



UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., Presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 20 October 2003

JUDICIAL PROCEEDINGS
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THE PROSECUTOR

v.

**ÉDOUARD KAREMERA
ANDRÉ RWAMAKUBA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA**

Case No. ICTR-98-44-I

DECISION ON THE PROSECUTOR'S MOTION FOR SPECIAL PROTECTIVE MEASURES FOR WITNESSES G AND T AND TO EXTEND THE DECISION ON PROTECTIVE MEASURES FOR THE PROSECUTOR'S WITNESSES IN THE NZIRORERA AND RWAMAKUBA CASES TO CO-ACCUSED NGIRUMPATSE AND KAREMERA, AND DEFENCE'S MOTION FOR IMMEDIATE DISCLOSURE

Rules 66, 69(A) and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni
Dior Fall
Simone Monasebian
Holo Makwaia
Tama Cummings- John

Defence Counsel

Peter Robinson and Dior Diagne
Didier Skornicki and John Traversi
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., Presiding, Andréia Vaz and Khalida Rachid Khan ("Chamber");

BEING SEIZED of the "Prosecutor's Motion for Special Protective Measures for Witnesses G and T; and to extend the Decision on Protective Measures for Prosecution Witnesses in the Nzirorera and Rwamakuba Cases to Co-accused Ngirumpatse and Karemera", filed on 29 September 2003 pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("Rules");

CONSIDERING the Response to the Prosecutor's Motion filed on 1st October 2003 by the Defence for Nzirorera, ("Response");

BEING FURTHER SEIZED of the Defence Motion for Immediate Disclosure ("Defence Motion") included in the Response;

CONSIDERING the Decisions on the Prosecutor's Motion for Protective Measures for Witnesses rendered by Trial Chamber II of the Tribunal in the present Case, regarding Accused Nzirorera, on 12 July 2000; regarding Accused Karemera and Ngirumpatse, on 6 July 2000 and regarding Accused Rwamakuba, on 22 September 2000;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules, and, especially, Articles 20 and 21 of the Statute and Rules 66, 69(A) and 75 of the Rules;

RECALLING this Chamber's Decision on the Motion by the Defence for Nzirorera for Disclosure of Witness Statements rendered in the present case on 8 August 2003;

NOW REVIEWS the Motion, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the Parties.

Submissions of the Parties

Prosecutor's submissions

1. The Prosecutor requests the following special protective measures concerning Witnesses G and T:

- (a) That the testimony of Witnesses G and T be heard via closed video-link with The Hague, the planning and scheduling of which testimony should be addressed during closed session in Chambers;
- (b) That the Registry be directed to make the necessary arrangements for Witnesses G and T to give their testimony by means of video link conferences in The Hague, and to make those arrangements with discretion and preservation of confidentiality;
- (c) That their relevant statements be disclosed in unredacted form to the Defence not less than 30 days before they are called to testify;



- (d) That their identity be disclosed not less than 30 days before they testify in this matter; and their present whereabouts and any other particulars identifying their present whereabouts be never disclosed;
- (e) That all hearings where protective measures for Witnesses G and T are considered be closed to the public;
- (f) That all court proceedings where the testimony of Witnesses G and T could reveal their identity, or that of their relatives or compromise the security of any ongoing investigations be closed to the public;
- (g) That any records that identify them be never disclosed to the public;
- (h) That the accused and their Defence teams be prohibited from disclosing documents, records and other information relating to them outside the team;
- (i) That the Affidavit, in annexure of the Motion not be disclosed to the Defence but only to the Trial Chamber.

2. The Prosecutor is seeking those measures for Witnesses G and T on the basis of Rules 66(C), 69(A) and 75 of the Rules. He argues that both are currently under "limited protective measures" afforded by the Office of the Prosecutor, in so far as their cooperation must not be disclosed for security reasons. The Prosecutor further argues that the measures sought are needed for their safety and for maintaining their confidence in the process. The Prosecutor relies on the special position occupied by both Witnesses in the *Interahamwe* and MRND organization, and states that their testimonies are both critical to his case and complementary.

