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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

ENGLISH
Original: FRENCH

Before: Judge Arlette Ramaroson, presiding
Judge designated pursuant to Rule 73(A) of the Rules

Registrar: Adama Dieng

Date: 19 March 2004

THE PROSECUTOR
v.
AUGUSTIN BIZIMUNGU
AUGUSTIN NDINDILIYIMANA
INNOCENT SAGAHUTU
FRANCOIS-XAVIER NZUWONEMEYE

Case No. ICTR-2000-56-I

DECISION ON THE PROSECUTOR'S MOTION FOR REVIEW, VARIATION AND EXTENSION OF PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

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Translation certified by LSS, ICTR

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

SITTING as Trial Chamber II, with Judge Arlette Ramaroson, designated pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules"), presiding;

BEING SEIZED OF:

i. The *Prosecutor's Motion for review, variation and extension of protective measures for victims and witnesses*, filed 22 November 2002 ("Motion"),

ii. The *Response to the Prosecutor's motion for review, variation and extension of protective measures for victims and witnesses,* filed by Nzuwonemeye's Counsel on 10 February 2003;

iii. *Accused Innocent Sagahutu's response to the Prosecutor's motion for review, variation and extension of protective measures for victims and witnesses*, filed on 11 February 2003;

iv. The *Reply by Applicant Augustin Ndindiliyimana to Prosecutor's Motion for review, Variation and Extension of Protective Meaures [sic] for Victims and Witnesses,* filed on 8 April 2003;

v. The "*Rectificatif de la réponse à la requête du Procureur aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins*", filed on 15 May 2003.

NOTING the *Order for Protective Measures for Witnesses*" of 12 July 2001 (hereafter "Order of 12 July 2001"), issued by Trial Chamber III in the *The Prosecutor v. Augustin Ndindiliyimana, Innocent Sagahutu and François-Xavier Nzuwonemeye*;

NOTING the "*Ordonnance portant calendrier*" [Scheduling Order] of 24 March 2003 issued in the instant case, directing the "[Prosecution to file a redacted version of Annex V (page 2045 only) with the Registry for disclosure exclusively to the Defendants within five days following notification of this order]";

RECALLING that the parties were informed by Memorandum ICTR/JUD-11-6-2-03/010 of the Court Management Section that they had ten days to reply instead of the earlier time limit of five days initially granted to them and **NOTING** the Prosecution's failure to reply to the Defence's responses;

RULING solely on the basis of the parties' written briefs, pursuant to Rule 73 of the Rules:

SUBMISSIONS OF THE PARTIES

Reinforced protective measures for victims and potential witnesses

1. The Prosecution submits that since the Order of 12 July 2001, victims and potential Prosecution witnesses have been facing new dangers and risks, regardless of their areas of residence.

2. Relying on Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules, the Prosecution seeks variation and extension of protective measures for witnesses, particularly by dropping the distinction based on the witness's place of residence, and reducing the time limits for disclosure of the identity of witnesses to the Defence to 21 days prior to the date each witness is due to testify.

3. The Prosecution relies on two written statements given under oath – one on 16 October 2002 by Rémi Abdulrahman, Chief of the ICTR security section in Kigali, and the other by an unnamed potential Prosecution witness, initially filed with the Chamber only, and marked "Filed confidentially, under seal, *ex parte*". The Prosecution also relies on "new and additional evidence" contained in Annexes D to U attached to the motion.

4. In light of these various documents, the Prosecution highlighted the following three sources of danger to which the potential Prosecution witnesses in this case, who reside in Rwanda, are exposed:

(a) The cross-border areas, where incursions by armed rebels occurred in 2000 and 2001, warranting the creation of two security zones in Rwanda (Phase II and Phase III);

(b) Because of the very nature of the trial and the former functions of the accused within the Rwanda Armed Forces (FAR) in 1994, the accused have many supporters, especially among ex-FAR members, who, according to Mr. Abdulrahman, are a possible source of threat which "must not be underestimated" (para. 11 of his "*affidavit*");

(c) For some time now, incidents of isolated attacks and killings of individuals in various regions of the country, including in Kigali-ville have been on the increase. According to Mr. Abdulrahman, the incidents have something to do with the role played by these people as witnesses in the various cases. These allegations were allegedly confirmed by an article in the *Hirondelle* press agency dated 25 March 2002.

5. Mr. Abdulrahman is of the view that the situation calls for reinforced witness protection measures and that the security of the "Tribunal's witnesses, could be very much compromised if adequate security measures are not put into place".

