴

3. In the present case, the Defence Motion was filed in the particular context of the Defence's previous requests to meet with a Prosecution witness just before or during his or her testimony in court. The meetings were requested by the Defence so it could show the witness any documents intended to be used during cross-examination in order to save time in court.⁵ The Prosecution does not dispute that it intervened during those meetings but submits

¹ Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order, filed on 25 September 2006.

² *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera ("Karemera et al.")*, Case No. ICTR-98-44-T, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

³ Prosecution's Response filed on 29 September 2006 and Corrigendum filed on 19 October 2006.

⁴ *Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

⁵ See: Defence Motion.

that it had no choice in order to avoid any misrepresentation to, or coercion of the witness to obtain the witness' co-operation.

4. The Chamber accepts that these incidents may be considered, to a certain extent, as a material change in circumstances that has occurred since its original Decision on Protective Measures for Prosecution Witnesses and therefore may require reconsideration of that Decision.

5. The Defence suggests eight orders for the Chamber to adopt that would have the effect of helping the witness to understand the reasons for meeting Defence Counsel prior to his or her testimony; eliminate the appearance that the Prosecution is discouraging the witness from meeting and speaking with Defence Counsel; and expedite the proceedings by allowing the witnesses to be shown documents intended to be used during cross-examination in order to save time in court.⁶ The Prosecution responds that the Chamber must preserve both the rights of the accused to a fair trial and the integrity of the process and therefore suggests that the witness should be informed by an impartial and independent legal officer, that he or she has the right to decide whether to be interviewed by the Defence and is not obliged to explain its refusal to anyone. It opposes the Defence's suggested order that the Defence Counsel make the request of the witness for consent to be interviewed by the Defence prior to giving testimony.⁷ In its reply, the Defence does not object in principle to the presence of a legal officer to referee and document pre-trial meetings with the witnesses,⁸ but insists that the Defence Counsel should have an opportunity to explain its reasons for the meeting to the witness before the witness decides whether to participate.

⁶ The Defence suggests the following orders:

1. The defence shall notify the WVSS in writing, upon reasonable notice, of its wish to contact a protected victim or prosecution witness.
2. WVSS shall make arrangements for the witness to meet defence counsel and provide notice to the prosecution of the time and place of the meeting and an opportunity to be present.
3. At the commencement of the meeting, before asking any questions about the substance of the witness' proposed testimony, defence counsel should ask the witness if he or she consents to be interviewed by the defence prior to giving testimony.
4. If the witness does not consent, the meeting shall be terminated.
5. If the witness consents, he or she should be asked by defence counsel whether the witness wishes to meet with defence counsel with or without the presence of a representative from the prosecution.
6. If the witness requests to meet with defence counsel without the presence of a representative of the prosecution, that representative should depart from the meeting.
7. The prosecution's representative shall make no comments to the witness during the process of determining whether the witness consents to meet with defence counsel and whether he or she wishes to do so in the presence of a representative of the prosecution.
8. A representative of WVSS shall be present at all times during the interview.

⁷ Corrigendum filed on 19 October 2006.

⁸ Defence Reply filed on 2 October 2006.

279.77

6. Article 19 and 20 of the Tribunal's Statute guarantee the rights of the accused to a fair and expeditious trial, including his or her rights of to have adequate time and facilities to prepare his or her defence and to examine and have examined a witness against him or her. The Chamber must further ensure that the proceedings are conducted with full respect for these rights and with due regard for the protection of victims and witnesses.⁹ When appropriate, protective measures can be ordered for the protection of the victims and witnesses.¹⁰

7. According to the Appeals Chamber, each party has the right to interview a potential witness.¹¹ "Witnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them."¹² In particular, the Appeals Chamber stated that

Given that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.¹³

It also considered that "[t]he Trial Chamber should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination."¹⁴

8. The right to contact and interview a potential witness is, however, not without limitation.¹⁵ The Chamber must ensure that there is no interference with the course of justice and that the witness does not feel coerced or intimidated. To this end, Trial Chambers have required that a witness formally consent to meet with the requesting party.¹⁶ The assistance of

⁹ Statute, Art. 19.

¹⁰ Statute, Art. 21 and Rules of Procedure and Evidence, Rules 69 and 75.

¹¹ *Prosecutor v. Mile Mrksic*, 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; see also, *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15.

¹² *Ibidem*.

