



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
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 21 August 2008

THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S EMERGENCY MOTION FOR NO
CONTACT ORDER AND "REQUETE URGENTE DE MATTHIEU NGIRUMPATSE
AUX FINS D'INTERDIRE AU PROCUREUR DE CONTACTER TOUTE
PERSONNE FIGURANT SUR LA LISTE DE TEMOINS SANS L'ACCORD
PREALABLE DE SES CONSEILS"**

Rule 75 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 10 December 2004, an order on protective measures for Prosecution witnesses was issued in this case,¹ which was later amended on 6 October 2006 to read, in relevant part:

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.²

2. Because he now fears that his witnesses may be dissuaded from testifying on his behalf if contacted by the Prosecution, Joseph Nzirorera moves the Chamber to issue the following protective measure, which is based on the Chamber's order of 10 December 2004:

The Prosecution shall notify the Defence, in writing, on reasonable notice, of its wish to contact a potential defence witness or a relative of such person. Should the 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 Defence shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.³

3. In a separate motion, Mathieu Ngirumpatse moves the Chamber to issue an order precluding the Prosecutor from contacting any of his witnesses or their relatives without the prior consent of his Counsel.⁴ The Prosecution opposes both motions in their entirety.⁵

¹ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44, ("Karemera et al."), Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

² *Karemera et al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006.

³ Joseph Nzirorera's Emergency Motion for No-Contact Order, filed on 31 July 2008; Reply Brief: Joseph Nzirorera's Emergency Motion for No-Contact Order, filed on 5 August 2008.

⁴ Requete Urgente de Matthieu Ngirumpatse aux Fins d'Interdire au Procureur de Contacter Toute Personne Figurant sur sa Liste de Temoins sans l'Accord Preamble de ses Conseils, filed on 13 August 2008.

⁵ Prosecutor's Response to Joseph Nzirorera's Emergency Motion for No Contact Order, filed on 4 August 2008; Prosecutor's Response to "Requête de Matthieu Ngirumpatse aux fins d'interdire au Procureur de contacter toute personne figurant sur la liste de temoins sans l'accord préalable de ses conseils", filed on 18 August 2008.

DELIBERATIONS

Standard for Issuing Protective Measures

4. Under Rule 75 of the Rules of Procedure and Evidence, a Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witnesses concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused. Witnesses for whom protective measures are sought must have a real fear for their own safety or that of their family.⁶ This fear must have an objective basis, and measures are generally granted on a case-by-case basis.⁷

5. The burden of proving that circumstances exist, which demand the protection of witnesses lies on the party seeking such protection.⁸ In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties.⁹

Joseph Nzirorera's Motion

6. The Prosecution argues that Joseph Nzirorera's motion is flawed because he has not demonstrated that any of his witnesses may be in danger, or at risk. The Prosecution also reminds the Chamber that Nzirorera stated that all of his witnesses would be coming to Arusha as non-protected witnesses in a motion dated 2 January 2008.

7. However, the Chamber agrees with Joseph Nzirorera that his witnesses may be dissuaded from testifying on his behalf if they are contacted directly by the Prosecution. The Chamber recalls that it must ensure that: 1) there is no interference with the course of justice when witnesses are interviewed and/or contacted; and 2) that witnesses do not feel coerced or intimidated.¹⁰ Furthermore, the Chamber notes that Nzirorera is not requesting anonymity for his witnesses; instead, he simply wishes to regulate the manner in which they are contacted

⁶ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, ("*Bizimungu et al.*"), Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 2 February 2005, para. 11.

⁷ *Ibid.*

⁸ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 2 February 2005, para. 12.

⁹ *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 8.

¹⁰ *Karemera et al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006, para. 8.

and interviewed by the Prosecution. Thus, his comment made on 2 January 2008 is not inconsistent with his present position.

8. The Prosecution claims that Joseph Nzirorera may not request protective measures for potential witnesses because Rule 75 does not expressly protect potential witnesses. Additionally, the Prosecution asserts that the proposed order would unfairly apply to an inordinate amount of potential witnesses because Nzirorera's witness list contains 236 persons, but he intends to call only 180 live witnesses.

