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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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IN TRIAL CHAMBER III

ENGLISH

Original: FRENCH

Before: Judge Lloyd George Williams, presiding
Judge Pavel Dolenc
Judge Andréia Vaz

Registry: Adama Dieng

Date filed: 5 July 2002

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**THE PROSECUTOR
V.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE
ANATOLE NSENGIYUMVA
Case No. ICTR-98-41-T**

**DECISION ON THE PROSECUTION MOTION *EX PARTE* IN THE MATTER OF
VIOLATION OF THE TRIAL CHAMBER'S WITNESS PROTECTION
ORDERS, AND CONTEMPT OF COURT**

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Translation certified by LCSS, ICTR

CHH02-0002 (E)

The International Criminal Tribunal for Rwanda (“the Tribunal”),

Sitting in Trial Chamber III, in the person of Judge Lloyd George Williams, presiding, Judge Pavel Dolenc, and Judge Andréia Vaz;

Having been seized by the Prosecution of a motion entitled: “Prosecution Motion *Ex Parte* in the Matter of Violation of the Trial Chamber’s Witness Protection Orders Dated 29 November and 5 December 2001 in the case of *Prosecutor v. Bagosora & Ors* (Case No. ICTR-98-41-T), motion that was filed on 22 May 2002 (“the Motion”);

Ruling on the Motion based solely on the Prosecution’s Brief, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (“the Rules”).

Prosecution’s Arguments

1. The Prosecution argues that a *Diplomatie Judiciaire* agency journalist named Thierry Cruvellier violated standing prosecution witness protection measures by disclosing to the public the identity and profession in 1994 of one of its witnesses in the present case (“the witness”), as well as the said witness’ status as a prosecution witness the present case. The article in question, dated 26 April 2002 and signed by Mr Cruvellier, was published on the Internet on the said press agency’s website (<http://www.diplomatiejudiciaire.com>); (“the article”, “the Internet site” and “the press agency”).

2. On 8 May 2002, when the Office of the Prosecutor learned of the matter, Ms Silvana Arbia, Acting Chief of Prosecutions, wrote a letter to Mr Cruvellier, informing him that he had violated standing protective measures, as alleged *supra*. Ms Arbia also asked him to immediately remove the article from the Internet¹. Mr Cruvellier acknowledged receipt of the letter the same day².

3. Violation of the Order was allegedly aggravated by the fact the article was not removed from the Internet after 8 May 2002³. This, despite the 8 May 2002 letter, allegedly showed that the Witness identity was deliberately disclosed by Mr Cruvellier and/or his natural or corporate agents, associates and assigns. The Prosecution argues that this constitutes “At the barest minimum, (...) a clear case of reckless disregard of the process of this Tribunal, if not a deliberate predisposition to embarrass the Tribunal or obstruct the course of justice in the Tribunal.”⁴

4. Although the Prosecution does not mention the term “contempt” in the main part of its Motion, its cites, *inter alia*, Rule 77 of the Rules on “Contempt of Court” as the basis for the Motion. This, coupled with the assertion that Mr Cruvellier knowingly and deliberately obstructed justice by continued and aggravated violation of the witness protection orders, can be construed as contempt of court against Mr Cruvellier and/or his natural or corporate agents, associates and assigns.

¹ Appendix 2 of the motion.

² Handwritten acknowledgement of receipt on the copy of the letter of 8 May 2002, Appendix 2 of the Motion.

³ Mention of the article still appears in Appendix 3 of the Motion, it was updated on 13 May 2002, according to the menu page of the *Diplomatie judiciaire* website indicates that it was updated on 13 May 2002.

⁴ Motion, sub-para. viii), p. 4.

5. The Prosecution therefore seeks the following relief from the Trial Chamber:

- i) A declaration that the said witness protection orders were violated;
- ii) A direction to the Registrar to take appropriate measures within his powers to deal with the violation;
- iii) An order to Mr Cruvellier, his natural or corporate agents, associates and assigns to immediately remove the article in question from the site and from circulation in any other form;
- iv) Such further and other consequential relief as the Chamber may deem just.

6. The Prosecution further seeks the following measures from the Trial Chamber, prior to determination of the merits of the Motion:

- i) an order directing the Registrar, given the needs of a fair hearing, to serve this Motion on Mr Cruvellier only;
- ii) an order directing the Registrar, given that at this stage there is no apparent implication of the Defendants in the matter and in order to preserve the confidentiality of the identity of the Witness concerned, to not serve this Motion on any of the Defendants or their Counsel, or on any other third party not directly involved in the said Motion;
- iii) an order preventing anybody including but not limited to Mr Cruvellier, his natural or corporate agents, associates and assigns, from revealing the following to the public, the media, or any third party not directly involved in the Motion the making of the Motion, the Chamber's decision in the Motion, or the incidence of the Motion in any other respect, given that any discussion in the press of the Motion, the making of it, the decision of the Chamber on the Motion, or the incidence of it in any other manner, will draw further attention to the impugned article and/or the violation, thereby compounding the matter;
- iv) that the confidential measures sought in this interim relief, given all the factors indicated above, be enforceable at all times before, during and after the hearing of this Motion;
- v) that the Chamber grant any other relief it may deem appropriate in the circumstances.

