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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 15 October 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE
DECISION RENDERED ON 28 OCTOBER 2009**

Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Extremely Urgent and Confidential Motion for Reconsideration of the Trial Chamber Decision Rendered on 28 October 2009”, filed confidentially on 1 September 2010 (the “Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Response and Counter-Motion to Defense Extremely Urgent and Confidential Motion for Reconsideration of Trial Chamber Decision rendered on 28 October 2009”, filed confidentially on 6 September 2010 (the “Response and Counter-Motion”);
- (b) The “Defence Reply to Prosecutor’s Response and Counter-Motion to Defence Extremely Urgent and Confidential Motion for Reconsideration of the Trial Chamber Decision Rendered on 28 October 2009”, filed confidentially on 8 September 2010 (the “Reply”); and
- (c) The “Additional Submissions to the Defence Reply to Prosecutor’s Response and Counter Motion to Extremely Urgent and Confidential Motion for Reconsideration of the Trial Chamber Decision Rendered on 28 October 2009”, filed on 13 September 2010 (the “Additional Submissions”);

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Articles 19, 20 and 21 of the Statute, Rules 73 and 75 of the Rules, and the inherent jurisdiction of the Chamber.

INTRODUCTION

1. In its Decision dated 6 May 2009, the Chamber ordered various protective measures for Prosecution witnesses, including Witness ANAE. These protective measures included a provision under subparagraph (v) that “[t]he Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS.”¹

¹ Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), dated 6 May 2009 (“Decision dated 6 May 2009”), pp. 6-7.

² 

2. On 28 October 2009, the Chamber granted in part a Defence motion to meet with the husband of Prosecution Witness ANAE (the “husband”),² and ordered a WVSS representative to be present during the meeting. The Chamber also granted the Prosecution’s request to attend the meeting (the “Impugned Decision”).³

3. On 19 January 2010, the Defence met with the husband, in the presence of a Prosecution team member and WVSS representatives. According to both Parties, the husband stated that he wished to testify as a Defence witness.⁴

4. On 20 January 2010, the Defence provided notice that it intended to call the husband as a Defence witness.⁵

5. On 9 February 2010, the Chamber ordered protective measures for potential Defence witnesses. These measures included an order for the Prosecution to notify the Defence if it wished to contact any protected Defence witness.⁶

6. On 21 May 2010, according to a confidential WVSS report, a representative of the Prosecution met with the husband alone, without having informed the Defence.⁷

7. On 6 July 2010, the Chamber ordered that *amicus curiae* be appointed to investigate possible violations of Rule 77, in particular the allegations and circumstances specified in that Decision.⁸

8. On 31 August 2010, the Prosecution closed its case-in-chief. The Defence case-in-chief is scheduled to commence on 15 November 2010.⁹

² Due to concerns for witness protection, the Chamber will not identify the husband of Witness ANAE in this Decision.

³ Decision on Defence Motion for Leave to Meet with the Husband of Witness ANAE and for Postponement of Her Testimony (TC), 28 October 2009 (“Impugned Decision”), p. 6.

⁴ Notification of the Intention to Call ANAE’s Husband as a Defence Witness, 20 January 2010 (“Defence Notification of 20 January 2010”), para. 1; Prosecutor’s Reply to Defence Notification to Call Witness ANAE’s Husband as a Defence Witness, dated 25 January 2010 (“Prosecution Reply to Defence Notification of 20 January 2010”), para. 5. See also Motion, paras. 13-15; Response, para. 1. The Chamber notes that the “Prosecution takes no issue with the statement of fact[s] in paragraphs 1 to 27 of the Defence motion.” Response, para. 1. The Chamber therefore relies on these paragraphs, for the purposes of this Decision, as an accurate statement of facts that may lie outside of the record in this case.

⁵ Notification of the Intention to Call ANAE’s Husband as a Defence Witness, 20 January 2010, para. 6.

⁶ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, pp. 8-9. Subparagraph (v) of the protective measures reads: “The Prosecution shall notify the Defence in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Defence shall facilitate such contact, in the presence of a representative of the Defence, together with the WVSS”. *Id.*, p. 9.

⁷ Motion, para. 17; Response, para. 1. See generally note 4, above.

⁸ Decision on Prosecution Oral Motions for Amendment of the Chamber’s Decision on Allegations of Contempt (TC), 6 July 2010, p. 6.