6. Moreover, the Prosecution stresses that witnesses residing outside Rwanda, either within or outside Africa, are also at risk because of the high concentration of Rwandan asylum seekers in some countries (Annex U). The Prosecution alleges that the reality of these threats is demonstrated in the witness's statement filed confidentially under seal, *ex parte* and appended to the motion (Annex V).

7. Lastly, the Prosecution cites ICTR case law and relies on a decision of 14 August 2002 rendered in the *Niyitegeka* case. This decision refers to a letter of 26 July 2002 from the Rwandan Representative to the United Nations to the President of the Security Council highlighting the Rwandan Government's concern about the risks faced by ICTR potential witnesses.

8. Counsel for Sagahutu and Nzuwonemeye submit that that Prosecution has not shown the existence of new exceptional circumstances warranting reinforced measures for the security of the witnesses.

9. The Defence criticizes the Prosecution for not attaching any new document to its initial motion for the protection of witnesses, filed on 16 May 2001. Counsel for Sagahutu argues that even Mr. Abdulrahman's affidavit contains passages similar to the one filed in support of the initial motion – which makes it debatable whether the evidence is really new and whether the document is relevant.

10. Moreover, Counsel for Sagahutu stresses that a detailed comparison of the statements made by Mr. Abdulrahman in his affidavits of 11 May 2001 and 16 October 2002 respectively tends to show that the security situation has improved. Indeed, in May 2001, Mr. Abdulrahman stated that the situation was "*highly precarious and unpredictable*" and that in October 2002, it was only "unpredictable".

11. Thus, Counsel for Sagahutu submits that the Prosecution has failed to show the existence of exceptional circumstances and challenges the application of Rule 69 cited by the Prosecution to the circumstances of the instant case.

12. Counsel for Ndindiliyimana challenges the practice of assigning a code name to all the Prosecution witnesses as a matter of course, whereas no evidence of a specific and individual threat has been. He submits that such a practice violates the right of the accused to a public and fair hearing.

13. In the present case, Counsel for Ndindiliyimana alleges that the Prosecution has not adduced any specific evidence of threat to potential witnesses in this matter. A case

in point is the witness statement in Annex V, which does not indicate any instance relating to this matter in which threats were allegedly issued.

Amendment relating to the Prosecution's disclosure obligation

14. The Prosecution seeks variation of the disclosure deadlines set by the initial Order of 12 July 2001. In light of three new developments, namely:

1. Whereas Trial Chamber III in its Order gave a strict interpretation to Rule 69(C) and adhered to a disclosure deadline of 21 days before the commencement of trial, the Prosecution argues that the amendment of Rule 69(C) of the Rules made in July 2002 transformed the obligation to disclose materials "prior to the trial" into an obligation to disclose "within such time as determined by [the] Trial Chamber".

2. The case law of both the International Criminal Tribunal for former Yugoslavia and Trial Chamber II of the International Criminal Tribunal for Rwanda in 2001 seems to agree on the obligation to disclose materials 21 days before the witness testifies.

3. A memorandum dated 4 September 2002 from the Witness and Victims Support Section recommends reinforced victim security measures, which may take the form of redaction of names and extension of disclosure deadlines to 21 days prior to the date of testimony.

15. Thus, the Prosecution requests that "unredacted disclosure [...] take place upon the implementation of witness protection measures but in any event not earlier than 21 days prior to testimony".

16. Counsel for Nzuwonemeye fails to see how an amended Rule 69 is a source of constraint for the Trial Chamber, which should now abide by what has become a "practice" of the Tribunal.

17. The Defence interprets amended Rule 69 differently and stresses that the amendment gives a wider discretion to the Trial Chamber, enables it to proceed on a case-by-case-basis, and also that there is no "final and general rule of application".

18. The Defence further submits that the Witness and Victims Support Section is only entitled to give a simple opinion, which is not binding on the judges and that, in the instant case, such opinion is not "supported by any fact".

19. Lastly, the Defence denounces the fact that, by seeking disclosure of materials "not earlier than 21 days prior to the date of testimony", the Prosecution arrogates to itself the right to disclose evidence "up to the date of the trial and lawfully so", thus

preventing the Defence from organizing itself to examine the witness testimony. The Defence contends that this would substantially undermine the adversarial principle.

Request for coercive measures against the Defence team

20. Points (e) to (h) of the Prosecutor's motion set out the protective measures that the Prosecution would like the Chamber to issue in order to prevent members of the Defence team from disclosing information.

