



UNITED NATIONS  
NATIONS UNIES

ICTR-00-55A-T  
18-08-2009  
(983-979)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Judge Dennis C. M. Byron, Presiding  
Judge Gberdao Gustave Kam  
Judge Vagn Joensen

**Registrar:** Mr. Adama Dieng

**Date:** 18 August 2009

**THE PROSECUTOR**

v.

**Tharcisse MUVUNYI**

*Case No. ICTR-00-55A-T*

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JUDGE DENNIS C. M. BYRON  
JUDGE GBERDAO GUSTAVE KAM  
JUDGE VAGN JOENSEN  
REGISTRAR ADAMA DIENG

**DECISION REGARDING THARCISSE MUVUNYI'S APPLICATION FOR  
PROTECTIVE MEASURES**

**Office of the Prosecutor:**

Charles Adeogun-Phillips  
Ibukunolu Alao Babajide

**Counsel for the Accused:**

William E. Taylor III  
Abbe Jolles

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## INTRODUCTION

1. On 21 July 2009, the Defence filed a motion for protective measures for Witnesses M0103, M037, M028 and M099.<sup>1</sup> In support of the Motion the Defence incorporated, by reference, an earlier motion for protective measures filed in September 2005.<sup>2</sup> By Order of the Chamber,<sup>3</sup> the Defence filed further submissions in support of the Motion on 4 August 2009.<sup>4</sup>
2. The Prosecution has not responded to the Motion.

## DELIBERATIONS

### *Preliminary Issues*

3. On 8 May 2009, the Chamber issued a Scheduling Order establishing various pre-trial deadlines for both the Prosecution and Defence, which included a directive to the Defence to file any motion for protective measures by 26 June 2009.<sup>5</sup> On 22 June 2009, the Chamber orally adjusted the Scheduling Order and ordered the Defence to file its Pre-Defence Brief no later than 6 July 2009.<sup>6</sup>
4. The Chamber notes that no explicit adjustment to the Scheduling Order was made regarding filing preliminary motions, including any Defence motion for protective measures. The Chamber accepts that it would have been logical for the Defence to assume its deadline to file a motion for protective measures was extended in tandem with the deadline for filing its Pre-Defence Brief, since the latter included a list of its witnesses. Nonetheless, the current Motion was filed roughly two weeks after the adjusted deadline. Accordingly, the Defence should have sought leave to file out of time. However, given the importance of the current Motion, and the imminent commencement of the Defence case, the Chamber will nonetheless address it.

<sup>1</sup> Tharcisse Muvunyi's Application for Protective Measures for Witnesses Who Will Testify at Trial Scheduled to Commence August 24, 2009, filed 21 July 2009 ("Motion").

<sup>2</sup> Tharcisse Muvunyi's Motion for Protection of Defence Witnesses, filed 30 September 2005.

<sup>3</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A ("Muvunyi"), Interim Order Regarding Motion for Protective Measures, 3 August 2009.

<sup>4</sup> Submissions Regarding Necessity of Ordering Protective Measures for Witness MO103, filed confidentially 4 August 2009 ("Further Submissions").

<sup>5</sup> *Muvunyi*, Scheduling Order, 8 May 2009, p. 3 ("Scheduling Order").

<sup>6</sup> T. 22 June 2009 pp. 53-54.

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5. The Chamber further notes that the Defence intends to call two "expert" historians.<sup>7</sup> While it is not clear that these two witnesses are being called as experts, the Chamber recalls that pursuant to Rule 94 *bis* (A), the full statement of any expert witness called by a party shall be disclosed to the opposing party not less than twenty-one days prior to the date on which the expert is expected to testify. Given that the Defence case is scheduled to commence on 24 August 2009, the Defence should have disclosed to the Prosecution the full statements of its experts by now. The Defence is accordingly ordered to indicate within two days of the date of this Decision if Witnesses MO101 and MO102 are being called as factual witnesses or expert witnesses; in case these Witnesses are called as expert witnesses, the Defence is ordered to comply with Rule 94 *bis* (A) within two days of the date of this Decision.

6. The Chamber further requests the Defence to immediately provide the full identifying information for all of its witnesses to the Prosecution to the extent that this has not been done, and to cooperate fully with the Victims and Witnesses Support Section ("WVSS").