Deliberations

7. The Chamber recalls the Tribunal's decisions are binding.

8. It notes that the alleged violation of orders in the instant case concerns a journalist who acted within the ambit of his functions.

9. The Chamber underscores that the allegations have not been brought to the attention of the person concerned.

10. The Chamber must now consider whether the Prosecution has sufficiently demonstrated that the orders in question were violated. The Chamber will, if need be, notify the Party concerned of the allegations against him.

11. If, after hearing the arguments of the Party concerned in the Motion, the Chamber is satisfied beyond reasonable doubt that violation occurred and that such violation is imputable to the said Party, it must, as much as practicable, safeguard both the protective measures the Tribunal has ordered and the fundamental freedom of speech and of the press. Thus the need for the Tribunal to be satisfied of the existence of sufficient evidence before initiating such a procedure is understood.

12. The Prosecution argues that the orders contained in paragraphs 43(e) and (f) of the 29 November 2001 decision⁵ were violated. The orders prohibit any person from disclosing information about the identity of protected Prosecution witnesses to the public or the media before, during and after the trial, and, in the case of the Defence, until further notice. A decision rendered on 5 December 2001 fixed the end of the period of non-disclosure to the Defence of any of the information referred to above at no later than 35 days prior to the said witnesses' testimony at trial.⁶

13. The Prosecution has not shown that the Witness is protected under the said orders.

14. The question is whether the Chamber is in a position to make a determination based on information contained in the Motion.

15. The 29 November 2001 decision, which supersedes the decisions on protective measures for prosecution witnesses of 26 June 1997 in *Nsengiyumva*⁷, 31 October 1997 in *Bagosora*⁸, and of 19 May 2000 in *Kabiligi and Ntabakuze*⁹, does not specify the categories of witnesses covered under the harmonised protective measures. This implies that the earlier decisions are still applicable in the instant case.

16. According to the pre-trial brief, the Prosecution intends to call the Witness to testify in the trial of each of the Accused.

17. Pursuant to the decisions of 31 October 1997 (*Bagosora*) and 19 May 2000 (*Kabiligi & Ntabakuze*), the witness is automatically protected if he resides on the African continent, unless he has expressly waived the protective measures. If, as of now, he is in exile outside Africa, the protective measures would only apply if he has so requested.

⁵ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses" (the "29 November 2001 Decision")

⁶ *Ibid.*, "Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses", 5 December 2001, para. 27.

⁷ *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-T, "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses", 26 June 1997.

⁸ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses", 31 October 1997.

⁹ *The Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze*, Case No. ICTR-97-34-I, "Decision on the Prosecution Motion for the Protection of Victims and Witnesses", 19 May 2000.

18. The Prosecution does not indicate which of the two categories above the Witness belongs to, nor does it specify his whereabouts. Assuming the Witness belongs to the second category, the Prosecution does not specify whether he has requested protective measures. The Chamber is therefore not in a position to determine which of the two categories of protected witnesses described in the decisions of 31 October 1997 and 19 May 2002 the Witness belongs to.

19. As for the 26 June 1997 decision in *Nsengiyumva*, it applies to the witnesses referred to by pseudonyms in the supporting materials attached to the Indictment which was confirmed on 12 July 1996 in Case No. ICTR-96-12-I. As those witnesses are referred to by pseudonyms only, it is impossible for the Chamber to determine whether the Witness belongs to the category of witnesses protected under the said 26 June 2000 decision.

20. Moreover, the Chamber would like to point out the following:

i) Mr Cruvellier is alleged to have disclosed both the witness' identity and his profession in 1994. The Prosecution is therefore of the view that such information discloses the identity of the Witness in question. The profession, which appears quite specific, was stipulated in the Prosecution pre-trial brief, a public document. Therefore, there would be no reason to believe that Mr Cruvellier violated the corresponding orders for non-disclosure, except to conclude that the Prosecution itself violated an order it sought and was granted.

ii) It would appear on reading the article that the author contacted the Witness and that the Witness indicated that he was unaware of the Prosecution's intention to call him to testify at trial. This suggests that not only was the Witness aware that the article was due to be published about him, but also that, if at all he intended to appear as a Prosecution witness in this case, he did not appear particularly concerned about protecting his anonymity.

iii) The article concerns *Bagosora et al* only indirectly and does not identify the Witness by the pseudonym assigned to him by the Prosecution in its pre-trial brief.

21. Accordingly, the Chamber dismisses the alleged violation of orders 43(e) and (f) contained in the 29 November 2001 decision.

22. Having thus ruled, the Chamber does not deem it necessary to review:

- i) the rules governing journalists in the exercise of their duties in so far as the orders on non-disclosure of the identity of protected witnesses are concerned; and
- ii) the Prosecution's plea of contempt of court pursuant to Rule 77 of the Rules.

For these reasons,

The Tribunal

Dismisses the Motion.

Arusha, 5 July 2002

[Signed]
Judge Lloyd George Williams, Q.C., presiding

[Signed]
Judge Pavel Dolenc

[Signed]
Judge Andréia Vaz

[Seal of the Tribunal]
