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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 24 November 2008

JUDICIAL RECEIVED

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

**DECISION ON PROSECUTOR'S EXTREMELY URGENT MOTION FOR
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES**

*Articles 19 and 21 of the Statute and Rules 54, 69, 73
and 75 of the Rules of Procedure and Evidence*

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabasinga

For the Accused

Allison Turner

INTRODUCTION

1. On 7 January 2008, an indictment was issued against the Accused, Mr Léonidas Nshogoza, charging him with two counts of contempt of the Tribunal and two counts of attempt to commit acts punishable as contempt of the Tribunal.¹

2. On 9 October 2008, the Prosecutor filed a motion seeking protective measures for Prosecution Witnesses GAA, GAF, BUC, SP-003 and SP-004, and other witnesses the Prosecutor may call to testify. No protective measures are currently in place for Witnesses BUC, SP-003 and SP-004. However, Witnesses GAA and GAF were called as witnesses for the defence in the *Prosecutor v. Jean de Dieu Kamuhanda* proceedings, and the protective measures granted in respect of them remain in force.² The Prosecutor seeks to modify the protective measures applicable to Witnesses GAA and GAF to the extent that the existing protective measures do not include all the measures requested in the Motion.³

4. The Defence does not object to the witness protection measures sought for the witnesses, with the exception of Witness BUC. The Defence submits that protective measures should not be granted for Witness BUC because the Defence wishes to call this witness as a Defence witness. The Defence asserts that granting protective measures for Witness BUC will impede the preparation of the Defence case.⁴ The Defence further requests that the Chamber order the Prosecution to disclose a video tape of an interview conducted with Witness BUC on 31 July 2008.⁵ This latter request will be addressed in a separate decision.

DISCUSSION

Law on Protective Measures

5. Article 21 of the Statute, and Rules 69 and 75 of the Rules provide for the protection of victims and witnesses.⁶ Rule 69 allows either party to apply to a Trial Chamber, in exceptional circumstances, for measures to prevent the disclosure of the identity of a victim or a witness who may be in danger. Under Rule 75 (A):

¹ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, "Indictment," filed 7 January 2008. The Accused is charged contrary to Rules 77 (A), (B) and (G) of the Rules of Procedure and Evidence ("Rules").

² *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, 22 March 2001 ("Protective Measures Decision"). Rule 75 (F) (i) provides, in relevant part, that once protected measures have been ordered for a witness or victim in any proceedings before the Tribunal, the measures "shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal...unless they are rescinded, varied or augmented." An order of the Chamber is required to rescind, vary or augment protective measures. See Rule 75 (G) – (I).

³ *Nshogoza*, "Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses", filed 9 October 2008 ("Motion").

⁴ *Nshogoza*, "Defence Response to Prosecution Extremely Urgent Motion for Protective Measures and Motion for Request to Prosecutor to Produce Videotape of Interview with Witness BUC," filed 20 October 2008, paras 3, 4, 7, 8 ("Defence Response").

⁵ Defence Response, para 5.

⁶ Article 21 of the Statute reads "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or 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.

6. Measures for the protection of witnesses are to be determined on a case-by-case basis.⁷ It is established in the jurisprudence of the Tribunal that witnesses for whom protective measures are sought must have a real fear for their safety or the safety of their family, and that there must be an objective justification for this fear.⁸ These fears may be expressed by persons other than the witnesses themselves.⁹

7. In determining whether this fear is justified, the representations made by the parties must be examined in the context of the broader security situation affecting the concerned witnesses.¹⁰ Generalised fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate these fears.¹¹

8. Furthermore, the protective measures must be strictly necessary for the protection of the relevant witness, and it is preferable to adopt a less restrictive measure if that measure can secure the desired level of protection.¹² Finally, the adoption of protective measures requires a careful balancing between the need to secure the safety and security of victims and witnesses, and the rights of the Accused to a fair and public hearing as enshrined in Article 20 of the Statute.¹³

9. Once protective measures have been ordered in respect of a witness, such measures remain in force until they are rescinded, varied, or augmented by a Chamber.¹⁴ Rule 75 (G) (ii) provides that, if no Chamber remains seized of the first proceedings, an order can be augmented by the Chamber of the second proceedings. However, rule 75 (H) requires that any determination under Rule 75 (G) (ii) must be preceded by the Chamber to the second proceedings obtaining all relevant information from the first proceedings, and additionally, consulting with any Judge who ordered the original protective measures, if that Judge remains a Judge of the Tribunal.

