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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 06 May 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL OFFICE
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**DECISION ON PROSECUTION'S
MOTION FOR SPECIAL PROTECTIVE MEASURES FOR PROSECUTION
WITNESSES AND OTHERS**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. David C. Thomas

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Trial Chamber”);

BEING SEIZED of the “Prosecution’s Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others”, filed on 24 April 2009 (the “Motion”);

CONSIDERING the “Defence Response to the Prosecutor’s Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others”, filed on 29 April 2009 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 (A), 75 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. The trial in this case is scheduled to start on 18 May 2009.¹ On 15 April 2009, the Chamber granted a Defence motion for certification to appeal a decision confirming the scheduled trial date and ordered a stay of the commencement of the trial should a determination of the appeal be filed after 18 May 2009.²
2. In an interoffice memorandum submitted to the Parties on 20 April 2009, the Trial Chamber noted, *inter alia*, that no motion for protective measures had yet been filed by the Prosecution despite the Prosecution’s use of pseudonyms to refer to the witnesses it intends to call at trial. The Chamber instructed the Prosecution to address the matter immediately.³

SUBMISSIONS OF THE PARTIES

Prosecution Motion

3. Pursuant to Articles 19 and 21 of the Statute, and Rules 54, 69, 73 and 75 of the Rules, the Prosecution moves for an order by the Trial Chamber granting protective measures for the following:

¹ Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009, p. 4; Decision on Defence Motion to Vary Trial Date, 25 March 2009, p. 6.

² Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009, p. 6.

³ Interoffice Memorandum, 20 April 2009, para. 3.



- a) All the 16 Prosecution witnesses listed in para. 1 of the Motion;⁴
- b) Family members of all the 16 Prosecution witnesses who presently reside in or out of Rwanda and who have not affirmatively waived their rights to protective measures;⁵ and,
- c) Victims and other potential Prosecution witnesses who presently reside in or out of Rwanda and who have not affirmatively waived their rights to protective measures.⁶

4. The Prosecution submits that the protective measures requested are appropriate under the circumstances of the present case and give due regard to the protection of the witnesses while, at the same time, safeguarding the rights of the Accused.⁷ According to the Prosecution the protective measures are being sought because witnesses face a real and substantial danger wherever in the world they reside by virtue of their cooperation or potential cooperation with the Tribunal.⁸

5. The Prosecution argues that its Motion is reinforced by the disclosure of “all confidential information of the witnesses [...] to the Defence on 13 March and 22 April 2009” and that, due to the potential postponement of the trial, witnesses might not be called until many months after their statements have been disclosed.⁹

6. With respect to danger to witnesses that reside outside of Rwanda the Prosecution avers that “since the Accused is believed to be residing in Europe as he was arrested in Germany, the supporters of the Accused might reside in or travel to any country in which any of the prosecution witnesses reside”.¹⁰

7. In support of its Motion, the Prosecution submits an Affidavit signed by the Officer in Charge at the Investigations Section in Kigali about the fear of the proposed witnesses to their lives,¹¹ and presents 24 Annexes setting out reports of incidents involving *inter alia* the alleged torture and murder of genocide survivors and witnesses between 2002 and 2009.¹² It further submits that the Tribunal has previously established that the present security situation affects victims and potential witnesses residing outside Rwanda or neighbouring countries.¹³ Referring to Annex 23, the Prosecution submits that the Motion is supported by the position of the Witnesses and Victims Support Section (“WVSS”), as it was stated to be on 4 September 2002.¹⁴

⁴ Motion, para. 1; referring to Prosecution witnesses: ANAA, ANAB, ANAC, ANAD, ANAE, ANAF, ANAG, ANAH, ANAI, ANAJ, ANAK, ANAL, ANAM, ANAN, ANAO, ANAP.

⁵ Motion, para. 23.

⁶ Motion, para. 23.

⁷ Motion, para. 3.

⁸ Motion, paras. 16, 20.

⁹ Motion, para. 4.

¹⁰ Motion, para. 16.

¹¹ Motion, Annex A, paras. 8-9.

¹² Motion, para. 12.

¹³ Motion, para. 13.

¹⁴ Motion, para. 19.

Defence Response

8. The Defence clarifies that it “does not object in principle to appropriate orders for protective measures for Prosecution witnesses who will appear at trial, subject to specific requirements of any particular witness”.¹⁵ However, it requests that the Chamber limit the protective measures granted to only 14 out of the 16 Prosecution witnesses identified in para. 23(i) of the Motion.¹⁶

9. The Defence submits that Prosecution witnesses ANAB and ANAC who are listed in para. 23(i) of the Motion should not be granted protective measures.¹⁷ The Defence argues that the situation of these witnesses, who reside outside of Africa, cannot be compared to that of witnesses residing in Rwanda,¹⁸ and that the Prosecution has failed to provide any material to support the submission that a real and substantial danger exists for witnesses ANAB and ANAC.¹⁹ The Defence avers that the Prosecution’s submission about “alleged supporters of the Accused who might reside outside of Africa [...] and who might constitute a real fear and substantial danger for the Prosecution witnesses residing outside of Africa is purely unsubstantiated and incongruous.”²⁰

