



UNITED NATIONS
NATIONS UNIES

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

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 14 February 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

**DECISION ON THE PROSECUTOR'S MOTIONS FOR VARIATION OF WITNESS
LIST AND PROTECTIVE MEASURES FOR WITNESSES BUW, CCF, CCJ AND
BLJ**

Office of the Prosecutor:

Mr William T. Egbe
Mr Sulaiman Khan
Mrs Veronic Wright
Mr Patrick Gabaake
Ms Amina Ibrahim

Counsel for the Defence:

Ms Aïcha Condé

INTRODUCTION

1. By decision of 24 October 2002, Trial Chamber III granted protective measures to Prosecution witnesses and victims residing in Rwanda and neighbouring countries. The Chamber however denied protective measures for witnesses not living in Rwanda or neighbouring countries on the ground that the Prosecution failed to provide evidence of threats to their lives or to offer any explanation to justify their protection.¹ On 15 November 2006, the trial against Emmanuel Rukundo commenced before Trial Chamber II. On 28 November 2006, the Chamber denied a Prosecution Motion requesting protective measures for Witnesses CCF, CCJ, BLC, BLS and BLJ, all living outside Rwanda or its neighbouring countries, noting that the Prosecution failed to demonstrate an objective basis for the fears allegedly expressed by the witnesses.²

2. On 1 February 2007, the Prosecution filed a motion seeking to add proposed Witness BUW to its list of witnesses, and for the Chamber to grant him protective measures similar to those granted to other prosecution witnesses.³ On 2 February 2007, the Prosecution filed a second Motion, asking the Chamber to grant the same protective measures to Witnesses CCF, CCJ and BLJ, all of whom are scheduled to testify in the session that has started on 12 February 2007.⁴ The Defence replied to the two Motions on 8 February 2007.⁵

3. The Chamber notes that the two Defence replies were not filed within the 5 day period stipulated by Rule 73(E). However, in the interests of justice, the Chamber will consider the Defence submissions and warns all Parties to ensure that in future, pleadings are filed on a timely basis.

SUBMISSIONS

4. With respect to the first Motion, the Prosecution avers that it informed the Defence of the existence of Witness BUW as soon as they came into contact with him, and disclosed the witness' statement on 3 November 2006. For these reasons, the Prosecution maintains that the Defence will neither be taken by surprise nor prejudiced if Witness BUW is allowed to testify. Moreover, the Prosecution intends to call Witness BUW towards the end of its case so as to give the Defence adequate time to prepare for cross-examination.

5. The Prosecution submits that the witness list can be varied pursuant to Rule 73bis (E) of the Rules. It further argues that sufficient reasons exist for calling Witness BUW, namely that his testimony supports specific allegations in the indictment, and contains facts that will advance the course of justice. In addition, the inclusion of Witness BUW will not prolong the trial any further because BUW will replace Witness BLS who is already on the list. Furthermore, the Prosecution submits that should the Trial Chamber grant its request to call Witness BUW, the Chamber should also order specified protective measures.

¹ *The Prosecutor v. Emmanuel Rukundo*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 24 October 2002, para. 16.

² "Decision on Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS AND BLJ", para. 7.

³ "Prosecutor's Urgent Confidential Motion for Variation of Witness List and Protective Measures for Witness BUW," 1 February 2007.

⁴ "The Prosecutor's Urgent Confidential Motion for Protective Measures for Witnesses CCF, CCJ and BLJ", p. 4-5.

⁵ "Conclusions en réplique a la requête du Procureur aux fins de mesures de protection pour les témoins CCF, CCJ et BLJ"; "Conclusions en réplique a la requête du Procureur aux fins d'être autorise a modifier sa liste de témoins."

6. With respect to the second Motion, the Prosecution submits that Witnesses CCF, CCJ and BLJ have indicated to the Witness and Victims Support Section (WVSS) and the Prosecutor that, due to the risk they face and the threats they have already received, they will only testify if protective measures are granted. The Prosecution further submits that although the witnesses live outside Rwanda, they still travel to their country on a regular basis and would be exposed to harm should it be known that they are witnesses before the Tribunal. The Prosecutor adds that family members of the witnesses still live in Rwanda and are likely to face danger if it were known that the witnesses testified before the Tribunal. In support of its Motion, the Prosecution annexed an affidavit in which one of its investigators confirms the threats the three witnesses are facing.⁶

7. The Defence does not oppose the addition of Witness BUW to the Prosecution's witness list and the protective measures requested for him/her since such measures would correspond to the ones granted by Trial Chamber III's decision on 24 October 2002. With respect to the second Motion, the Defence submits that the Prosecution has not brought forward any new element in support of its request that had been denied by the Chamber on two previous occasions. The Defence further submits that the affidavits by the OTP investigators have no probative value since they simply relate the witnesses' views without any verification. The Defence does not however oppose protective measure (b) requested in paragraph 16 of the second Prosecution Motion provided that the same measure will be granted to Defence witnesses living in Europe.

DELIBERATIONS

8. Since the two Motions request the same measures, it will serve judicial economy to address them in one Decision.

i) Request to Add Witness BUW to the Witness List

9. The Trial Chamber notes that a list of witnesses may be varied if this is considered to be in the interests of justice.⁷ Specifically, the Chamber notes that the factors to be taken into consideration in determining a motion to vary the witness list are the timeliness of the disclosure to the Defence and its ability to prepare effective cross-examination, the probative value of the witness' testimony, and the justification offered by the Prosecution for the inclusion of the witness.⁸

10. With regard to the issue of timeliness of the disclosure, the Chamber is satisfied that the disclosure of Witness BUW's statement on 3 November 2006, gives the Defence sufficient time to prepare its case and conduct an effective cross-examination. Moreover, the fact that Witness BUW will only testify towards the end of the Prosecution case will give the Defence further time to prepare for his testimony and thus minimize any potential prejudice.

