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Case No. : ICTR-20001-64-T

ANGLAIS
Original: FRENCH

TRIAL CHAMBER III

Before: Judge Andréia Vaz, presiding
Judge Jai Ram Reddy
Judge Sergey A. Egorov

Registrar: Adama Dieng

Decision of: 25 August 2003

2003 SEP -9 | A 11: 50
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THE PROSECUTOR

v.

SYLVESTRE GACUMBITSI

**DECISION ON DEFENCE MOTION FOR PROTECTIVE MEASURES FOR
DEFENCE WITNESSES
ARTICLES 14, 19 AND 21 OF THE STATUTE AND RULES 69 AND 75 OF THE
RULES OF PROCEDURE AND EVIDENCE**

Defence Counsel:

Kouengoua
Anne Ngantio Mbattang

Office of the Prosecutor:

Richard Karegyesa
Khaled Ramadan

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the Tribunal),

SITTING in the person of Judge Andréia Vaz, appointed by Trial Chamber III (the Trial Chamber) pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the Rules);

BEING SEIZED OF the Defence Motion and of the written submissions of the parties as follows:

- (i) “Extremely Urgent Motion for Protective Measures for Defence Witnesses – Rules 69 and 75 of the Rules of Procedure and Evidence”, filed on 11 August 2003 (the Motion);
- (ii) “Prosecutor’s Response to Defence Motion for Protective Measures for Defence Witnesses”, filed on 18 August 2003 (the Response);

RULING ON the sole basis of the written submissions of the parties, pursuant to Rule 73(A) of the Rules;

DECIDES as follows.

1. Mindful of ensuring a fair and expeditious trial for the Accused as well as the protection of victims and witnesses, the Trial Chamber may order, pursuant to Articles 14, 19 and 21 of the Statute and Rules 69 and 75 of the Rules, appropriate measures for their protection. The party requesting such measures must prove exceptional circumstances.

2. The Defence submits that all Defence witnesses and potential Defence witnesses have expressed a fear that their safety would be threatened if their identity or their status as witnesses were revealed.

3. Such fear, subjectively, can be used as evidence of the existence of exceptional circumstances affecting the safety of the witnesses; it is not enough to prove it.

4. The Defence appended newspaper clippings on the general insecurity faced by the population in Rwanda and in neighbouring countries like Congo and Uganda, and by Rwandan communities in African countries in general.

5. The Prosecution does not oppose that some of the measures requested be granted. The Trial Chamber therefore concludes that the Prosecution deems that the precarious situation of insecurity is really affecting the Rwandan Defence witnesses and potential witnesses.

6. In view of the documents appended to the motion, the Trial Chamber is convinced that the situation of insecurity affecting the Rwandan witnesses residing in the African countries necessitate the adoption of protective measures for them. The Trial Chamber recalls that it had reached the same finding before deciding on the adoption of protective measures for Prosecution witnesses in the instant case on 20 May 2003.

7. As in the Decision rendered on 20 May 2003, the Trial Chamber notes that the requesting party, in this case the Defence, has not provided enough evidence to prove that this situation of insecurity also affects Rwandan witnesses residing out of Africa. The Trial Chamber, therefore, shall not adopt, as the case stands, protective measures for Defence witnesses and potential witnesses residing out of Africa.

8. Concerned about equality between the parties, and considering that the Rwandan Defence witnesses are as affected by the precarious situation of insecurity as the Prosecution witnesses, the Trial Chamber grants mainly the same protective measures to Defence witnesses and potential Defence witnesses, who have not waived their rights to such protective measures, residing in African countries as it granted to Prosecution witnesses and potential Prosecution witnesses residing in African countries on 20 May 2003. The Trial Chamber **orders** as follows:

(a) That Defence designate a pseudonym for each Protected Defence Witness and that the pseudonym be used whenever referring to this person in Tribunal proceedings, communications, and discussions between the parties and with the public;

(b) That the names, addresses whereabouts, and any other information tending to identify any Protected Defence Witness be put under seal by the Registrar and not be included in any records of the Tribunal;

(c) That the names, addresses, whereabouts and any other information tending to identify the witnesses in question be communicated by the Registry only to the staff of the Victims and Witnesses Support Unit, in accordance with the established procedure and only for the purposes of implementing the protective measures adopted for such Protected Witnesses;

(d) That disclosure to the public and the media of any information permitting to identify Protected Defence Witnesses be **prohibited**, even after the trial;

(e) That the photographing, audio and/or video recording, or sketching of any Protected Defence Witness in relation to his or her cooperation with or appearance before the Tribunal at any time or place, without leave of the Trial Chamber and the Protected Defence Witness concerned be **prohibited**;

(f) That the names of any Protected Defence Witness, address, whereabouts, the identity of any relative and any other information tending to identify the Witness be put under seal by the Registry and not be included in any public or non-confidential records of the Tribunal;

(g) That, subject to the provisions of Rule 67(A)(ii)(a) of the Rules, the Defence be **authorized** not to disclose to the Prosecution the identity of the Protected Defence Witnesses until twenty-one (21) days before the Witness is due to testify at trial;

(h) That the Prosecution provide to the Registry a designation of all persons working in the Prosecution team who will have access to any identifying information concerning the Protected Defence Witnesses, and that the Prosecution notify the Registry as

soon as possible, in writing, of any person leaving its team and to confirm in writing that such person has remitted all material containing identifying information on the Witnesses;

(i) That the Prosecution, in making its legitimate investigations and inquiries, limit the exposure of witness identifying information and not disclose to any person the fact that the Protected Defence Witness has testified or will be testifying before the Tribunal.