⁷ *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Defence Motion for Protection of Witnesses, 9 February 2006, para. 2; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006 para. 7; *Prosecutor v. Juvenal Rugambarara*, Case No. ICTR-00-59-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006, para. 12; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, 25 February 2000, para 4.

⁸ *Nahimana*, para. 11 (citing *Prosecutor v. Bagosora*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Nutyahaga (TC), 13 September 1999, para. 28); *Rugambarara*, para 9; *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses, 26 July 2006, para. 5; *Bikindi*, para. 7.

⁹ *Bikindi*, para. 7.

¹⁰ *Kamuhanda*, Protective Measures Decision, para 12 (citing *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, para. 9); *Nahimana*, para 4.

¹¹ *Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 10 (citing *Prosecutor v. Milosević*, Case No. IT-02-54, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7).

¹² *Renzaho*, para. 28.

¹³ *Rugambarara*, para. 10; *Bikindi*, para. 7.

¹⁴ Rule 75 (F).



Are Protective Measures Appropriate in this Case?

10. In support of his Motion, the Prosecutor provides a sworn affidavit from Commander Kwende of the Office of the Prosecutor in Kigali. In his affidavit, Commander Kwende states that it has come to his knowledge, in the course of his role as Commander in Chief of the Investigation Section of the Office of the Prosecutor in Kigali, that "witnesses who participate in ICTR investigations and prosecution face a high potential of reprisals".¹⁵ Commander Kwende also states that there is an objective danger to the safety of these witnesses due to the current uncertain security situation in Rwanda and its region, and in particular in the Gikomero area.

11. The Chamber has considered Commander Kwende's representations of the general security risks to potential witnesses, including the existence of a volatile security situation in Rwanda, and tensions in neighbouring Democratic Republic of the Congo. The Chamber is satisfied, based on the information before it, that there is a real and objective basis for the fears expressed by these Prosecution witnesses.

12. Taking into consideration an acceptable balance between the rights of the Accused, and the need to ensure that appropriate measures are adopted to safeguard the privacy and security of the witnesses, the Chamber finds that the adoption of protective measures is warranted.

13. Regarding the Defence submission that protective measures should not be granted for Witness BUC, the Chamber recalls that the party seeking the protective measures must demonstrate that the witnesses in question have a real fear for their own safety or that of their families, and that an objective basis exists to justify this fear.¹⁶ The fact that the Defence may also wish to call Witness BUC does not mitigate the security concerns identified by the Prosecutor, and is not a basis for denying protective measures for this witness.

14. Any protective measures granted by the Chamber pursuant to the Motion shall apply uniformly to all Prosecution witnesses concerned. With respect to Witnesses GAA and GAF, this will result in an augmentation of the protective measures already in place for them.¹⁷

15. The Chamber recalls that it can augment the protective measures granted in respect of a witness in another proceeding if no Chamber remains seized of the first proceedings. No Chamber remains seized of the *Kamuhanda* proceedings, and the original protective order for Witnesses GAA and GAF was made by Judge Laïty Kama, who is no longer a Judge of the Tribunal. Therefore, this Chamber is empowered to make its own determination on the augmentation of the existing order pursuant to Rules 75 (G) (ii) and 75 (H).

16. Upon examination of the materials associated with the original order, this Chamber considers it appropriate to augment the original protective measures granted in respect of Witnesses GAA and GAF.¹⁸

¹⁵ Motion, annexed Affidavit, para 4.

¹⁶ *Nahimana*, para. 11 (citing *Bagosora*, para. 28).

¹⁷ Motion, para. 2.

¹⁸ *Kamuhanda*, Protective Measures Decision; *Kamuhanda*, "Prosecutor's Brief in Response to Motion by the Defence for Protective Measures Regarding Defence Witnesses, File (sic) on 24/02/2001," filed 14 March 2001.



Which Protective Measures Should be Granted?

17. The Prosecutor requests that the Chamber adopt ten protective measures for all Prosecution witnesses.¹⁹ The Chamber will now consider which of the measures sought should be granted.

18. The Chamber notes that protective measures to ensure the anonymity of the witness, such as those requested in measures [i], [ii], [iii], [iv], [v], [vi], [viii] and [ix] at paragraph 6 of the Motion, have been granted regularly by this Tribunal.²⁰ The Chamber considers their adoption to be appropriate in this instance.