¹³ *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 14.

¹⁴ *Ibid.*, para. 15.

¹⁵ *Prosecutor v. Mile Mrksic*, 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.

¹⁶ See: *Bizimungu et al.*, Case No. ICTR-99-55-T, Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda (TC), 24 August 2004; *Prosecutor v. Nindiyimana et al.*, Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in the Military I Case (TC), 3 November 2004, paras. 21-23; *Bizimungu et al.*, Case No. ICTR-99-55-T, Decision on Prosper Mugiraneza's Extremely Urgent Motion To Vary Conditions Of Interview With Jean Kambanda. (TC) 19 January 2005; *Prosecutor v. Bagosora et al.*,

27976

the Registry, in particular of the Witnesses and Victims Support Section ("WVSS"), has often been requested to help in that determination.¹⁷ If a witness for any reason declines to be interviewed, the requesting party does not have the power to compel the person to attend an interview or to respond to any question.¹⁸ If the requesting party wishes to compel an unwilling person to submit to a pre-trial interview, then it may seek the assistance of the Chamber to issue a subpoena and any other order pursuant to Rule 54 of the Rules.

9. In the Chamber's view, in light of the prior experience in this case and since a witness is the property of neither the Prosecutor nor the Defence, when the Defence seeks to contact a Prosecution witness in the future, WVSS should make the necessary arrangements for this meeting to take place and provide its assistance where necessary. It must be noted that the presence of a representative of the Prosecution to such a meeting should not interfere with the right of the Defence to interview a consenting witness. The Chamber is, however, not persuaded that the presence of a representative of WVSS is necessary for each interview, nor is there any need to rule in detail on how the interview should proceed, including whether the Defence is entitled to ask the witness whether he or she consents to the meeting, as requested by both parties. The particular circumstances referred to in their submissions concern situations where the Defence sought to interview a witness at the outset of his or her testimony in court. There has been no allegation of any difficulty during meetings when the witness was not about to give evidence in court. In any event, the parties are at liberty to file specific requests seeking the assistance of the Chamber in particular circumstances.

10. The Chamber is particularly concerned that allowing either Counsel to meet a witness for the opposite party at the outset of the witness' testimony in court may interfere with the course of the proceedings and the interests of justice. It has the potential of delaying the proceedings and destabilizing the witness immediately prior to his or her testimony. Consequently, while each party has the right to interview a witness, requests for a meeting between the Defence and a Prosecution witness at the outset of his or her testimony should only be made on giving good reason why the application was not made earlier. In that respect, the Chamber notes that the Defence's request to meet the witness at the outset of his or her testimony with the view of showing documents intended to be used in court does not

Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him (TC), 31 October 2005, para. 6.

¹⁷ *Ibidem*; see also Rules of Procedure and Evidence, Rules 33 and 34.

¹⁸ *Prosecutor v. Mile Mrksic*, 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.

go beyond the need to prepare more effective cross-examination and does not constitute good reason to override the risks of having such a meeting.

11 In its reply, the Defence requests the disclosure of investigatory reports concerning Witness AWB's refusal to testify to show that the Defence did nothing to discourage the witness' participation in the trial.¹⁹ The Chamber does not intend to make any finding on this issue. There is no reason to order the requested disclosure. The Chamber further takes note of the Prosecution's intention to disclose any material falling within the ambit of Rules 66(B) or 68 if and when continuing investigations reveal information relevant to the case.²⁰

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS in part the Defence Motion,

II. AMENDS Order 8 of its Decision on Protective Measures for Prosecution Witnesses of 10 December 2004 as follows:

ORDERS that the 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.

¹⁹ Defence Reply filed on 2 October 2006; this position is reiterated in a Reply Brief: Motion for Disclosure of Materials Related to Witness AWB, filed on 26 October 2006.

²⁰ See Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Witness AWB Material, filed on 25 October 2006. The Prosecution filed this delayed response because it did not take note of the Nzirorera's motion for disclosure of Witness AWB material which was incorporated in the Defence's Reply related to Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order. The Defence submits that this late filing should not be considered by the Chamber.

III. DENIES the remainder of the Motion.

Arusha, 30 October 2006, done in English.



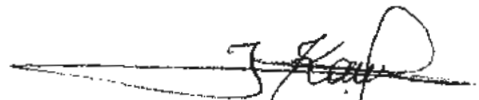
Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]