9. The Decision rendered on 20 May 2003 does not provide a measure regulating contact by the other party of Prosecution Witnesses. The Defence requests moreover an order of this nature, requiring that any contact with a Defence Witness be subject to the consent of the Witness and with the explicit leave of the Trial Chamber or of a Judge thereof. The order granted by the Trial Chamber shall apply to the Witness of both parties as follows;

(j) The party requiring to contact a Protected Witness of the other party or any relative of such Witness shall notify beforehand the Defence who, if the Witness consents to an interview, or his guardian or statutory representative if the Witness is under the age of eighteen (18) years, shall take the necessary steps for the interview to be held with the assistance of the Victims and Witnesses Support Unit, if necessary.

10. The Trial Chamber rejects the following draft orders, which it deemed unnecessary in light of current Tribunal practice and applicable rules, or which related to the protection of witnesses usually granted by the Tribunal, or which were considered to be unreasonable:

- (i) Requiring that the second order referred in paragraph 8 (h) *supra* be amended to include a 2-day time limit for notification to the Registry;
- (ii) Requiring that any identifying information concerning the Protected Witnesses contained in a document or in any Section of the Tribunal other than the Victims and Witnesses Support Unit be expunged from the documents or those Sections;
- (iii) Requiring that all hearings on the issue of protective measures for witnesses with pseudonyms be heard in closed session;
- (iv) Requiring that at least five (5) days prior to the hearing, the Defence may request that Defence Witnesses be heard in an equipped room and be prevented from being stared at;
- (v) Requiring that, at its request and in concert with the Victims and Witnesses Support Unit, the Defence be authorized to call any witness to testify;
- (vi) That a witness may refuse to make any statement which might incriminate him or her and, should the Trial Chamber oblige him or her to make such a statement, the statement shall not be used as evidence against the said witness except in case of perjury because this order is in line with the provisions of Rule 90(E) of the Rules;
- (vii) That the Registry should seek the cooperation of the States concerned in order to facilitate the appearance of Defence Witnesses because the said States are

presumed to be aware of their obligations under Article 28 of the Statute and Rule 56 of the Rules regarding cooperation with the Tribunal.

11. The Defence requests that Protected Defence Witnesses be issued with a safe-passage as and when required during the proceedings. The Trial Chamber notes that a safe-passage comprises the granting of immunity for crimes within the jurisdiction of the Tribunal for the period during which the Witness is present at the seat of the Tribunal for the purposes of his or her testimony. The Trial Chamber notes further that no such measures are provided for under the Statute and the Rules of Procedure, but nonetheless, several Trial Chambers of the International Criminal Court for the Former Yugoslavia (the ICTY) have judged that such measures could be envisaged pursuant to the general provision of Rule 54 of ICTY Rules, empowering the Trial Chamber to issue orders and warrants, which provision is similar to that of Rule 54 of ICTR. In view of their desire to comply with the principle of personal appearance of witnesses, ICTY Trial Chambers have granted such safe-passage, subject to well defined arrangements, to specific witnesses who refused to testify before the Trial Chamber without being granted a safe-passage, in lieu of orders granting them leave to give evidence by video-link¹. In the instant case, as the Motion granting safe-passage is unreasonable for a particular witness, the Trial Chamber should dismiss the request.

12. Finally, the Trial Chamber dismisses the request for the following orders, which it equally deems unreasonable owing to lack of justification on a case-by-case basis:

- (i) That leave be granted for image and voice-altering devices or closed circuit television to be used during testimonies;
- (ii) That at the request of the Defence, the testimony of a witness be taken out of court by an individual who shall be named and be specifically designated by the Trial Chamber.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER:

I. GRANTS the orders referred to in paragraphs 8 and 9 *supra*, for Defence Witnesses and Potential Defence Witnesses residing in Africa who have not specifically waived their rights to such protective measures;

¹ See, *Prosecutor v. Dusko Tadic*, case No. IT-94-I-T, Decision on Defence Motion to summon and protect Defence Witnesses and on giving evidence by video-link, 3 May 1996 and Decision on the Defence Motions to summon and protect Defence Witnesses, and on giving evidence by video-link, 25 June 1996; ICTY, Trial Chamber II, *Prosecutor v. Slavko Dokmanovic*, Case No. IT-95-13a-PT, Decision on Defence Motion for Protection of a Witness, 27 August 1997; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, Order Granting Safe-Passage to Defence Witness "D/A" relating to Defence Motion for Protection of a Witness, 7 September 1998.

II. DENIES the Motion in all other respects.

Arusha, 25 August 2003

[Signed] Andresia Vaz
Presiding Judge

