



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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OR: ENG

**TRIAL CHAMBER III**

**Before Judge:** Inés Mónica Weinberg de Roca, Presiding  
Florence Rita Arrey  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 5 February 2007

**THE PROSECUTOR**

**v.**

**Simon BIKINDI**

*Case No. ICTR-2001-72-T*

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**DECISION ON MOTION FOR PROTECTIVE MEASURES, VARIATION OF THE  
WITNESS LIST, AND TRANSFER OF DETAINED WITNESS BUY**

*Article 21 of the Statute and  
Rules 54, 69, 73 (A), 73 bis(B), 73 bis(E), 75 and 90 bis of the Rules of Procedure and  
Evidence*

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**Office of the Prosecutor:**

William T. Egbe  
Sulaiman Khan  
Veronic Wright  
Patrick Gabaake  
Iain Morley  
Amina Ibrahim  
Gilain Disengi Mugeyo

**Defence Counsel:**

Wilfred Ngunjiri Nderitu  
Jean de Dieu Momo  
Jack Muriuki

## INTRODUCTION

1. Pursuant to Rules 54, 73 (A), 73 *bis*(B) and 90 *bis* of the Rules of Procedure and Evidence (the “Rules”), the Prosecution requests, in its first application, the Motion for Transfer: (i) an order temporarily transferring Witness BUY, who is currently detained in Rwanda, to the Detention Facility of the Tribunal in Arusha; (ii) an order that the Registrar of the Tribunal transmit the order of transfer to the authorities of Rwanda; (iii) an order that Witness BUY be returned to the Rwandan authorities at a time determined by the Chamber; and (iv) any other order that the Chamber deems fit and proper.<sup>1</sup>
2. The Prosecution estimates that it will require the presence of Witness BUY beginning 6 February 2007.<sup>2</sup>
3. The Prosecution submits that it has complied with the provisions of Rule 90 *bis*(B)(i) and (ii) by verifying with the Rwandan authorities that the presence of the witness is not required for any criminal proceedings in progress in the Republic of Rwanda during the period the witness is required to be present at the Tribunal,<sup>3</sup> and that the transfer of the witness will not extend the period of his detention, as foreseen by the Republic of Rwanda.<sup>4</sup>
4. The Prosecution also moves the Chamber, in its second application, the Motion to Order Protective Measures and to Vary the Witness List,<sup>5</sup> under Article 21 of the Statute of the Tribunal (the “Statute”) and Rules 54, 69, 73, and 75 of the Rules, to add Witness BUY to the Prosecution Witness List, drop Witnesses AHO, AHQ, AJP, BGU and AKG,<sup>6</sup> and to issue protective orders in identical terms to the orders specified by the Chamber in its Decision of 4 September 2006<sup>7</sup> for Witness BUY.<sup>8</sup>
5. The Prosecution informed the Defence and the Chamber in October 2006 of its intention to drop the five witnesses listed above, and to add Witness BUY as a replacement witness. Moreover, the Prosecution submits that it has disclosed the witness statements of Witness BUY to the Defence in a timely manner.<sup>9</sup> The Prosecution maintains that it is advancing the proceedings by shortening the Prosecution Witness List.<sup>10</sup>
6. The Defence has not responded to the Motions.

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<sup>1</sup> “The Prosecutor’s [Confidential] Request for An Order Transferring Detained Witness Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence”, 22 January 2007, paras. 1-2 (the “Motion for Transfer”).

<sup>2</sup> Motion for Transfer, para. 9.

<sup>3</sup> Motion for Transfer, para. 5.

<sup>4</sup> Motion for Transfer, para. 6.

<sup>5</sup> “The Prosecutor’s Urgent Confidential Motion for Protective Measures for Witness BUY & Request for Variation of Witness List”, 23 January 2007 (the “Motion to Order Protective Measures and to Vary the Witness List”).

<sup>6</sup> Motion to Order Protective Measures and to Vary the Witness List, paras 3-4.

<sup>7</sup> Decision on Protective Measures for Prosecution Witnesses (TC), 4 September 2006 (the “Decision of 4 September 2006”).

<sup>8</sup> Motion to Order Protective Measures and to Vary the Witness List, paras. 14-17.

<sup>9</sup> Motion to Order Protective Measures and to Vary the Witness List, paras. 3, 11.

<sup>10</sup> Motion to Order Protective Measures and to Vary the Witness List, paras. 4, 13.

## DELIBERATIONS

7. Regarding the request to vary the Prosecution Witness List, Rule 73 *bis*(E) of the Rules states that “[a]fter the commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called”. Pursuant to the established jurisprudence, this Rule provides that a list of witnesses may be varied if the Chamber considers it to be in the interests of justice.<sup>11</sup>

8. The Prosecution Witness List currently totals 25 witnesses. In the Chamber’s view, the removal of five witnesses and the addition of one witness by the Prosecution will expedite the proceedings and serve the interests of justice. Furthermore, witness statements have been disclosed in a timely manner.