19. The Prosecutor's requested measure [vii] requires the Defence to contact the Prosecutor to obtain consent to speak with a protected witness or with a family member of a protected witness, and requires that the Victims and Witness Support Unit ("WVSS") facilitate any such meeting. The Chamber notes that similar procedures have been used in other cases before this Tribunal and considers that this procedure, including the use of WVSS to facilitate meetings, will not interfere with the Accused's fair trial rights as enshrined in Articles 19 and 20 of the Statute.²¹

20. The Chamber recalls that Rule 69 (C) requires the identity of protected witnesses to be disclosed within a sufficient timeframe to allow adequate time for the preparation of the Defence.²² The Prosecutor requests that this time period commence "at least thirty days prior to the commencement of the prosecution case."²³ As this is a contempt of the Tribunal case involving a single Accused, there is little likelihood of a substantial delay between the disclosure of a witness's identity and his or her testimony.²⁴ The Chamber, therefore, considers disclosure of the witness's identity 30 days before the commencement of the trial to be appropriate.

FOR THESE REASONS the Chamber,

GRANTS the Motion; and

AUGMENTS the protective measures previously applicable in respect of Witnesses GAA and GAF; and

¹⁹ The requested measures are set out in paragraph 6 of the Motion and are largely identical to the measures ordered by the Chamber at page 6 of this Decision.

²⁰ Motion, para 6. See e.g. *Bikindi*, para 8; *Renzaho*, para. 13. The authority for such measures is derived from Rules 69 and 75 of the Rules.

²¹ See e.g. *Kamuhanda* Protective Measures Decision, para. 21; *Nahimana*, measure 8.

²² Rule 69 (C) reads, "Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence."

²³ Motion, para. 6 (x).

²⁴ *Nchamihigo*, para. 8 (citations omitted); *Prosecutor v. Alloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 7 (citations omitted). Twenty days prior to the day the witness will testify is often the period ordered for disclosure of the identity of a protected witness. However, in single accused cases, thirty days has been considered appropriate.



ORDERS that the following protective measures shall apply to Prosecutions Witnesses GAA, GAF, BUC, SP-003 and SP-004, as well as any other witnesses, living in Rwanda, whom the Prosecutor may call to testify:

- i. Pseudonyms shall be designated for each Prosecution witness, to be used whenever referring to such witnesses in ICTR proceedings, communications, and discussions, both between the parties and the public;
- ii. The names, addresses, whereabouts and other information that might identify or assist in identifying the witnesses and their families ("identifying information") shall be sealed by the Registry and shall not be included in public or non-confidential records;
- iii. Identifying information contained in existing records of the Tribunal shall be removed from the public record of the Tribunal and placed under seal;
- iv. Identifying information shall not be disclosed to the public or the media for an indefinite period of time to exceed the conclusion of the trial unless otherwise ordered by the Chamber;
- v. Until 30-days prior to the Prosecution case, when the Prosecutor discloses identifying information to the Accused and the Defence, neither the Accused, nor any member of the Defence team, shall attempt or encourage or aid another person in an attempt to make an independent determination of the identity of any protected witness or his or her family members;
- vi. The public and the media shall be prohibited from making audio or video recordings, broadcasts, sketches or taking photographs of any witness and/or his or her family members in relation to their testimony at the Tribunal, without leave of the Chamber;
- vii. The Accused and the Defence team shall be prohibited from making contact with a protected witness and/or his or her family members unless the consent of the person concerned has first been obtained. The Accused and/or any member of the Defence team shall contact the Prosecutor, who, with the assistance of the WVSS shall ascertain whether such consent exists. In the event that consent exists, the WVSS shall facilitate the interview, which shall be conducted in the presence of a representative of the Prosecutor;
- viii. The Accused and the Defence team shall keep confidential any identifying information, and shall not share, discuss, or reveal, directly or indirectly, such information to any person or entity;
- ix. The Accused and/or the Defence team shall provide a written list to the WVSS and the Prosecutor designating all officially authorised persons working on the Defence team who will have access to any identifying information. In the event any such persons leave the Defence team, the Defence must provide written notification to the WVSS and confirm that such person has remitted all materials containing identifying information; and



- x. The Prosecutor shall disclose identifying information to the Accused and/or the Defence team no later than thirty days before the commencement of the Prosecution case.

Arusha, 24 November 2008

Khalida Rachid Khan

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga

Lee Gacuiga Muthoga
Judge

Emile Francis Short

For and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]





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