⁹ T. 31 August 2010, p. 56.

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence requests that the Chamber reconsider the Impugned Decision, remove Prosecution Witness ANAE's husband from the protective orders for Prosecution witnesses, and order that the husband become a protected Defence witness. The Defence also seeks permission to meet the husband without the Prosecution's presence, and without having to notify the Prosecution beforehand. Finally, the Defence does not wish to be required to obtain the Chamber's specific approval for individual meetings with the husband.¹⁰

10. The Defence submits that the husband's request to be excluded from the Prosecution protective orders, as well as the close of the Prosecution's case-in-chief, are both new facts and material changes in circumstances warranting reconsideration. The latter development signifies that the husband is no longer a potential Prosecution witness.¹¹

11. Moreover, the Prosecution should not be permitted to prevent the husband from being a Defence witness or from meeting with the Defence outside of the Prosecution's presence. This would be contrary to the husband's stated wishes, and would prejudice Ngirabatware's right to a fair trial.¹²

12. In order to avoid any potential interference with Witness ANAE, the Defence is prepared to meet her husband outside of Gisenyi prefecture, or even outside of Rwanda.¹³

Prosecution Response and Counter-Motion

13. The Prosecution requests that the mandate of *amicus curiae* be extended to investigate the possibility of witness tampering with regard to the husband, and that both Parties be prevented from contacting the husband until this investigation is completed.¹⁴

14. The Prosecution avers that the husband was initially a Prosecution witness, and expresses its shock that he may have agreed to testify as a Defence witness. The Prosecution further contends that the Defence request to meet with the husband is "unusual", which thereby raises a host of unanswered questions about the propriety of this arrangement.¹⁵

¹⁰ Motion, para. 29, pp. 9-10.

¹¹ *Id.*, paras. 28-30, 32-34.

¹² *Id.*, paras. 35-41, citing *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-PT, Decision on Motion to Interview Prosecution Witnesses (TC), 24 August 2009, para. 10; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Defence Written Request to Interview Prosecution Witnesses (TC), 20 September 2005, para. 5; *The Prosecutor v. Mile Mrkšić*, 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.

¹³ Motion, paras. 42-43.

¹⁴ Response and Counter-Motion, paras. 2, 10-12.

¹⁵ *Id.*, paras. 5-8.

15. The Prosecution submits that this situation is so unusual that an objective test demonstrates that there are reasonable grounds to warrant a further enquiry into whether the husband has faced any undue interference. An extension of *amicus curiae*'s mandate would be in the interests of justice, and would "guard against any possible perversion of justice."¹⁶

Defence Reply and Additional Submissions

16. The Defence repeats its prayer to meet with the husband without the Prosecution's presence, and submits that the close of the Prosecution's case-in-chief, as well as the beginning of the Defence case-in-chief, both constitute a new fact and a material change in circumstances warranting reconsideration. The Defence also requests that the Chamber decline to appoint *amicus curiae*, and direct the Prosecution to stop making unsupported allegations against the Defence regarding the fabrication of evidence or the non-respect of protective measures.¹⁷

17. The Defence notes that the Prosecution advanced no legal or substantive argument challenging the Motion, and did not address the Defence arguments concerning reconsideration.¹⁸

18. The Defence also disputes that the husband was ever a Prosecution witness. Throughout numerous correspondences by both Parties from May 2009 until September 2010, the Prosecution never indicated that the husband might be a witness for the Prosecution. Instead, the Prosecution first announced that he was a witness in its Response on 6 September 2010. In the Defence's view, the Prosecution seeks to prevent the husband from testifying as a Defence witness, and to impugn his credibility before he gives any evidence.¹⁹

19. The case history demonstrates that the Defence has always complied with the protective measures, and the Prosecution allegations of witness tampering are unsupported and incorrect. Such speculation does not provide a sufficient basis under Rule 77 (C) for the Chamber to order an *amicus curiae* investigation, which would also unduly delay the proceedings.²⁰

¹⁶ *Id.*, paras. 9-11. The Chamber wishes to direct the Prosecution's attention to the Appeals Chamber's language in *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, note 231. There, the Appeals Chamber noted that, although similar phrases may be appropriate in some legal systems, a reference to "perverted justice" could be equated with the last phase of the jurisprudence of the *Reichsgericht* during the Nazi-regime. The Appeals Chamber called upon the Prosecution to avoid employing this language in future proceedings.