9. As to the request for protective measures for Witness BUY, the Chamber considers the submissions of the Registry concerning the situation in Rwanda, as well as its recommended protective measures for witnesses in its Decision of 4 September 2006. The Chamber further considers the current Motion, which requests that identical protective measures be extended to Prosecution Witness BUY and states that the Witness and Victims Support Section (WVSS) has been in contact with the witness and confirms his concerns.<sup>12</sup> The Chamber reaffirms its conclusion stated in the Decision of 4 September 2006 that the fears expressed by potential Prosecution witnesses for their own safety or the safety of their family members, in and outside Rwanda, are justified. Furthermore, as the trial is set to resume on 12 February 2007, the Chamber immediately extends the protective measures contained in its Decision of 4 September 2006 to Prosecution Witness BUY.

10. Regarding the Motion for Transfer, Rule 90 *bis*(B) of the Rules stipulates in its first two paragraphs that:

(B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:

- (i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
- (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

11. The conditions for ordering the transfer of a detained witness are not specified in the Rules and therefore the Chamber enjoys large discretion in considering the elements presented in the Motion for Transfer.<sup>13</sup>

12. As an annex to the Motion for Transfer, the Prosecution filed a letter dated 15 January 2007, addressed to the Minister of Justice of Rwanda, requesting confirmation that the

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<sup>11</sup> *Prosecutor v. Karemera et al.*, Decision on Prosecutor’s Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Decision on the Prosecutor’s Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis*(E) (TC), 26 June 2003, para. 13.

<sup>12</sup> See Motion to Order Protective Measures and to Vary the Witness List, para. 15. The Prosecution subsequently filed, on 24 January 2007, an affidavit by Prosecution investigator Guillain Disengi Mugeyo in support of the protective measures for Witness BUY.

<sup>13</sup> Decision on Transfer of Detained Witnesses and Protective Measures for Prosecution Witnesses (TC), 14 September 2006, para. 6 (“Decision of 14 September 2006”); *Prosecutor v. Zigiranyirazo*, Decision on the Prosecutor’s Motion for the Transfer of Detained Witnesses AVY and ATN (TC), 17 January 2006; *Prosecutor v. Seromba*, Order for the Temporary Transfer of Detained Witnesses (TC), 19 August 2004, para. 3.

witness would not be required for any criminal proceedings in Rwanda from the 6<sup>th</sup> through the 23<sup>rd</sup> of February 2007, and that the transfer will not extend his detention.

13. On 5 February 2007, the Prosecution submitted a letter from the Minister of Justice of Rwanda, the most appropriate authority to guarantee the pertinent information on the status of the detainee. This letter, read with the request submitted by the Prosecution, fully meets both requirements as prescribed in Rule 90 *bis*(B), namely, that the detainee whom the Prosecutor wishes to call is not required for any criminal proceedings in Rwanda during the said period, and that his stay at the Tribunal will not extend the period of his detention. Due to the Prosecution's late filing of this Motion for Transfer and transmission of this correspondence to the Chamber, and the upcoming resumption of the trial on 12 February 2007, the Chamber orders the transfer of Witness BUY as soon as practically possible.

14. The Chamber previously expressed its concern about the confidential filing of motions that deserve to be filed publicly.<sup>14</sup> Yet, the present Motion for Transfer is filed "confidentially". The Chamber repeats that the transparency of the proceedings is served by the public filing of documents. Confidentiality should be reserved for exceptional circumstances – for instance, where the protection of a witness is at stake.<sup>15</sup> In the present case, the Chamber considers that Annexes A and B of the Motion for Transfer may be deemed to be confidential because they may contain identifying information related to the witness, but that the Motion for Transfer itself contains no such confidential information.

#### **FOR THE ABOVE REASONS, THE CHAMBER**

- I. GRANTS** the Prosecution Motion to add Witness BUY to the Prosecution Witness List and to remove witnesses known by the pseudonyms AHO, AHQ, AJP, BGU and AKG;
- II. ORDERS** that the amended version of the Prosecution Witness List be filed according to this Decision by 9 February 2007;
- III. ORDERS** that protective measures, as previously ordered in its Decision of 4 September 2006, be extended to Witness BUY;
- IV. ORDERS**, pursuant to Rule 90 *bis*(B) of the Rules, that Prosecution Witness BUY be transferred to Arusha, as soon as practically possible and no later than 19 February 2007, until as soon as practically possible after the individual's testimony has ended;
- V. REMINDS** the Registrar of his obligations under Rule 90 *bis* of the Rules;
- VI. REQUESTS** the Government of the Republic of Rwanda, in accordance with this Order, to cooperate with the Prosecutor and the Registrar and, in conjunction with the Government of the United Republic of Tanzania, the Registrar and the WVSS, to take the necessary measures to implement the present decision; and
- VII. ORDERS** that the confidentiality of the Motion for Transfer be lifted by the Registrar, while Annexes A and B remain confidential and under seal.

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<sup>14</sup> Decision of 14 September 2006, para. 8.

<sup>15</sup> Decision of 14 September 2006, para. 8; *Prosecutor v. Zigiranyirazo*, Decision on the Transfer of Detained Witnesses (TC), 22 September 2005, para 4; *Prosecutor v. Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

Arusha, 5 February 2007, in English.  
Judge Inés Mónica Weinberg de Roca is signing from Buenos Aires.

Inés Mónica Weinberg de Roca  
Presiding Judge

Florence Rita Arrey  
Judge

Robert Fremr  
Judge

[Seal of the Tribunal]