10. With regard to the protection of ‘family members’ of witnesses, the Defence submits that this term is too imprecise and would thus be prejudicial to the Accused, as the Defence would not be able to precisely ascertain which persons are to be protected by such an order.²¹ Furthermore, the Defence argues that the Tribunal has no jurisdiction over family members of witnesses.²² The Defence requests that the Chamber deny protective measures to family members of witnesses.²³

11. Further, the Defence submits that protective measures should not apply to potential witnesses not identified by the Prosecution.²⁴ The Defence argues that the Prosecution cannot seek protective measures for potential witnesses not included in the initial witness list without first requesting to vary the witness list, and that Rules 69 and

¹⁵ Response, para. 12. However, the Defence submits that the Prosecution’s request for protective measures is defective because (i) the Prosecution has not proved the existence of exceptional circumstances to protect its witnesses; (ii) Annex A does not provide enough details to support the Prosecution’s submission that each witness experiences fear for his or her life; (iii) in requesting a general blanket protection for all its witnesses, the Prosecution has failed to identify any substantial danger on a case-by-case basis; and (iv) none of the annexes to the Motion allege security issues with regard to Gisenyi region, while most of them date back to several years ago and have therefore lost their relevance. The Defence argues that it “realizes that Trial Chambers have in the past granted similarly defective requests, [and that] the Defence is making the objections set forth above in order to preserve these issues for possible appeal.” Response, paras. 7-10.

¹⁶ Response, paras. 19, 27.

¹⁷ Response, para. 27.

¹⁸ Response, para. 22.

¹⁹ Response, para. 23. The Defence further asserts that ANAB and ANAC cannot fear for their lives, since until recently they were scheduled to testify as expert witnesses, and the identity of expert witnesses is always disclosed to the public. Response, paras. 23, 25-26.

²⁰ Response, para. 24.

²¹ Response, para. 13.

²² Response, para. 20.

²³ Response, para. 27.

²⁴ Response, paras. 15, 27.

75 do not provide for the protection of potential witnesses.²⁵ Furthermore, the Defence argues that granting protective measures to unidentified potential witnesses will be prejudicial to the Accused, and prevent the Defence from freely communicating with people.²⁶

12. The Defence recalls that full identifying information has not been disclosed with respect to witnesses ANAB, ANAC and ANAP, and that contact details or any identifying information has not been disclosed regarding witness ANAN. The Defence submits that in order to prepare for trial it must be aware of the identity of the persons it may cross-examine, and requests that the Chamber order the Prosecution to provide the available identifying information for these witnesses.²⁷

DELIBERATIONS

13. As a preliminary matter, the Chamber notes that some of the annexes attached to the Motion are in support of the proposition that Prosecution witnesses need protective measures, while other annexes appear to be outdated.²⁸ Furthermore, the Chamber notes that the Prosecution filed the Motion only after it had been prompted by the Chamber to address the issue of protective measures. The Chamber urges the Prosecution to act in a diligent manner by filing future motions on time and submitting only relevant and up-to-date supporting material.

14. With regards to the law that governs and guides Chambers' discretion on whether to grant protective measures, the Trial Chamber considers that Articles 19 (1) and 21 of the Statute stipulate that proceedings shall be conducted with due regard for the protection of victims and witnesses and that the Tribunal shall provide for such protection in its Rules. Rules 69 and 75 of the Rules govern the disclosure of information and further provide for various measures for protection of victims and witnesses, for which the Parties can apply.

15. Measures for the protection of witnesses are granted on a case-by-case basis. In the exercise of its discretion, the Chamber has a duty to strike a fair and proper balance between the rights of the accused to a fair trial and the protection of the witness for whom the protective measures are sought. To ensure a proper balance between these two interests, the jurisprudence of this Tribunal requires that witnesses for whom protective measures are sought have a real fear for their safety or that of their families, and that there is an objective justification for this fear. Subjective fears of potential witnesses are not *per se* sufficient.²⁹

²⁵ Response, paras, 14-16.

²⁶ Response, paras, 17-18.

²⁷ Response, paras. 21, 27.

²⁸ See for example Annexes 9-13, 19-24.

²⁹ *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on Prosecution's Confidential Motion for Leave to Vary the Witness List, for Protective Measures for Witness BRW and for the Testimony of Witness BRW via Closed-Video Link, 7 April 2009, para. 16; *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55-I, Decision on Prosecution Extremely Urgent Motion for Protective Measures, 16 January 2009, paras. 3-4; *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-

16. In determining whether the witness' fear is justified, the representations made by the parties must be examined in the context of the broader security situation affecting the concerned witness. However, generalized fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate these fears.³⁰

17. Finally, 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.³¹

18. The Chamber notes the generalized manner in which the Prosecution submitted its request for protective measures, without distinguishing between the different type of witnesses and their different circumstances. The Chamber urges the Prosecution in future motions to distinguish between different categories of witnesses. However, in light of the disclosure of confidential information of the witnesses to the Defence, and in accordance with previous decisions issued by this Chamber,³² the Chamber will evaluate the fear for the safety of witnesses in light of the general security situation within and outside Rwanda and decide whether measures are necessary to secure the desired level of protection.