¹⁷ Reply, paras. 15-16, 24, 57, 60; Additional Submissions, paras. 13-14, citing *The Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on Witness GFR's Recantation of His Evidence (TC), 10 February 2010, para. 14.

¹⁸ Reply, para. 5.

¹⁹ *Id.*, paras. 6-12, 26-56, 59.

²⁰ *Id.*, paras. 4, 7, 11, 13-14, 17-48, 54-56, 58-59.

DELIBERATIONS

20. As a preliminary matter, the Chamber notes that the Defence filed its Additional Submissions subsequent to its Reply. In part because both documents were filed by the deadline for any Reply, and because no further submissions were due, the Chamber has taken account of the Additional Submissions in this Decision, in the interests of justice.²¹ The Chamber does not expect the Defence or any Party to file multiple submissions beyond those allowed by the Rules of Procedure and Evidence in the future.

Reconsideration

21. The Chamber recalls the Tribunal's jurisprudence on reconsideration:²²

The Chamber notes at the outset that the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.²³

22. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) 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 an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.²⁴

²¹ The Chamber hastens to add that this determination should not be considered to hold any precedential value in the future.

²² Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"), citing Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16; Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 ("Decision of 31 March 2010"), para. 21; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004 ("*Bagosora et al.* Decision of 15 June 2004"), para. 7.

²³ *Bagosora et al.* Decision of 15 June 2004, para. 7.

²⁴ Decision of 15 July 2010, para. 18, citing Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *Karempera et al.*, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

23. In its Motion, the Defence submits that the close of the Prosecution's case-in-chief, as well as the request by Prosecution Witness ANAE's husband to be withdrawn from the Prosecution protective measures, both constitute a new fact and a material change in circumstances warranting reconsideration.²⁵ The Defence Reply, however, contends that reconsideration is warranted by the close of the Prosecution's case-in-chief, as well as the impending start of the Defence case-in-chief.²⁶ Despite the shifting nature of the Defence submissions on this matter, the Chamber will consider all three issues raised for reconsideration.

24. The Chamber notes that the Prosecution does not state any position on the issue of reconsideration.²⁷

25. The Impugned Decision concerns the conditions for a meeting between the Defence and the husband of Witness ANAE. In holding that a Prosecution representative must attend this meeting, the Chamber specifically identified three facts upon which it relied: the husband was married to a Prosecution witness, the Prosecution witness was still on the Prosecution witness list, and she could potentially be recalled to testify further.²⁸

26. These facts remain unchanged. The Defence has not demonstrated that the facts alleged to be new developments—namely the close of the Prosecution's case-in-chief, the husband's request to be withdrawn from the Prosecution protective measures, and the impending start of the Defence case-in-chief—present either new facts or material changes in circumstances warranting reconsideration of the Impugned Decision. The Chamber denies the Defence Motion in this respect.

Other Relief Requested in the Motion

27. The Chamber notes that the Defence also prays that the husband be excluded from the Prosecution protective measures and become a protected Defence witness. In addition, the Defence prays to be able to meet with the husband in the absence of the Prosecution, and without having to notify the Prosecution or request the Chamber's prior authorization.²⁹

28. The Chamber considers that the relief sought by the Defence might be properly construed as a variation of the protective measures ordered for Prosecution Witnesses. Specifically, the Defence appears to seek a variation of subparagraph (v) of the Decision dated 6 May 2009,³⁰ as it relates to Witness ANAE.

²⁵ Motion, para. 30.

²⁶ Reply, para. 57.

²⁷ See generally Response. The Prosecution instead requests an order that neither Party contact the husband before the completion of an *amicus curiae* investigation. *Id.*, para. 12. The Chamber addresses this request below.

²⁸ See Impugned Decision, para. 22.

²⁹ Motion, pp. 9-10.

³⁰ This subparagraph orders that "[t]he Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family.

29. The Prosecution does not appear to state any position on the additional forms of relief requested by the Defence.³¹

30. In its Decision dated 6 May 2009, the Chamber ordered protective measures for Prosecution witnesses. In doing so, the Chamber noted that “protective measures must be strictly necessary for the protection of the relevant witness”, and that “adequate protection of Prosecution witnesses requires also some protection of members of their families”.³² These measures are intended to guarantee the welfare of the witnesses. Although they may also benefit family members, the protective measures can not be revoked unilaterally by a witness’s family member. The Chamber will exercise appropriate caution when determining whether to vary these protective measures.