3. The Prosecutor further argues that the safety of the witnesses would be in jeopardy and that the evidence being of special quality, it would go against public interest and would prejudice ongoing investigations regarding other targets, to disclose information or materials at this stage.

4. According to the Prosecutor, all these circumstances justify derogation from the obligation of disclosure, on the basis of Article 66(C) of the Rules. The Prosecutor refers to the Decision in the case of *The Prosecutor v. Dusko Tadic*¹ in which the International Criminal Tribunal for the former Yugoslavia (ICTY) identified the conditions necessary for a Witness to be granted anonymity. The Prosecutor compares the situation to the one in *Tadic* to reach the conclusion that the measures sought are essential and justified in so far as all the conditions referred to are met in the present case.

5. The Prosecutor asserts that the witnesses or their relatives would be in serious danger if the evidence is made known and the identity and whereabouts of the witnesses are revealed. He further outlines the relevance and the necessity of the testimony for the Prosecutor case, as well as the trustworthiness of the witnesses. Concerning the inadequacy of the witness protection program, the Prosecutor submits that as in the ICTY, the Tribunal has no long-term witness protection program and no funds for this purpose. Lastly, he refers to the necessity of the measures sought; the Prosecutor argues that he has found "no less restrictive means to secure the required protection". To substantiate further his arguments, the

¹ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses dated 10 August 1995. Paras 61-66.

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Prosecutor relies on the Decisions rendered by Trial Chamber I on 14 September 2001 and 29 October 2001 where similar relief had been granted.²

6. The Prosecutor appends to his Motion an Affidavit from an investigator based in Kigali, in which all the surrounding circumstances justifying such special measures are detailed.

7. In the second part of his motion, the Prosecutor is seeking an amendment of the Nzirorera and of the Rwamakuba Decisions of Trial Chamber II, where the Chamber gave a minimum of 21 days before their appearance, for the identity of the Prosecution witnesses to be disclosed and that this Order be extended to Co-Accused Ngirumpatse and Karemera.

Defense's submissions

8. The Defense for Nzirorera contends that the Prosecutor's request should be denied since it is made belatedly. The witness statements were required to be disclosed by 23 August 2003 pursuant to the 8 August 2003 Order of the Chamber or by 4 September 2003 pursuant to Rule 66(A)(ii). The Defense argues that such a failure could hamper the beginning of the trial.

9. The Defence adds that, in the alternative, if the Chamber were to grant the motion, the Prosecutor should be ordered to immediately disclose all interviews and redacted statements of Witnesses G and T and deliberate on the motion only until after the Prosecutor has complied with its disclosure obligation, as embodied in the Chamber Order of 8 August 2003 and in Rule 66(A)(ii) of the Rules. Only at that point, the Counsel will be in a position to file a supplemental and informed response.

Deliberations

10. The Chamber notes the Prosecutor's main contention that the special measures sought are justified by the allegedly exceptional role of Witnesses G and T, in so far as they are alleged to have had an important position within the political structure of Rwanda at the time of the 1994 events. The Chamber further notes that the said measures are sought under Rules 66, 69 (A) and 75 of the Rules.

11. The Chamber, pursuant to Rule 69(A), has the power, in exceptional circumstances, to allow the non-disclosure of the identity of a witness whose security is at risk. The Chamber is cognizant of the fact that the application of such a drastic measure could affect the proper preparation of the Defence and that is the reason why the circumstances averred by the Prosecutor must be reviewed carefully. In so doing, The Chamber will bear in mind Rule 66.