9. Whether Rule 75 specifically refers to potential witnesses in addition to actual witnesses is not a dispositive issue for this motion. The Chamber recalls that it has the power under Rule 54 to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. Therefore, the Chamber finds that it may issue a protective measure for potential witnesses where, as here, it finds that they may be dissuaded from testifying if contacted directly by the Prosecution. The Chamber also notes that the Prosecution has benefited from an order, which prevents Nzirorera from directly contacting its potential witnesses and their relatives, since 10 December 2004.¹¹ It is therefore disingenuous for the Prosecution to claim that it would be unfairly prejudiced if it is unable to directly contact Nzirorera's potential witnesses and their relatives. If such an argument were to succeed, it would amount to the assertion that the Defence has been unfairly prejudiced for nearly four years.

10. The Chamber further recalls that the Prosecution only called 29 of the 212 witnesses listed in its pre-trial brief.¹² While the Chamber appreciates the efforts made by the Prosecution to streamline its case, it nonetheless notes that over 84% of the witnesses covered by the order regulating Joseph Nzirorera's contact with Prosecution witnesses were *potential* witnesses. Accordingly, the Chamber does not consider the amount of potential witnesses on Nzirorera's witness list to be a decisive factor when deciding this motion.

11. The Prosecution also contends that the proposed order should not apply to the relatives of Joseph Nzirorera's witnesses because he has not provided enough identifying information for his witnesses from which it can conclude who all of their relatives are. However, the Prosecution has not specified which items of identifying information are

¹¹ *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.
¹² Prosecutor's Pre-Trial Brief, filed on 27 June 2005, para. 262.

missing, nor has it explained how the identifying information that it provided to the Defence, which surely located and interviewed Prosecution witnesses, is any more complete.

12. Additionally, the Prosecution claims that the proposed order would cause it to lose valuable time in preparing its cross-examination or case in rebuttal. It submits that Joseph Nzirorera's proposed order is a deliberate ploy to prevent it from investigating the relatives of his witnesses, so as to prevent it from finding rebuttal and impeachment evidence.

13. The Chamber reiterates that Joseph Nzirorera has been preparing his case while subject to a protective measure that prevents him from directly contacting actual and potential Prosecution witnesses and their families since late 2004. Moreover, it notes that this is not the proper stage in the proceedings for the Prosecution to be concerned with building its case. Finally, the Chamber notes that Nzirorera's proposed order does not *prevent* the Prosecution from investigating the relatives of his witnesses; rather, it proposes a specific regime for contacting and interviewing them, so that they, and their relatives who are witnesses, are not dissuaded from testifying.

14. For these reasons, and considering the fairness of the trial and the need for equality among the parties, the Chamber issues a protective measure in Joseph Nzirorera's favor, which regulates the manner in which the Prosecution may contact his actual and potential witnesses and their families. However, because Nzirorera has not raised any concerns regarding his witnesses's incentive to testify if they are contacted by WVSS, the Chamber issues a protective measure that mirrors the one issued in favor of the Prosecution on 6 October 2006, and not the one proposed by Nzirorera.

Mathieu Ndirumpatse's Motion

15. According to the Appeals Chamber, witnesses are not the property of the Prosecution or the Defence, and both sides have an equal right to interview them.¹³ Therefore, the Chamber does not consider that Mathieu Ndirumpatse is entitled to a protective measure, which prohibits the Prosecution from interviewing his witnesses without the prior consent of his Counsel. Nevertheless, the Chamber notes that Ndirumpatse has also been subject to the same protective measure as Joseph Nzirorera, which regulated his contact with actual and potential Prosecution witnesses and their families, since late 2004.

¹³ *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.

16. Accordingly, for the reasons outlined above in its decision on Joseph Nzirorera's motion, the Chamber finds that Mathieu Ndirumapatsé is also entitled to a protective measure that mirrors the one issued in favor of the Prosecution on 6 October 2006.

FOR THESE REASONS, THE CHAMBER

- I. GRANTS** Joseph Nzirorera's motion in its entirety;
- II. DENIES** Mathieu Ndirumapatsé's motion in part; and
- III. ORDERS** that:

The Prosecution shall notify the Witnesses and Victims Support Section of the Tribunal and the Defence for each concerned Accused, in writing, on reasonable notice, of its wish to contact a Defence witness or potential Defence 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 Prosecution and provide sufficient notice to the Defence 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.

Arusha, 21 August 2008, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]