31. The Chamber recalls that, in exercising its discretion, it has a duty to strike a fair and proper balance between the rights of the Accused to a fair trial and the protection of the witness for whom protective measures were sought, in the interests of justice.³³

32. In the *Nshogoza* case, the Trial Chamber considered whether to vary its protective measures in respect of a protected Prosecution witness’s family member who may have agreed to testify for the Defence.³⁴ Before varying the protective measures, the Trial Chamber required the Defence to provide the Chamber with signed documentation that the family member consented to meet with the Defence and testify on behalf of the Accused.³⁵

33. Both Parties agree that, in January 2010, Witness ANAE’s husband stated his wish to testify for the Defence.³⁶ In spite of this agreement, the Chamber remains unaware of the exact contents of any statement made by Witness ANAE’s husband. Moreover, any such statement would have been made about nine months ago, and it is unclear whether the husband’s position on this matter may have changed in the intervening months.

34. The Chamber thus considers that, before deciding whether to vary the Prosecution protective measures as they relate to Witness ANAE and her husband, it would be appropriate for WVSS to obtain a signed statement from Witness ANAE’s husband that clarifies whether he wishes to meet with the Defence without representatives of the Prosecution or WVSS, whether he wishes to be covered by the Defence protective

If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS”.
Decision dated 6 May 2009, p. 7.

³¹ See generally Response. Instead, the Prosecution seeks an order that neither Party contact the husband before an *amicus curiae* investigation is completed. *Id.*, para. 12. The Chamber addresses this submission below.

³² Decision dated 6 May 2009, paras. 17, 20.

³³ See, for example, *id.*, para. 15.

³⁴ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT (“*Nshogoza*”), Decision on Defence Motion for Protective Measures for Victims and Witnesses (TC), 22 January 2009, paras. 4, 24.

³⁵ *Nshogoza*, Decision on Defence Motion for Variation of 24 November 2008 Witness Protection Order (TC), 23 January 2009, para. 14, p. 5.

³⁶ See Defence Notification of 20 January 2010, para. 1; Prosecution Reply to Defence Notification of 20 January 2010, para. 5; Motion, paras. 13-15; Response, para. 1. See generally Reply, Annex 3.



measures, and whether he is willing to testify as a Defence witness. As the Defence is unable to contact the husband,³⁷ the Chamber directs WVSS to obtain a signed statement from the husband of Prosecution Witness ANAE concerning these matters, and to communicate this statement to the Parties.

35. If the Chamber is again moved on this matter, the Chamber anticipates providing an expedited schedule for any Response and Reply, in order to facilitate a prompt resolution. This would also permit the Prosecution to indicate whether it wishes to contest any proposed variation of the Prosecution protective measures, which the present Response does not clearly address.

Other Relief Requested in the Response and Counter-Motion, and in the Additional Submissions

36. The Prosecution, in its Response and Counter-Motion, moves the Chamber to expand the mandate of *amicus curiae* to investigate the possibility of witness tampering, and to order that both Parties refrain from contacting the husband until such an investigation is completed.³⁸ The Defence, in its Additional Submissions, seeks a direction that the Prosecution desist from making unsupported allegations that the Defence has fabricated evidence or failed to respect protective measures.³⁹

37. These requested forms of relief are not the subject of a Motion dedicated to their consideration, and the Chamber will not consider them on the merits. The Chamber will address issues raised in Motions that have been properly filed before it.

38. Furthermore, in the Chamber's view, serious allegations that potentially impugn a Party's integrity should not be raised lightly.

³⁷ See Decision dated 6 May 2009, p. 7.

³⁸ Response and Counter-Motion, para. 12.

³⁹ Additional Submissions, para. 14.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion;

DIRECTS WVSS to obtain a signed statement from the husband of Prosecution Witness ANAE, as outlined in paragraph 34 above; and

DIRECTS WVSS to communicate the signed statement to the Parties in a strictly confidential manner, and to inform the Chamber when this is done.

Arusha, 15 October 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]



Mparany Rajohnson
Judge