12. The Chamber, after examining the Affidavit annexed to the Prosecutor's Motion, is of the view that the security of the said witnesses may be under serious threat when the prospect of their testimony is made known. However, this does not relieve the Prosecutor of his obligation to disclose to the Defence, within 60 days of the commencement of the trial, copies of the redacted statements of all the witnesses he intends to call, as per Rule 66(A)(ii) of the Rules. The Chamber notes that such a disclosure has not been made. The Chamber

² *Prosecutor v. Nahimana et al.* Case No-99-52-I. Decision on the Prosecutor's Application to add Witness X to its list of Witnesses and for Protective Measures. Decision on the Defence's Application for the Prosecution to Disclose Exculpatory Material contained in the 17 Transcripts of Interview with Witness X.



therefore considers that the Prosecutor is in breach of his obligation under the Rules and under the Order of this Chamber dated 8 August 2003, with respect to Witness G.³ Accordingly, the Prosecutor is under an obligation to disclose the redacted statements, in whatever form they exist, of the two witnesses no later than three days of receiving notice of this Decision.

13. The Prosecutor submits that the testimony via a video-link system is a threshold requirement for the testimonies of Witnesses G and T and requests this measure under items (a) and (b). The Chamber notes that the relief sought has already been granted by this Tribunal regarding witnesses in similar circumstances. Trial Chamber I analyzed three factors in granting such a measure. It considered whether the testimony was important enough so as to justify the video link method in the interest of justice, whether the accused will be in a fair position to confront the witness and whether the latter was unable or unwilling to come to the Tribunal. The Chamber adopts this approach and considers that the Prosecutor has proven the importance of the testimonies. The Defence will be in a position to cross-examine the witnesses. Lastly, the witnesses have affirmed that the video link solution was the pre-requisite condition before their testimony, since they do not wish to come to Arusha, out of concern for their security. Moreover, as in the case of *The Prosecutor v. Bagosora et al.*,⁴ the Chamber, on the basis of the Affidavit, has taken into account the security concerns raised and considers that Witnesses G and T are entitled to the additional protection that can be afforded by their testimony at The Hague via video link. Consequently, the Chamber grants prayers (a) and (b).

14. There seems to be some confusion between the Prosecutor's requests in respect of items (c) and (d). Item (c) is repeated in item (d). The Chamber considers that an early disclosure of any personal details regarding Witnesses G and T could endanger them and that the measure requested is strictly necessary to ensure their security. The Chamber is of the view that the identities of Witnesses G and T are to be disclosed 30 days before they are called to testify. Consequently, the Chamber grants the Prosecutor's request to disclose the unredacted statements of Witnesses G and T, thirty days prior to their testimony.

15. Concerning the request in item (d) for the non-disclosure of the whereabouts of Witnesses G and T and any other particulars identifying their whereabouts, the Chamber looks with favour at this request. The Chamber recalls its Decision in the case of *The Prosecutor v. Bagosora et al.* in which it was considered that the "fear of reprisal for his anticipated testimony in this case as well as for his co-operation with the Prosecutor in respect to ongoing investigations strictly require that his current whereabouts remain forever inviolate as against the Defence and the public."⁵ Consequently, the Chamber grants the request to the effect that the whereabouts of Witnesses G and T shall never be disclosed to the public, the Defence or the Accused.

³ The Chamber ordered that "the Prosecutor disclose within 15 days to each of the Accused Karemera, Ngirumpatse, Nzirorera and Rwamakuba, copies of the statements of all the witnesses referred to in the Pre-Trial Brief whom she intends to call at trial which remain to be disclosed, subject to the redactions necessary pursuant to the applicable non-disclosure orders regarding the identity of protected victims and witnesses."

⁴ *Prosecutor v. Bagosora et al.* Case No. ICTR-98-41-T, Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence dated 5 June 2002. Para.29.

⁵ *Prosecutor v. Bagosora et al.* Case No. ICTR-98-41-I, Decision on The Prosecutor's Motion for Special Protective Measures for Witnesses ZA, ZA, and ZZ pursuant to Rules 66(C), 69(A) and 75 of the Rules of Procedure and Evidence, 10 July 2002. Para. 30.

16. The Chamber notes, regarding requests (e), (f) and (g), that the measures sought are not special in so far as they are commonly granted in respect of witnesses in need of protection, and for whom there has been a showing of "exceptional circumstances" under Rule 69(A). The Tribunal has already granted such measure.⁶ Consequently, those measures already exist regarding all the Prosecutor's protected witnesses, including Witnesses G and T and need not be addressed in the present Decision.