7. Finally, the Defence is warned pursuant to Rule 46 (A) that any disregard for the Orders and Rules of the Tribunal will not be tolerated by the Chamber.<sup>8</sup>

#### *Protective Measures*

8. Article 21 of the Statute, and Rules 69 and 75 of the Rules provide for the protection of victims and witnesses. 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. Pursuant to Rule 75 (A):

A Judge or a Chamber may [...] 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.

9. Measures for the protection of witnesses are to be determined on a case-by-case basis. The jurisprudence of this Tribunal has consistently required that witnesses for whom protective measures are sought must have a real fear for their safety or the safety of their

<sup>7</sup> Accused Tharcisse Muvunyi's Pre-Defence Brief, filed 6 July 2009, paras. 23.9 and 23.10.

<sup>8</sup> *Muvunyi*, Order for the Transfer of Prosecution Witnesses from Rwanda, 22 May 2009; *Muvunyi*, Order to Comply with Scheduling Order, 26 May 2009.

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family, and that there must be an objective justification for this fear. Subjective fears of potential witnesses are not *per se* sufficient.<sup>9</sup>

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. 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.<sup>10</sup>

11. Pursuant to Rule 75(F) of the Rules, once protective measures have been ordered in respect of a witness in any proceeding before the Tribunal, such measures remain in force unless and until they are rescinded, varied or augmented by a Chamber in accordance with the Rules.

12. The Chamber notes that protective measures for Witnesses M037 and M028 were granted in the first trial of Tharcisse Muvunyi, along with Witnesses MO01, MO31, MO69 and MO78.<sup>11</sup> The Chamber has also received confirmation from WVSS that protective measures were granted to Witness M099 in another proceeding before this Tribunal.<sup>12</sup> Pursuant to Rule 75(F), the protective measures previously granted to Witnesses M037, M028 and M099 continue in force during the present proceedings.<sup>13</sup>

13. With respect to Witness M0103, the Defence submits that although the witness faces no specific threats, her unique position requires protective measures. The Defence requests that Witness MO103 be granted a pseudonym and that her country of residence not be revealed.<sup>14</sup> The Chamber does not accept the Defence submission that the unique position of Witness MO103 requires that she testify with the protection of a pseudonym; indeed, this position may be relevant to assessing her testimony. However, the Chamber recalls that Rule 75 (A) provides that the Chamber may grant appropriate measure to safeguard the privacy of

<sup>9</sup> *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT (“Nshogoza”), Decision on Prosecutor’s Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008, paras. 5-8 and cases cited therein; *The Prosecutor v. Iephonse Hatekegimana*, 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, paras. 15-16.

<sup>10</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion for Protective Measures, 11 May 2009, para. 10 and cases cited therein; *Nshogoza*, Decision on Prosecutor’s Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008, paras. 5-8.

<sup>11</sup> *Muvunyi*, Decision on Tharcisse Muvunyi’s Motion for Protection of Defense Witnesses, 20 October 2005.

<sup>12</sup> Motion, para. 2.

<sup>13</sup> See *Muvunyi*, Order Regarding Protective Status of Witnesses, 29 May 2009, para. 7.

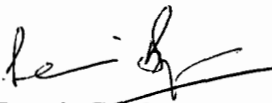
<sup>14</sup> Further Submissions, paras. 3-4.


a witness. As such, the Chamber accepts that it would be appropriate not to reveal Witness MO103's country of residence.

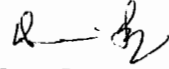
**FOR THE FORGOING REASONS, THE CHAMBER**

- I. GRANTS** the Defence's Motion in part;
- II. FINDS** that the protective measures previously granted to Witnesses M028, M037 and M099, as well as Witnesses MO01, MO31, MO69 and MO78, remain in force throughout the present proceedings;
- III. ORDERS** that Witness MO103's country of residence be kept confidential;
- IV. ORDERS** the Defence to indicate within two days of the date of this Decision if Witnesses MO101 and MO102 are being called as factual or expert witnesses; if these Witnesses are being called as expert witnesses, **ORDERS** the Defence to comply with Rule 94 *bis* (A) within two days of the date of this Decision;
- V. ORDERS** the Defence to provide the full identifying information for all of its witnesses to the Prosecution to the extent that this has not been done, and to cooperate fully with WVSS; and
- VI. WARNS** the Defence, pursuant to Rule 46 (A), to comply with the Orders and Rules of this Tribunal.

Arusha, 18 August 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

