



UNITED NATIONS
INTERNATIONAL
CRIMINAL TRIBUNAL FOR RWANDA

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judge Dennis C.M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 2 June 2008

THE PROSECUTOR

v.

**ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA**

JUDICIAL SECTION ARCHIVER
RECEIVED
2008 JUL 10 10 3 55
[Handwritten signature]

**DECISION ON ÉDOUARD KAREMERA'S MOTIONS TO VARY HIS WITNESS LIST
AND FOR EXTENSION OF PROTECTIVE MEASURES**

Articles 19 and 21 of the Statute, Rules 29, 73 *ter* and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Gerda Visser
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze
Deo Mbuto

Counsel for Édouard Karemera:
Dior Diagne Mbaye and Félix Sow

Counsel for Mathieu Ndirumpatse:
Chantal Hounkpatin and Frédéric Weyl

Counsel for Joseph Nzirorera:
Peter Robinson and Patrick Niny Mayidika Ngimbi

CI008-0096 (E)

1

Translation certified by I.S.S. ICTR

1955

102-98-44-1
10-7-2008
(36131-3626)

36131
[Handwritten signature]

INTRODUCTION

1. Édouard Karemera is the first Accused to present his defence evidence in the instant case. Following the closing of the Prosecution case on 25 January 2008, the Chamber on several occasions ordered the Defence to comply with the provisions of Rule 73 *ter* (B) of the Rules of Procedure and Evidence ("Rules").¹

2. On 21 April 2008, Édouard Karemera filed an *ex parte* motion to vary the list of his potential witnesses and to add witnesses discovered during recent investigations.²

3. On 23 April 2008, Édouard Karemera filed a confidential motion, requesting the Chamber to extend the protective measures ordered in the Decision of 19 February 2008 to the following new witnesses on the said list: CMX, CTB, DEL, DPL, DSV, ECM, ETB, KKB, KKV, NKM, RON, ROU, RTM, UOK, UOW, UPM, WOU, WXU, XCU, XJB, XKK, XKU, XOY, XPV, XPX, XWZ, and XXW.

Variation of the list of witnesses

4. During the hearing, the Chamber directed Édouard Karemera to file, if necessary, an *ex parte* motion to vary his witness list and for the protection of his witnesses. Considering the motion, the information contained therein and the current stage of the proceedings, the Chamber decides to make public the decision to be reached as well as the motion itself, since they do not contain any information that would lead to the identification of any witness. However, this not being the case with the annex to the *ex parte* motion, the Chamber directs the Registrar to classify it as confidential but accessible to the parties.

(i) Consideration of the conditions to be met in order to vary the list of witnesses

5. Rule 73 *ter* (E) of the Rules provides that, after commencement of the Defence case, the Defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called. The decision as to whether or not to grant a request to vary the witness list requires, in the case of each witness, a close analysis of, *inter alia*, the sufficiency and time of disclosure of the information regarding the witness; the materiality and probative value of the proposed testimonies in relation to existing testimonies and the allegations in the indictment; the ability of

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Édouard Karemera's Motion for Orders for the Protection of Defence Witnesses (TC3), 19 February 2008; Decision on Édouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the "Prosecutor's Cross-Motion for Enforcement of Rule 73 *ter* and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA Pursuant to Rule 70 *bis*" (TC3), 27 February 2008; Reconsideration of the Decision of 27 February 2008 on the Resumption of Trial and Commencement of the Defence Case (TC3), 6 March 2008; Decision on Mathieu Ndirumpatswe's Request for Extension of Time to File Rule 73 *ter* Materials (TC3), 2 April 2008; and Decision on Prosecutor's Submissions Concerning Édouard Karemera's Compliance with Rule 73 *ter* and Chamber's Orders (TC3), 2 April 2008; *Décision relative à la présentation des moyens de preuve à décharge*, 17 April 2008.

