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UNITED NATIONS
NATIONS UNIES

**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: 6 February 2009

THE PROSECUTOR
v.
DOMINQUE NTAWUKULILYAYO

Case No. ICTR-05-82

JUDICIAL RECORDS/ARCHIVES
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DECISION ON PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES

*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:
Charles Adeogun-Phillips
Ibukunolu Alao Babajide
Veronic Wright
Thembile Segoete

Counsel for the Defence:
Francois Roux

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INTRODUCTION

1. The trial in this matter is scheduled to commence on 30 March 2009. By motion dated 29 January 2009, the Prosecution seeks protective measures for all potential Prosecution witnesses.¹

DISCUSSION

Preliminary Matter

2. The Chamber notes that the Defence has not had the opportunity to respond to the Motion.² However, the Prosecution disclosed a number of unredacted witness statements under Rule 66 (A) (ii) on 30 January 2009.³ In order to ensure the security of the witnesses whose statements have been disclosed, the Chamber deems it necessary to consider the Motion without any further delay.

The Law Regarding Protective Measures

3. Pursuant to Article 19 of the Statute, the Tribunal shall conduct proceedings with due regard for the protection of victims and witnesses. Article 21 obliges the Tribunal to provide in its Rules for the protection of victims and witnesses, including, but not limited to, the accommodation of in-camera proceedings and the protection of witnesses' and victims' identities. Rule 75 elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records; assigning a pseudonym to a witness; and permitting witness testimony in closed session. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Defence in adequate time for preparation.

4. Measures for the protection of witnesses are granted on a case-by-case basis. According to the jurisprudence of this Tribunal, the witnesses for whom protective measures are sought must have a real fear for their safety or that of their families, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves.⁴

¹ Prosecution Motion for Protective Measures, 29 January 2009, para. 1 ("Motion").

² Although the five day time limit under Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") for the Defence to respond to the Motion has expired, the Chamber has noted that counsel for the Defence is French speaking and requires documents in French.

³ Rule 66 (A) (ii) provides that the Prosecution shall disclose, no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

⁴ *Prosecutor v. Kalimanzira*, Case No. ICTR-2005-88-I, Decision on Prosecution Motion for Protective Measures (TC), 8 November 2007, para. 3; *Prosecutor v. Setako*, Case No. ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures (TC), 18 September 2007, para. 4; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, paras. 4-5.

Real and Objectively Justified Fear

5. In support of its Motion, the Prosecution has provided the Chamber with the affidavit of Prosecution Investigator Felix Bide,⁵ which states that witnesses who participate in Tribunal investigations and prosecution “face a high potential of reprisals in the form of death threats, intimidation and actual physical harm” which “holds equally for family members of such witnesses.”⁶ The Prosecution submits that on review of Mr. Bide’s affidavit and the Protective Measures decisions issued by other Trial Chambers at the Tribunal, there is subjective and objective fear on the part of the Prosecution witnesses such that, wherever they may live, they do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.⁷

6. In view of the information provided by the Prosecution, and mindful of the rights of the Accused, the Chamber accepts that prospective Prosecution witnesses do fear for their safety, or that of their families, and that such fear is objectively justified. Therefore, the Chamber considers that the conditions for ordering protective measures are satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS that the following protective measures shall apply to Prosecution witnesses:

I. The pseudonyms to be designated by the Prosecution to witnesses shall be used in the proceedings and in communications and discussions, both between the Parties and with the public. The use of such pseudonyms shall continue until such time as the Trial Chamber orders otherwise.

II. The names, addresses, whereabouts, and other identifying information concerning the protected witnesses and/or their family members shall be sealed by the Registry and not included in any public or non-confidential Tribunal records, or otherwise disclosed to the public.

III. Names, addresses, locations and other identifying information of the protected witnesses which may appear in the Tribunal’s public records shall be expunged and placed under seal.

IV. No person shall disclose identifying information of protected witnesses to the public or the media.

V. The Defence, or any person working for the Defence, shall not attempt to make an independent determination of the identity of any protected witness or encourage or otherwise aid any person in so doing.

VI. No person shall make audio or video recordings or broadcastings, or take photographs or make sketches of protected witnesses, without leave of the Chamber and the Parties.

VII. The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and, if the witness

⁵ Motion, Annex A.

⁶ Motion, para. 6 of Annex A.

⁷ Motion, para. 3.

consents, the Prosecution shall facilitate such contact together with the Witness and Victims Support Service.


VIII. The Accused and the Defence team in this case shall keep confidential to itself all information identifying any protected witness, and shall not, directly or indirectly, share, discuss or reveal any such information.


IX. The Defence shall provide the Registry with a designation of all persons working on the Defence team in this case who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any such person leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.


X. The Prosecution shall disclose the identifying information of the protected witnesses to the Defence as soon as possible and, in any event, no later than two days from the notification of this Decision, in order to allow adequate time for the preparation of the Defence pursuant to Rule 69 (C) of the Rules.

XI. The Prosecution shall forward the names and identities of the protected witnesses to the Registry in confidence, to be communicated to the Witnesses and Victims Support Unit for the purpose of implementing the above protective measures for such witnesses.

Arusha, 6 February 2009


Khalida Rachid Khan
Presiding Judge


With the consent, and
on behalf of
Lee Gacuiga Muthoga
Judge


With the consent, and
on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