17. The Chamber considers that request (h) relating to an Order prohibiting the Defence from divulging documents and records regarding G and T outside the team is necessary, since allowing the Defence to do so would undermine the special protection put in place for the two witnesses. Accordingly, request (h) is granted.

18. The Chamber will now address the issue of the *ex parte* communication of the attached affidavit and its withholding from the Defence, (prayer (i)). The Chamber considers that such a request finds its justification in Rule 66(C) of the Rules, which allows the Prosecutor to apply to the Chamber *in camera* to be relieved from the general disclosure obligation, upon showing that the disclosure of information or materials would prejudice current investigations. The Chamber is satisfied that the disclosure of the content of the Affidavit, which demonstrates the importance of the two Witnesses for the coming trial, would, adversely affect the Prosecutor's ongoing investigations. Furthermore, the Chamber is of the view that its non-disclosure will not prejudice the preparation of the Defence's case. Accordingly, the Chamber grants measure (i).

19. The Prosecutor's application for special protective measures for Witnesses G and T is not timely and the Chamber urges the Prosecutor in future to act more expeditiously.

20. In the second part of his Motion, the Prosecutor seeks an extension of the protective measures for witnesses in the case of Accused Nzirorera and Rwamakuba to the cases of Accused Ngirumpatse and Karemera. The Chamber notes that the measures already exist for those two accused since it was granted on 6 July 2000 by Trial Chamber II and also in an Order of this Trial Chamber dated 8 August 2003, and that in a joint trial, any measure granted in regard to one accused should apply to the other accused, in appropriate circumstances. The Chamber therefore finds the request unnecessary.

FOR THE FOREGOING REASONS,

THE CHAMBER,

- I. GRANTS** leave to the Prosecutor, pursuant to Rule 69(A) of the Rules, to introduce the testimonies of Witnesses G and T by means of closed video-link with The Hague and to be broadcast live to the seat of the Tribunal in Arusha, Tanzania in the presence of all the parties excluding the public;
- II. DIRECTS** the Registry to make the necessary arrangements for Witnesses G and T to give their testimonies by way of video-link conference in The Hague and to do so in a confidential manner;

⁶ Those measures were granted in the Nzirorera, Karemera, Ngirumpatse and Rwamakuba Decisions of 12 July 2000, 6 July 2000 and 22 September 2000, respectively.




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Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T

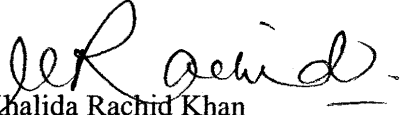
- III. **GRANTS** the Prosecutor leave to disclose the unredacted statements of Witnesses G and T to the Defence no later than 30 days before they are called to testify;
- IV. **GRANTS** pursuant to Rule 75 and 66(C) of the Rules the Prosecutor's request that the whereabouts of Witnesses G and T shall never be disclosed to the public, the Defence or the Accused;
- V. **GRANTS** the Prosecutor the right to withhold from disclosure, pursuant to Rule 66 (C), the Affidavit of the Investigator, which was annexed to the instant Motion;
- VI. **PROHIBITS** the Defence from disclosing documents, records and other information relating to Witnesses G and T outside their teams;
- VII. **ORDERS** the Prosecutor to disclose to the Defence the redacted version of the statements of Witnesses G and T, no later than three (3) days of the receiving notice of this Decision; redacting out those portions that are susceptible of revealing the whereabouts of Witnesses G and T or of compromising ongoing investigations in which they are providing assistance to the Prosecutor;
- VIII. **VIEWES** the Prosecutor's failure to disclose with great concern.

Arusha, 20 October 2003


Lloyd G. Williams, Q.C.
Presiding Judge


Andrésia Vaz
Judge

[Seal of the Tribunal]


Khalida Rachid Khan
Judge