21. The Prosecution acknowledges that the orders sought in Points (f) to (h) were rejected by the Chamber in its Witness protection Order, yet it makes a fresh request of them.

22. The Prosecution submits that the Trial Chamber, which at the time relied on a decision of the Appeals Chamber in denying the request, should adopt one of the other measures ordered by the Appeals Chamber, and proposes to include it in its initial request. Since the Trial Chamber had declined to issue a requested order requiring the Defence to draw up and disclose a list of persons working on the Defence team, the Prosecution requests that the said list be drawn up by the Registry, which would inform the members of the Defence team of the non-disclosure obligations imposed on them.

23. The Prosecution further submits that while the Trial Chamber had deemed it "prudent to require that Defence Counsel notify the Chamber in writing of any person leaving the Defence team", it would now be appropriate to specifically issue an order to that effect.

24. Reacting to the Prosecution requests, Counsel for Nzuwonemeye first argues that the orders sought in paragraphs (d) to (g) had already been issued, almost verbatim, in the First Order, and condemns this "unacceptable suspicion" vis-à-vis the Defence, insofar as the Prosecution does not apparently take into account the fact that Defence Counsel take the oath and that concern for confidentiality is inherent in their profession.

25. The Defence further states that the Prosecution seems to request that Defence Counsel take "responsibility [...] for any bad behaviour on the part of members of the team", which, in the opinion of the Defence is:

> (i) Practically unmanageable given the fact that members of the team live far from each other;
>
> (ii) Legally untenable, since members of the Defence team "are individually contracted by the United Nations under the direction of the Registry and, therefore, the Lead Counsel has no legal means of exercising coercion in the matter."

Arguments of the Defence

26. Counsel for Sagahutu comments on the annexes to the Prosecutor's motion, describing them as "oversized". He cites the Practice Direction on the length of briefs and motions on appeal which limits the length of annexes to three times that of the body of the motion. He further argues that, pursuant to Rule 107 of the Rules, the rules that govern proceedings before the Trial Chamber are applicable to proceedings before the Appeals Chamber. He concludes that it would therefore be "logical" that the rules governing proceedings on appeal, in this case the said Practice Direction, should be applicable before the Trial Chamber, hence he requests that the Prosecution's filings be dismissed on account of their excessive length.

27. Counsel for Nzuwonemeye, like Counsel for Ndindiliyimana, denounces the confidential manner in which the Prosecutor filed Annex V, and requests the Chamber not to admit it into evidence, in accordance with the principle of a fair trial.

28. Both Counsel for Nzuwonemeye and Counsel for Sagahutu agree that the Prosecution is seeking measures which the Chamber had already granted in the First Order, almost exactly as they were requested.

29. Counsel for Sagahutu also asserts that the Prosecution, realizing that it cannot appeal the initial decision on the basis of Rule 73(B), requests the Chamber to review it by means of an order. Counsel however, points out that Rule 120 of the Rules which governs requests for review of a "decision" is only applicable in cases where a "new fact" has been discovered. The Defence considers that the Prosecution has failed to demonstrate the existence of a new fact and consequently requests that the Order of 12 July 2001 be upheld.

30. Counsel for Nzuwonemeye accepts, on the one hand and unconditionally, the orders requested in Points (a), (b), (d), (g), (i), (k), and, on the other hand, the order sought in Point (j), subject to the Prosecution providing specific and objective reasons. However, he objects to the orders sought in Points (c), (e), (f) and (h).

AFTER HAVING DELIBERATED

Legal basis of the motion

31. The Chamber notes that the Prosecutor's request is basically founded on Articles 19 and 21 of the Statute. Article 21 of the Statute provides for protection measures for victims and witnesses taken within the framework of the Rules. Such measures "shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity".

32. The application of Article 21 of the Statute is clarified by Rules 69 and 75 of the Rules. Rule 69(A) of the Rules provides that "[I]in exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise." Rule 75(A) of the Rules moreover states that "A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused", pursuant to Article 20 of the Statute.

33. In accordance with Article 20 of the Statute and in order to safeguard the rights of the accused to "have adequate time and facilities for the preparation of his or her defence" and his or her right to "to examine [...] the witnesses against him or her", the Chamber may, on a case-by-case basis and pursuant to Rules 69 and 75 of the Rules, take any appropriate measure to protect the witnesses. The Chamber recalls, in this connection, the new provisions of paragraph (C), Rule 69 of the Rules as amended in July 2002.