11. With respect to the relevance of Witness BUW's testimony, the Chamber has closely examined the statement disclosed on 3 November 2006 and is satisfied that the witness may

⁶ Affidavit of Rejean Tremblay, dated 1 February 2007, attached as Annex 1 to the Motion.

⁷ *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. Augustin Ndingiriyimana, et al.*, Case No. ICTR-2000-56-T "Decision on Prosecution Motion to Vary Its List of Witnesses: Rule 73bis of the Rules", 11 February 2005, para. 20; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-2000-56-T, "Decision on the Prosecution's Motion dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73bis (E)", para. 32;

⁸ *Prosecutor v. Bagosora et al.*, Case No: ICTR-98-41-T "Decision on Prosecution Motion for Addition of Witness Pursuant to Rule 73 bis (E), dated 26 June 2003," para. 14.

offer information relevant to some of the allegations in the Indictment. As such, his testimony may assist the Chamber to ascertain the truth about those allegations. However, the Chamber notes that the Prosecution could have done more by pinpointing the relevant paragraphs of the Indictment that may be supported by Witness BUW's testimony.

12. For the reasons stated above, the Chamber concludes that it would be in the interests of justice to hear Witness BUW's testimony

ii) Request for Protective Measures for Witnesses BUW, CCF, CCJ and BLJ

13. As to the request for protective measures for Witnesses BUW, CCF, CCJ and BLJ, the Chamber has considered the affidavits of the Prosecution investigators. The Chamber further notes that WVSS confirms the concerns of the witnesses.⁹ In light of this supporting material, the Chamber concludes that the fears expressed by BUW, CCF, CCJ and BLJ for their own safety or the safety of their family members, are justified by objective considerations. The Chamber therefore grants measures (a), (b), (c), (d), (e), (f), (g), and (h) contained in paragraphs 24(ii) and 16 of the respective Prosecution Motions. This stand is solely based upon the merits of the Motions and not in regard to any quid pro quo proposed by the Defence. The Defence must note that any future request for protection of its witnesses would similarly be determined on its own merits.

14. The Chamber notes that the measures hereby granted slightly differ from those envisaged in Trial Chamber III's decision of 24 October 2002. In particular, measures (j) and (k) contained in the current Motions were granted by the Chamber in 2002. A more recent jurisprudence, however, holds that these measures are not consistent with the rights of the Accused under Article 20(4)(b) of the Statute.¹⁰ For that reason, the Chamber denies measures (j) and (k) contained in paragraphs 24(ii) and 16 of the respective Motions.¹¹

15. For the sake of consistency and in light of the recent jurisprudence in this area, the Chamber orders that the protective measures granted in this Motion equally apply to all witnesses/victims in this case. Thus, Trial Chamber III's decision of 24 October 2002 is amended accordingly.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motions in part;

ALLOWS the Prosecution to add Witness BUW, to its witness list and to remove Witness BLS;

ORDERS that:

- (a) the Prosecution shall assign the pseudonyms BUW, CCF, CCJ and BLJ to these witnesses; the assigned pseudonyms shall be used at any time when referring to

⁹ Annexes 2-4 of the second Motion.

¹⁰ *The Prosecutor v. Juvenal Rugambarara*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment," 31 January 2006, para 14; *The Prosecutor v. Muhimana*, "Decision on Defence Motion for Protective Measures for Defence Witnesses", 6 July 2004, para. 5 (holding, *inter alia*, that protective measures must be consistent with the rights of the Accused).

¹¹ Measures (j) and (k) respectively request for an "order prohibiting the accused or any person working for the defence from personally possessing any material which includes or might lead to the discovery of the identity of the witness; and "An order prohibiting the accused individually from personally possessing any material which includes, but is not limited to, any copy of a statement of the witness even if the statement is in redacted form unless the accused is, at the time of the possession, in the presence of his defence counsel, and instructing the [UNDF] authorities to ensure compliance with the prohibition set out in this prohibition."

these witnesses during the course of proceedings before this Tribunal and in communications and discussions between the parties and to the public;

- (b) the names, address, whereabouts and any other information capable of identifying these witnesses, including but not limited to familial and social relations, shall be kept confidential by the Registry and not be included in any non-confidential records of the Tribunal, or otherwise disclosed to the public or media, prior to, during and after the conclusion of this trial and any appeal. The identifying information shall be communicated to WVSS in accordance with established procedure and only in order to implement protective measures for the individual;
- (c) the names, address, whereabouts, relations, and any other information capable of identifying these witnesses contained in the existing records of the Tribunal shall be expunged from such records;
- (d) the Defence and the Accused are prohibited from sharing or otherwise disclosing any information, documentary or otherwise, capable of identifying these witnesses, to any person or any entity other than the Accused, assigned Counsel or other persons designated by the Registry as working in the Defence team;
- (e) the Accused and each member of the Defence team shall not attempt to make an independent determination of the identity of these witnesses, nor shall they encourage, or otherwise aid any other individual to do the same;
- (f) No photograph, audio or video recording or sketching of these witnesses shall be taken at any time or any place without the leave of the Trial Chamber.

DIRECTS that the above protective measures shall apply to all prosecution witnesses for whom protective measures have already been sought and granted;

DENIES measures (j) and (k) requested in paragraphs 24(ii) and 16 of the two Prosecution Motions.

Arusha, 14 February 2007.

Asoka de Silva
Presiding Judge

Taghrid Hikmet
Judge

Seon Ki Park
Judge

[Seal of the Tribunal]