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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
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 11 May 2009

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THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

DECISION ON DEFENCE 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:
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INTRODUCTION

1. On 6 February 2009, this Trial Chamber issued a decision granting protective measures to all Prosecution witnesses.¹ On 21 April 2009, the Defence filed a motion seeking protective measures for witnesses it intends to call to testify.²
2. The Prosecution did not respond to the Motion.

DISCUSSION

Preliminary Matter

3. The Chamber first wishes to express its concern regarding the confidential filing of motions that deserve to be filed publicly. The transparency of the proceedings is served by the public filing of documents. The Motion is filed “confidentially” but does not contain any identifying information with regard to any Defence witness. Confidential filing should be reserved for exceptional circumstances – for instance, where the protection of a witness is at stake.³ In the present case, the Chamber considers that the Motion contains no such confidential information and therefore, the confidentiality of the Motion should be lifted.

The Law Regarding Protective Measures

4. Pursuant to Article 19 (1) of the Statute of the Tribunal (“Statute”), Trial Chambers shall ensure that proceedings are conducted with due regard for the protection of victims and witnesses. Article 21 of the Statute further 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 victim’s identities.

5. Furthermore, the Tribunal must at all times ensure that the rights of accused are respected in accordance with Articles 19 and 20 of the Statute.

6. Rule 69 (A) of the Rules of Procedure and Evidence (“Rules”) allows either party to apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk. Pursuant to Rule 69 (C), the identity of a witness shall be disclosed within such time as determined by a Trial Chamber to allow adequate time for preparation of the Prosecution and Defence.

7. In addition, Rule 75 (A) provides that:

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,

¹ *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82, Decision on Prosecutor’s Motion for Protective Measures, 6 February 2009 (“Prosecution Protective Measures Decision”).

² *Ntawukulilyayo*, Requête de la Défense aux fins de prescription de mesures de protection des témoins à décharge (Articles 19 et 21 du Statut du Tribunal Pénal International pour le Rwanda et 69 et 75 du Règlement de Procédure et de Preuve), 21 April 2009.

³ *Ntawukulilyayo*, Decision on Defence Extremely Urgent Application for Extension of Time for Filing Response to Prosecution Motion for Protection Measures, 17 February 2009, para. 3; *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Order for Transfer of Detained Witnesses, 1 March 2007, para. 5; *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.



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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.

8. Rule 75 (B) further 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 to be taken in closed session.

9. Measures for the protection of witnesses are granted on a case-by-case basis. According to the Tribunal's jurisprudence, 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

10. 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.⁵ Additionally, 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.⁶ As well as the fairness of the trial, Chambers must take into consideration the equality of the parties,⁷ and be mindful of the accused's right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, as guaranteed by Article 20 (4) (d) of the Statute.

11. 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.⁸

Should Protective Measures be Granted?

12. The Defence submits that witnesses met by the Defence team expressed fears for their own safety as well as that of their family members, should they testify before the Tribunal. The Defence submits that witnesses residing in Rwanda and the Great Lakes region have justified fears in view of the general insecurity in the region. While the Defence does not provide any material in support of its Motion, it cites Trial Chamber decisions in which it has been found that witnesses could justifiably fear that disclosure of their participation in the

⁴ *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-PT, Decision on Prosecution Extremely Urgent Motion for Protective Measures (TC), 16 January 2009, paras. 3-4; *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.

⁵ *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. 28.

⁶ *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. 10; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006 para. 7.

⁷ *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8; *Prosecutor v. Bagosora et al.*, Case No. ICTR-91-48-T, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

⁸ Rule 75 (F).



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proceedings of this Tribunal would threaten their safety and security.⁹ The Defence further relies on a report from May 2007 of an expert witness, André Guichaoua, in relation to the fears of witnesses in Rwanda, as well as that of Professor Filip Reyntjens dated 15 July 1998 with regard to witnesses residing abroad, including those residing in Europe.¹⁰

13. In addition, the Defence refers to the affidavit of Prosecution Investigator Felix Bide, annexed to the Prosecution's motion for protective measures filed on 29 January 2009,¹¹ and which the Chamber took into consideration in its Prosecution Protective Measures Decision.¹² Mr. Bide's affidavit states:

"... witnesses who participate in ICTR investigations and prosecution face a high potential of reprisals in the form of death threats, intimidation and actual physical harm arising from their said participation in the Tribunal process. This holds equally for family members of such witnesses [...] the security threat for potential witnesses and their family members remains the same regardless of where the witnesses are geographically located: inside or outside Rwanda [...] That some potential witnesses are detained prisoners in Rwanda and I believe that the security threat that these witnesses and their families face is the same as for witnesses outside detention."¹³

14. The Chamber has reviewed the information provided by the Defence in its Motion. The Chamber notes that the Tribunal decisions and the reports referred to by the Defence are not recent and are general in nature. It does not follow from these decisions and reports that potential Defence witnesses in this case have a real fear which can be objectively justified. The Chamber however notes that the affidavit of Mr. Bide, referred to by the Defence and which notably refers to witnesses' fears regardless of their location, is recent and based on Mr. Bide's "day to day contact with the people of Rwanda, including potential witnesses."¹⁴ Additionally, the Chamber is mindful of its Prosecution Protective Measure Decision based on the affidavit of Mr. Bide, and giving due regard to the rights of the Accused and the principle of equality of arms, the Chamber considers that the granting of protective measures to Defence witnesses in this case is warranted.

Which Protective Measures should be Granted?

15. The Defence requests a number of protective measures listed as numbers (i) to (x) in its Motion. These measures are almost identical to those granted by the Chamber to Prosecution witnesses, with the exception of measures (ii) and (v) requested by the Defence.

16. Requested measure (ii) provides that confidential information regarding a witness' identity or the identity of his or her family members ("identifying information"), should only be provided by the Registry to its staff within the Witness and Victims Support Section ("WVSS"). The Chamber considers that measure (ii) is unworkable and unnecessary.¹⁵ Members of the Registry who are not part of WVSS may be called upon to provide assistance

⁹ Motion, paras. 14-17.

¹⁰ Motion, paras. 18-19 and 24-25.

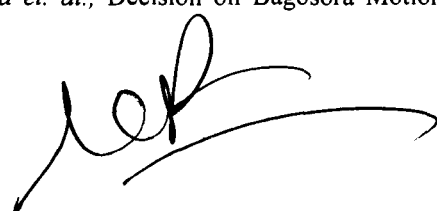
¹¹ *Ntawukulilyayo*, Prosecution Motion for Protective Measures, 29 January 2009 ("Prosecution Motion for Protective Measures"), Annex A.

¹² Decision of 6 February 2009, paras. 5-6.

¹³ Motion, paras. 20-21 and Prosecution Motion for Protective Measures, Annex A, paras. 6-8 of the Affidavit.

¹⁴ Prosecution Motion for Protective Measures, Annex A, para. 5.

¹⁵ See for example, *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 10; *Prosecutor v. Bagosora et. al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 5.



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for these witnesses in respect of their appearance and protection. Confidential information is handled by the Registry in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties. Accordingly, the Chamber will not grant requested measure (ii).

17. With regard to measure (v), the Defence requests that identifying information be disclosed to the Prosecution no sooner than 21 days before the testimony of the protected witness. The Chamber however considers that such "rolling disclosure" is unnecessary in the present circumstances of a relatively short single accused trial. Further, the Chamber recalls that "rolling disclosure" was not granted in relation to the identifying information of Prosecution protected witnesses. Accordingly, the Chamber considers it appropriate in this case that the identifying information of all Defence witnesses should be disclosed to the Prosecution no later than 21 days prior to commencement of the Defence case.

FOR THESE REASONS, the Chamber

ORDERS that the confidentiality of the Defence Motion be lifted by the Registrar;

GRANTS IN PART the Defence Motion and,

ORDERS that the following protective measures shall apply to Defence witnesses and that, in accordance with Rule 75 of the Rules, these measures shall remain in force unless the Chamber orders otherwise:

I. The pseudonyms to be designated by the Defence 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 Prosecutor, or any person working for the Prosecution, 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 Prosecution team in this case and any representative acting on its behalf shall notify the Defence in writing if it wishes to contact any protected witness and, if the witness



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consents, the Defence shall facilitate such contact together with the Witnesses and Victims Support Section.

VIII. The Prosecution 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 Prosecution shall provide the Registry with a designation of all persons working on the Prosecution 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 Prosecution team and to confirm in writing that such person has remitted all material containing identifying information.

X. The Defence shall disclose the identifying information of the protected witnesses to the Prosecution no later than 21 days prior to the commencement of the Defence case, in order to allow the Prosecution adequate time for preparation, pursuant to Rule 69 (C) of the Rules.

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

Arusha, 11 May 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