34. In determining the appropriateness of such protective measures, the Chamber takes into account several criteria as set forth in previous decisions:[1] first, the testimony must be relevant and of consequence to the accused's case; secondly, there must be strong reasons to fear for the security of the witnesses and thirdly, protective measures must be absolutely necessary.

35. In this regard, and in order to determine the existence of exceptional circumstances pursuant to Rule 69(A), the Tribunal requests the parties to provide recent information when they seek protection measures.[2] Now, the Chamber notes that some of the evidence presented in the annex to the Motion to show Rwanda's very volatile security situation dates back over two years, and was obtained prior to the date of filing of the Prosecutor's first motion of 16 May 2001, in the light of which the initial Order of 12 July 2001 was issued. The Chamber is therefore of the view that the information contained in those annexes cannot constitute new facts as alleged by the Prosecution.

36. Furthermore, in the eyes of the Chamber, the volume of the annexes is not justified, considering the information provided. In this connection, the Chamber invites the Prosecution to show more diligence and orders that in future, it should to take into account the volume of annexes filed and to select them on the basis of their relevance,

[1] See *The Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-I; "*Decision on the Defence motion for protective measures for witnesses*", 18 September 2001 and "*Decision on the extremely urgent motion for protective measures for Mr. Bernard Ntuyahaga*", 13 September 1999.
[2] See *The Prosecutor v. C. Ntagerura*, Case No. ICTR-96-10A-I, "*Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses*", 27 June 1997.

so as to facilitate the conduct of proceedings by limiting the filing of voluminous documents, and hence avoiding their being translated.

37. However, the Chamber does not accept the reasoning of the Defence founded on Rule 107 of the Rules. The *Practice Direction* on the length of briefs and motions on appeal cannot, under any circumstances, be applicable before a Trial Chamber.

38. The Chamber notes that the annexes contain two new documents, namely:

(i) the affidavit by Mr. Rémi Abulrahman, dated 16 October 2002, the security situation in Rwanda that the activities of the rebels no longer seem to be the only cause of insecurity, what with the attacks and incidents of armed robbery that have marked the beginning of 2002. According to Mr. Abulrahman, the death of the representative of IBUKA "was not unconnected with his role as a potential witness for the GACACA court". He asserts that in addition to these threats, "supporters of the Defendants" were also under threat. Lastly he specifically recommends that the security of "the witnesses could be very much compromised if adequate security measures are not put into place".

(ii) The statement of a potential Prosecution witness (Annex V), indicating that he was threatened on account of his testimony in this matter despite his being outside the Rwandan territory. The witness specifically requested that his statement should not be disclosed to the public or the Defence. By Order of the Chamber, the statement was subsequently disclosed to the Defence in its redacted form.

39. It is the opinion of the Chamber that the Prosecution has presented new facts which are different from those presented before Trial Chamber III which issued the Order that limited protective measures to witnesses residing in Rwanda, which order has been challenged by the Prosecution. Consequently, the Chamber finds that the change in the security situation of victims and potential witnesses residing in and outside Rwanda demonstrates the existence of exceptional circumstances warranting the extension of protective measures to all the Prosecution witnesses, including those residing outside Rwanda. The Chamber thus grants order (a) sought by the Prosecution.

Time limits for disclosure of the identity of Prosecution witnesses

40. The Chamber will now consider the amendment made to Rule 69(C) of the Rules since the initial Order of 12 July 2001 and Article 20(b) of the Statute relating to the rights of the accused to "have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing".

41. Pursuant to Rule 69(B) which provides that "in the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit", the Chamber noted the Unit's opinion presented in a memorandum dated 4 September 2002, prepared at the request of the Prosecution in another case. In terms of organization of its work, the Section points out that the best protection consists in the non-disclosure of the identity of witnesses up to 21 days before they testify, as well as the disclosure to the Defence of redacted documents which contain information likely to reveal the identity of the witnesses.

42. The Chamber also considers that in the decision rendered on this point in *Musabyimana,*[3] Trial Chamber II, composed differently, pointed to the need to strike a "balance between the right of the Defence and the demonstrated need for protective measures for witnesses".

43. The Chamber considers that, by requesting that the identity of witnesses be disclosed not earlier than 21 days before their testimony at trial (measure (c)), the Prosecution departed from the case law that it cited itself. The Chamber therefore reminds the Office of the Prosecutor of its continuous obligation to co-operate in matters of disclosure.

44. In accordance with the relevant precedents on the subject, the Chamber grants measure (c), subject to rewording the phrase "no earlier than twenty-one (21) days before each witness is due to testify at trial" to read "not later than twenty-one (21) days before each witness is due to testify at trial".

