



**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: 30 October 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON PROSECUTION ORAL MOTION FOR RULE 77
INVESTIGATION RELATED TO WITNESS ANAF**

Office of the Prosecutor

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

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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 Oral Motion for an investigation under Rule 77 related to Witness ANAF, proffered on 1 October 2009;¹

CONSIDERING the Defence’s oral assent to the Prosecution motion;²

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

NOW DECIDES the Motion pursuant to Rule 77 of the Rules on the basis of the oral submissions of the Parties.

INTRODUCTION

1. On 30 September 2009, the Prosecution informed the Chamber that protected Prosecution Witness ANAF had expressed concern about her security to members of the Prosecution team. The Witness informed the Chamber, *inter alia*, that an individual had approached the Witness in June 2009 who knew the Witness would be testifying in this case and was aware of the contents of the Witness’ statement, and told the Witness that the statement was well known; and that the Witness’ spouse was threatened by another individual three days later.³

2. The Chamber instructed the Witness and Victim Support Services (“WVSS”) unit to follow up on the Witness’ concerns, and the Prosecution subsequently moved for an investigation under Rule 77 of the Rules.⁴

SUBMISSIONS OF THE PARTIES

3. The Prosecution offers four primary factual submissions based on the witness’ closed session testimony: first, that several people approached a protected witness; second, that several of them seemed aware of the contents of the witness’ statement; third, that the people in question appeared to have information about other protected witnesses; and fourth, that threats were made against ANAF and the witness’ family.⁵

4. As a legal matter, the Prosecution submits that the Chamber’s order of 6 May 2009, ordering protective measures for Prosecution witnesses and their families, has been

¹ T. 1 October 2009, p. 34 (ICS).

² T. 1 October 2009, p. 35 (ICS).

³ T. 30 September 2009, p. 35-36.

⁴ A WVSS representative averred for the record that WVSS has opened a file regarding Witness ANAF’s concerns and will conduct further investigations. T. 1 October 2009, p. 32 (ICS).

⁵ T. 1 October 2009, p. 33-34 (ICS).

violated. The Prosecution further submits that this violation triggers issues of interference with a protected witness under Rule 77 of the Rules.⁶

5. The Prosecution avers that an offence has been committed in Rwanda because of the threats against Witness ANAF and the Witness' family.⁷

6. The Defence supports an investigation being ordered, but asserts that it would be preferable for the investigation to be conducted by an independent third party.⁸

7. The Prosecution expressed its agreement with the appointment of an independent investigator.⁹

DELIBERATIONS

8. The Chamber notes that Rule 77 (C)(ii) of the Rules directs that when a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may "direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings."

9. The Chamber further notes that the Parties both expressed on the record their support for the appointment of an independent investigator.

10. Under Rule 77 (A)(iv), a person may be in contempt of the Tribunal, *inter alia*, where that person "threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness."

11. The Chamber recalls that Witness ANAF is a protected witness. Accordingly, pursuant to the Chamber's decision of 6 May 2009, the Witness is entitled to certain protective measures. Most pertinently:

- (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[.]¹⁰

⁶ T. 1 October 2009, p. 34 (ICS).

⁷ T. 1 October 2009, p. 34 (ICS).

⁸ T. 1 October 2009, p. 36-37 (ICS).

⁹ T. 1 October 2009, p. 37 (ICS).

¹⁰ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, filed 6 May 2009, p. 7.

12. The Chamber considers that Witness ANAF's testimony that a member of the public was aware that the witness would be testifying in this case and aware of the contents of the witness' statement constitutes reason to believe there may have been a violation of the protective order regarding Witness ANAF. The Chamber further notes that the alleged threats against Witness ANAF render the Witness' allegations a particularly serious matter and may themselves be grounds for a finding of contempt pursuant to Rule 77 (A)(iv). Therefore, after reviewing the Witness' testimony and the submissions of the Prosecution, the Chamber considers that there is reason to believe that one or more persons may be in contempt of the Tribunal, as required by Rule 77 (C).

13. The appointment of an independent investigator is generally appropriate "where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct."¹¹ In this case, the Defence asserted that if the Prosecution were to investigate Witness ANAF's allegations, the Prosecution would be forced to play a dual role by preparing witnesses and simultaneously investigating allegations related to a witness' security, and the Prosecution agreed to an independent investigator in response.¹²

14. The Parties agree the appointment of an independent investigator is appropriate in this case. The Chamber also agrees that the appointment of an independent investigator would, under the circumstances, best protect the interests of justice. Thus, the Chamber will grant the Prosecution motion and direct the registry to order the appointment of an independent investigator.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Prosecution's oral motion for an investigation under Rule 77;

ORDERS an investigation into possible violations of the Chamber's 6 May 2009 order granting protective measures for Prosecution Witness ANAF;

DIRECTS the Registrar pursuant to Rule 77 of the Rules to appoint an independent *amicus curiae* to investigate the allegations:

- (1) that threats were made against Witness ANAF and her family,
- (2) that persons who were not permitted access to Witness ANAF's identity under the Chamber's 6 May order were aware of the Witness' identity and status as a witness in this case; and
- (3) that several of those persons were familiar with the contents of the Witness' statement and the identities of other protected witnesses in this case.

¹¹ Rule 77(C) (ii).

¹² T. 1 October 2009, p. 36-37 (ICS).

The Chamber further directs the Registrar to instruct the appointed *amicus curiae* to report back to the Chamber as soon as possible, and advise the Chamber as to whether there are sufficient grounds for instigating proceedings against any person or party for contempt of court as a result of the above-referenced allegations.

Arusha, 30 October 2009

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]