² *Urgente Soumission ex-parte et confidentielle d'Édouard Karemera en vue de varier la liste de ses témoins potentiels préalablement à la présentation de sa défense*, filed on 21 April 2008.

the other party to conduct an effective cross-examination of the witness; and the justification offered by the applicant for the addition of the witnesses.³

6. In the *ex parte* annex to his motion and in accordance with the requirements of Rule 73 *ter*, Édouard Karemera provided the list of the witnesses he intends to call to testify in his defence, summaries of their testimonies, their identities, their particulars, including their countries of residence, as well as the proposed order of their appearance, which is said to be adjustable. The Chamber also takes note of the Defence argument that the said witnesses are material witnesses required to rebut the serious factual allegations made, especially by Prosecution Witnesses AXA, AMO, BDW, QBG, FH and T, whereas the witnesses who have already been called testified to the context.

7. In the light of the aforementioned factors, the Chamber finds that it is in the interests of justice to allow Édouard Karemera to vary his witness list.

(ii) *Time allotted for the presentation of Édouard Karemera's case*

8. According to the provisions of the Tribunal's Statute and Rules, it is the duty of the Chamber to guarantee a fair trial. Thus, the Chamber must, in particular, ensure that the trial is held without undue delay, without prejudicing the rights of the accused, and with guaranteed protection for victims and witnesses whenever necessary. In so doing, the Chamber may assume control over the manner of questioning witnesses and the presentation of evidence, as well as the order of witness appearance. To this end, the Chamber recalls once again the orders and decisions which have governed proceedings and are still applicable.⁴

9. Under Rule 73 *ter* (D), the Chamber may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

10. In the instant case, the Chamber is of the view that about 40 days of hearing, six hours per day, would be adequate for the presentation of evidence in defence of Édouard Karemera. In determining this time frame, the Chamber took various factors into consideration. It first noted that the Prosecution had presented its evidence in 169 court days, during which 29 witnesses were heard. Secondly, and still in connection with the Prosecution case, the Chamber noted that the said period of time was not devoted solely to the presentation of prosecution evidence, owing to many hitches in the disclosure of evidentiary materials by the Prosecution, whereas the risks of similar hitches are limited during the presentation of defence evidence. Moreover, and regarding once again prosecution evidence, the Chamber took into account the impact of the admission of several facts already established and the written statements submitted pursuant to Rule 92(B). Further, the Chamber considered Édouard Karemera's Pre-Defence Brief and noted that the Defence has already had about 10 days between 21 April and 15 May 2008 for nine witnesses. Lastly, having noted some repetitions in the testimonies proposed in the annex to the

³ *The Prosecutor v. Bagambira et al.*, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, Trial Chamber, 6 June 2006, para. 3.

⁴ See *supra*, footnote 1.

motion, which testimonies are intended to prove the same facts, the Chamber is of the view that it is neither necessary nor possible to hear all the remaining witnesses on the Defence list.

11. Consequently, the Chamber directs the Defence to select on its own, from its list, those witnesses whom it deems really necessary, and to call only them. Thus, the Chamber reminds the Defence that it should make arrangements to call the witnesses who have not yet been heard, within the remaining period of time and in accordance with the time frame indicated in the previous paragraph.

12. While the proposed time frame seems reasonable at this stage, the Chamber is prepared to consider and allow an extension thereof, in the light of new circumstances and in the interests of justice. Accordingly, the Chamber directs the Defence for Édouard Karemera to disclose as soon as possible, in any event, three weeks before the next session, the order of appearance of the witnesses who are yet to be heard within the period remaining out of the approximately 40 days indicated, and the estimated duration of their testimonies.

13. Lastly, the Chamber reminds the Defence of the need to disclose to the Prosecutor, as soon as possible and in a confidential annex, all the identifying information relating to its witnesses, including those who are new on the list, as well as a summary of their testimonies.

Extension of protective measures

14. In submissions filed on 28 April 2008, the Prosecutor emphasizes that this motion cannot be considered as an implicit motion to vary the list of witnesses, as a result of the Defence's failure to disclose to the Prosecution the information required under Rule 73 *ter* (B). The Chamber however recalls having been seized of an *ex parte* motion to vary the list of witnesses, which contained the information in question, and which the Prosecutor could therefore not have been aware of.