19. After reviewing the relevant information provided by the Prosecution and bearing in mind the rights of the Accused to a fair trial, the Chamber considers that the existence of objective fear on the part of the Prosecution's witnesses who reside in or out of Rwanda and the Great Lakes Region has been established, as the relevant reports submitted by the Prosecution show the occurrence of frequent violent incidents perpetrated against genocide victims and potential witnesses. The Chamber considers that there is an objective fear that the disclosure of these witnesses' participation in the proceedings of this Tribunal may threaten their safety and security. Therefore, the Chamber considers that the conditions for ordering protective measures for these witnesses are satisfied.

05-88-I, Decision on Prosecution Motion for Protective Measures, 8 November 2007, para. 3; *The Prosecutor v. Ephrem Sekato*, Case No. ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures, 18 September 2007, para. 4; *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses, 26 July 2006, paras. 4-5; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, para. 6.

³⁰ *The Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, para. 9; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, para. 7; *The 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.

³¹ *The 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; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, para. 8.

³² See *The 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.

20. The Chamber notes that a number of decisions extend some of the protection granted to witnesses to their family members.³³ In view of the frequent violent incidents perpetrated against genocide victims and potential witnesses and the circumstances of this case, the Chamber considers that adequate protection of Prosecution witnesses requires also some protection of members of their families.

21. With regard to the inclusion of witnesses the Prosecution may call to testify, the Chamber notes that the jurisprudence of this Tribunal includes instances where protective measures have been ordered for potential witnesses, even though these witnesses had not previously been determined³⁴ and deems this measure appropriate in the present case.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion;

ORDERS that the following protective measures shall apply to Prosecution witnesses ANAA, ANAB, ANAC, ANAD, ANAE, ANAF, ANAG, ANAH, ANAI, ANAJ, ANAK, ANAL, ANAM, ANAN, ANAO, ANAP, as well as to other witnesses the Prosecution may call to testify; and that, in accordance with Rule 75 of the Rules, these measures shall remain in force unless the Chamber orders otherwise:

- (i) Pseudonyms designated by the Prosecution shall be used in the proceedings and in all communications and discussions, both between the Parties and with the public;
- (ii) 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 any public or non-confidential records, or otherwise disclosed to the public;
- (iii) Identifying information contained in existing records of the Tribunal shall be removed from the public record of the Tribunal and placed under seal and shall not be disclosed to the public or the media;

³³ *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, Decision on Prosecution Motion for Protective Measures, 8 November 2007, p. 4; *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, 24 November 2008, p. 6; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, p. 7; *The 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, p. 7; See *infra* Order for Protective Measures (ii), (iv), (v).

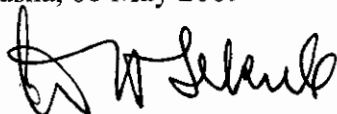
³⁴ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, p. 7; *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, Decision on Defence Motion for Protective Measures, 14 December 2007, p. 3; *The Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3.



- (iv) No person shall be allowed to make audio or video recordings, broadcasts, sketches or take photographs of any protected witness and/or his or her family in relation to their testimony at the Tribunal, without leave of the Chamber;
- (v) 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/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS;
- (vi) The Defence shall keep confidential any identifying information, and shall not share, discuss, or reveal, directly or indirectly, such information to any person or entity;
- (vii) The Defence shall provide a written list, and immediately following a change to the Defence provide an updated written list, to the Prosecution and the Registry, designating all officially authorised persons working with the Defence who will have access to any identifying information. In the event that any such persons leave the Defence, the Defence must provide written notification to the Registry and confirm that any such persons have remitted all materials containing identifying information; and,
- (viii) The Prosecution shall forward the names and identities of the protected witnesses to the Registry in confidence, to be communicated to WVSS for the purpose of implementing the above mentioned protective measures;

ORDERS the Prosecution to disclose to the Defence immediately, and in any event not less than 30 days prior to commencement of the Prosecution case, if it has not done so yet, the identifying information of all the protected witnesses in order to allow adequate time for the preparation of the Defence pursuant to Rule 69 (C) of the Rules.

Arusha, 06 May 2009



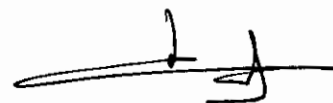
William H. Sekule

Presiding Judge



Solomy Balungi Bossa

Judge



Mparany Rajohnson

Judge



[Seal of the Tribunal]