



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44D-I  
24-08-2009  
(1563-1559)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1563  
1094

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 24 August 2009

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

*Case No. ICTR-98-44D-PT*

2009 AUG 29 P 5:16  
SECRET  
PROSECUTIVE

**DECISION ON MOTION TO INTERVIEW PROSECUTION WITNESSES**

*Rules 54, 69 and 75 of the Rules of Procedure and Evidence*

**Office of the Prosecution:**

Paul Ng'arua  
Elvis Bazawule  
Marie Ka

**Defence Counsel**

Vincent Courcelle-Labrousse  
Philippe Larochelle

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## INTRODUCTION

1. On 13 February 2009, the Chamber ordered protective measures for all Prosecution witnesses or potential Prosecution witnesses in the current proceedings.<sup>1</sup> In particular, the Chamber ordered the Defence to make a written request to the Chamber before contacting any potential Prosecution witness, and if an interview is granted by the Chamber, ordered the Prosecution to undertake all necessary arrangements to facilitate the interview.<sup>2</sup>
2. Callixte Nzabonimana now moves the Chamber for an order permitting the Defence to conduct interviews with Prosecution Witnesses.<sup>3</sup> Nzabonimana also seeks clarification regarding the status of Prosecution witnesses who have been removed from the Prosecution's current witness list.<sup>4</sup>
3. The Prosecution responded to the Motion on 31 July 2009<sup>5</sup> and the Defence replied on 7 August 2009.<sup>6</sup>

## DELIBERATIONS

4. Each party to proceedings before the Tribunal has the right to interview a potential witness, as the Appeals Chamber has held "[w]itnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them."<sup>7</sup> Where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate

<sup>1</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009 ("Protective Measures Order").

<sup>2</sup> Protective Measures Order, pp. 3-4.

<sup>3</sup> Nzabonimana's Motion for the Interview of Prosecutor's Protected Witnesses and for Clarification Regarding the Scope of the "Interim Order Regarding Protective Measures for Prosecution Witnesses", filed 27 July 2009 ("Motion").

<sup>4</sup> Motion, paras. 9-12.

<sup>5</sup> Prosecutor's Response to Callixte Nzabonimana's Motion for Interview of Prosecutor's Protected Witnesses and for Clarification Regarding the Scope of the "Interim Order Regarding Protective Measures for Prosecution Witnesses", filed 31 July 2009 ("Response").

<sup>6</sup> Nzabonimana's Reply to the Prosecutor's Response to "Nzabonimana's Motion for the Interview of Prosecutor's Protected Witnesses and for Clarification Regarding the Scope of the 'Interim Order Regarding Protective Measures for Prosecution Witnesses'", filed 7 August 2009 ("Reply").

<sup>7</sup> *Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003.

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expectation of interviewing the witness in order to obtain this information and thereby better prepare its case.<sup>8</sup>

5. The right to contact and interview a potential witness, however, is not without limitation. The Chamber must ensure that there is no inference with the course of justice, and will consider whether the moving party has articulated good reasons for its request.<sup>9</sup> Chambers have also required that a witness formally consent to meet with the requesting party.<sup>10</sup>

6. The Defence seeks to interview Prosecution witnesses in order to obtain information regarding which witnesses have either testified or been accused in Rwanda.<sup>11</sup> The Defence also submits that, with respect to witnesses who have been withdrawn from the Prosecution's witness list, they can no longer properly be considered "potential Prosecution witnesses" and are therefore no longer subject to the Protective Measures Order. However, the Defence seeks guidance from the Chamber on the matter before contacting any witnesses.<sup>12</sup>

7. The Prosecution does not oppose the Defence request to interview witnesses, but submits that no distinction should be drawn between witnesses who remain on the Prosecution list and those who have been withdrawn.<sup>13</sup> Accordingly, the Prosecution asserts the right to be present at any Defence interview of the witnesses, including those who have been withdrawn from the Prosecution witness list.<sup>14</sup>