45. Regarding order (j) which seeks in camera proceedings, the Chamber is of the view that this is contrary to Rule 79 pursuant to which the Chamber may order a closed session on a case-by-case basis and to paragraph (B) thereof which requires the Chamber to make public the reasons for its order.

Measures (b), (d), (e), (g) and (i)

46. The Chamber notes that order (b) sought by the Prosecution for the protection of information that may lead to the identification of protected persons has, in fact, already been granted by the First Order (para. (b)). The Chamber dismisses the measure proposed and upholds measure (b) of the First Order.

47. The Chamber notes that, apart from some changes made by the Prosecution affecting only the form and not the substance of the measures, measures (d), (e), (g) and (i) have already been granted by the First Order in paragraphs (d), (e), (f) and (g). The Chamber hereby denies the request and upholds the measures prescribed in the First Order.

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[3] *Decision on the Prosecutor's Motion for protective measures for victims and witnesses,* 19 February 2002.

Preventive measures to monitor the activities of the Defence (f), (h) and (k)

48. The Chamber is of the view that measure (f) sought by the Prosecution concerning the provision (either by the Defence itself or through the Registry) of a list of the members of the Defence team, does not in any way constitute a protective measure for witnesses and victims, as was held in the First Order of 12 July 2001. The Chamber dismisses the measure sought and upholds the terms of the said Order.

49. With respect to order (h) relating to the disclosure of all identifying information, the Chamber notes that it is not feasible to manage such a situation, as emphasized by the Defence in its submissions. The Chamber consequently rejects the request for the order.

50. Measure (k) requiring "[A]any other order or orders the Trial Chamber may deem appropriate in the interests of justice" is rejected on the ground that it is superfluous.

For these reasons, the Trial Chamber,

GRANTS measure (a) sought by the Prosecution and amends the first heading of the Order of 12 July as follows:

ORDERS that the following protective measures be put in place for all Prosecution witnesses:

EXPUNGES the second heading of the Order of 12 July 2001 which reads:

ORDERS that the following protective measures be taken for all potential prosecution witnesses residing in Gisenyi, Ruhengeri, Kibuye, Cyangugu and Gikongoro Prefectures:

GRANTS measure (c) sought by the Prosecution and reworded by the Chamber and, consequently, orders that measure (j) of the First Order be reworded as follows:

> (j) that the Prosecution must disclose to the Defence any identifying information relating to protected witnesses no later than 21 days prior to the date when each witness is due to testify.

UPHOLDS measures (a) to (i) as ordered on 12 July 2001.

Wherefore, the TRIBUNAL,

ORDERS that the following protective measures be put in place for all Prosecution witnesses:

(a) That the Prosecution should designate a pseudonym for each witness, to be used whenever referring to such witnesses in Tribunal proceedings, communication and discussions between the parties and the public;

(b) That the names, addresses and whereabouts and other identifying information of these witnesses (hereinafter referred to as "identifying information") be sealed by the Registry and not included in any records of the Tribunal and that such identifying information be communicated to the Victims and Witness Support Section ("VWSS") in order to implement protection measures for these witnesses;

(c) That any identifying information relating to these witnesses that is contained in existing records of the Tribunal be redacted;

(d) That no identifying information relating to these witnesses shall be disclosed to the public or the media prior to, during and after the trial;

(e) That the Accused and all members of the Defence team shall not attempt to make any independent determination of the identity of any of witnesses nor encourage or otherwise aid any person to attempt to identify any such protected witnesses;

(f) That the Accused or Defence Counsel shall make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of the witnesses whose identity is known to the Defence or any relative of such person, and that, on the instructions of the Trial Chamber, the Prosecution shall facilitate such contact provided that the person (or his or her parents or guardian where he or she is under the age of eighteen years) consents to an interview with the Defence;

(g) That there shall be no photographing and audio and/or video recording or sketching of any of these witnesses at any time or place without leave of the Trial Chamber and of the parties.

(h) That the Registry shall not disclose to the Defence any identifying information filed with the Registry in relation to the protected witnesses;

(i) That the Prosecution may initially disclose materials to the Defence in a redacted form in order to protect the names, addresses and other identifying information relating to these protected witnesses;

(j) That the identities and all previously redacted information pertaining to these protected witnesses be disclosed to the Defence no later than 21 days prior to the date each witness is due to testify.

DENIES the motion in all other respects.

Arusha, 19 March 2004

[Signed]
Arlette Ramaroson
Presiding Judge