15. Article 21 of the Statute of the Tribunal as well as Rules 69 and 75 provide that, in exceptional circumstances, either party may apply to the Chamber to order protective measures for victims or witnesses. The Chamber may also, *proprio motu*, order such measures. In practice, witness protection implies postponement of disclosure of witness identifying information, between the parties, in order to minimize any risk for the witnesses concerned, even though, in any event, the disclosure must be made before the hearing of the witness. With respect to the public, however, protection may involve total prohibition of any disclosure of identifying information.

16. According to the Tribunal's case law, there must be a real fear for the safety of the witnesses and their families for whom protective measures are sought, and an objective basis underscoring the fear. Moreover, witness protection measures are granted on a case by case basis, taking into account the rights of the accused (Rule 75(A)).

⁵ *The Prosecutor v. Juvénal Rugambarara*, Case No. ICTR-00-59-1, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 28 October 2005, para. 6.

The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case No. ICTR-98-44-T

17. In the instant case, the Defence seeks for the authorized witnesses on its new list, the same protective measures as set out in the Decision of 19 February 2008, arguing that the witnesses and their families have expressed real and objective fear for their safety.⁶ During the testimonies, however, some of the protected witnesses were surprised to learn that they were protected, and the Chamber had to reconsider its decision granting them protection, although the said decision was based on a similar Defence argument. In view of the principle of open court hearings, the Chamber deems it necessary for the Defence to consult its witnesses individually in order to inform the Chamber as soon as possible which of them actually sought protective measures. That said, in order not to disrupt preparation by the parties and the course of the proceedings, and since the conditions have been met, although subject to the specific circumstances of each witness, the Chamber provisionally grants the motion to order protective measures for the new witnesses on the list.

18. As the Defence has already started presenting its evidence, the Chamber insists that it is absolutely necessary to disclose immediately to the Prosecutor, identifying information concerning the said witnesses, in order to enable the Prosecutor to prepare his cross-examination.

19. Indeed, the applicant is required to disclose to the other party, information on each witness due to testify, in order to enable the said party to prepare itself. In the instant case, the Prosecutor has on many occasions complained about the Defence's failure to disclose this information in its entirety, or about partial disclosure which affected the Prosecution's preparation regarding defence testimonies. This situation cannot go on and the Chamber directs the Defence to take all the necessary measures in order not to hinder the preparation of the Prosecution case.

20. The Chamber also notes that the Defence has requested the Chamber to grant in advance the same protective measures to its future witnesses who would meet the necessary conditions. In the Chamber's view, there is no need to consider this request, since the list of witnesses is closed at this stage of the proceedings. This request cannot therefore be granted.

FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Édouard Karemera's motion to vary his list of witnesses;
- II. **PARTIALLY GRANTS** Édouard Karemera's request by ordering the provisional extension of the same protective measures set out in its Decision of 19 February 2008 to the new witnesses;
- III. **ORDERS** that all the identifying information relating to the said witnesses, a summary of their testimonies and any other information required under Rule 73 *ter* (B) as well as the Chamber's earlier Decisions be disclosed to the Prosecutor as strictly confidential material, no later than 31 May 2008;

⁶ *Submission confidentielle en vue d'étendre les mesures de protection prises par la Chambre dans sa Décision du 19 février 2008 aux témoins ajoutés sur la liste amendée des témoins à décharge, déposée au Greffe le 23 avril 2008, par la Défense d'Édouard Karemera.*

36126

- IV. **ORDERS** the Prosecutor not to disclose the said confidential information to be disclosed by the Defence for Édouard Karemera;
- V. **ORDERS** the Defence for Édouard Karemera to file with the Registry before 9 June 2008 the order of appearance of the witnesses he intends to call, taking into account the Chamber's observations and orders as set out above.
- VI. **ORDERS** the Registry to make public the motion to vary the list of witnesses as well as the decision, but to classify as confidential the annex to the motion filed *ex parte*, so that it is accessible to the other parties.

Arusha, 2 June 2008, done in French.

[Signed]

Dennis C. M. Byron
Presiding Judge

[Signed]

Gberdao Gustave Kam
Judge

[Signed]

Vagn Joensen
Judge

[Seal of the Tribunal]