8. The Chamber notes that the removal of a witness from a Prosecution's list of witnesses does not necessarily imply that protective measures previously imposed no longer apply.<sup>15</sup> Indeed, Rule 75(F) provides that once protective measures have been ordered in respect of a witness, those measures continue to have effect unless rescinded, varied or augmented. As such, the Defence was under an obligation, pursuant to the Protective Measures Order, to make a written request to the Chamber before contacting any Prosecution witness, whether

<sup>8</sup> *The Prosecutor v. Sefer Halilović*, Case No. IT-01-42-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 14.

<sup>9</sup> *The Prosecutor v. Augustin Ndingiriyimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, 26 October 2007, para. 3.

<sup>10</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 8.

<sup>11</sup> Motion, para. 4.

<sup>12</sup> Motion, paras. 10-12.

<sup>13</sup> Response, paras. 2 and 2(ii).

<sup>14</sup> Response, para. 2(iii).

<sup>15</sup> *Karemera et al.*, Decision on Defence Written Request to Interview Prosecution Witnesses, 20 September 2005, para. 4.

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they remain on the Prosecution's witness list or not; an obligation that the Defence has complied with in filing the Motion.

9. The Chamber finds that the Defence has demonstrated good reason to interview Prosecution witnesses, noting in particular that the Prosecution has no objection to such meetings. The Chamber finds, however, that the witnesses should first be contacted to ensure that they agree to meet with the Defence. The Chamber requests the Victims and Witnesses Support Unit ("WVSS") to contact the witnesses to seek their consent and thereafter to make the necessary arrangements for any interviews.

10. The Chamber does not find, however, that simply because the witnesses remain subject to protective measures, the Prosecution has a right to attend any Defence meeting with Prosecution witnesses who have been removed from its list of witnesses.<sup>16</sup> Consequently, the Prosecution may be present for the Defence interviews of only those witnesses that remain on its witness list.

11. However, as Prosecution Witness CNAO is the subject of another decision rendered confidentially by the Chamber on 24 August 2009, the present decision will not be applicable to this witness until further notice.

**FOR THE ABOVE NOTED REASONS, THE CHAMBER**

**I. GRANTS** the Defence Motion;

**II. ALLOWS** the Defence to meet with Witnesses CNAA, CNAC, CNAE, CNAF, CNAH, CNAL, CNAJ, CNAK, CNAL, CNAM, CNAP, CNAQ, CNAS, CNAV, CNAX, CNAY, CNAZ, CNBA, CNBB, CNBC, CNBG, CNBH, CNBT and CNBU in the presence of a representative of the Prosecution;

**III. ALLOWS** the Defence to meet with Witnesses CNAB, CNAD, CNAG, CNAN, CNAR, CNAT, CNAU, CNAW, CNBD, CNBE, CNBF, CNBI, CNBJ, CNBK, CNBL, CNBM, CNBN, CNBO, CNBP, CNBQ, CNBR and CNBS without the presence of any representative of the Prosecution; and,

<sup>16</sup> *Karemera et al.*, Decision on Defence Written Request to Interview Prosecution Witnesses, para. 5.

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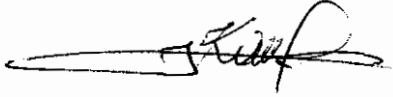
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IV. **REQUESTS** WVSS to contact all of the above witnesses to seek their consent to meet with the Defence; should consent be given, **REQUESTS** WVSS to make all the necessary arrangements to facilitate the interviews.

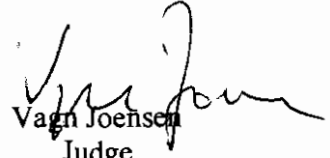
Arusha, 24 August 2009, done in English.



Dennis C. M. Byron  
Presiding Judge



Gberdao Gustave Kam  
Judge



Vagn Joensen  
Judge

[Seal of the Tribunal]

