



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-05-86-T

02-11-2009

(2678-2672)

OR: ENG

TRIAL CHAMBER III

Before Judges: Vagn Joensen, Presiding

Registrar: Adama Dieng

Date: 2 November 2009

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-2005-86-S

JURISDICTION
2009 NOV -2 P 12:35

DECISION ON DEFENCE'S MOTION FOR PROTECTIVE MEASURES

Articles 19 and 20 of the Statute and Rules 69 and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Wallace Kapaya
Patrick Gabaake
Iskander Ismail

Defence Counsel:

Geert-Jan Alexander Knoops
Wayne Jordash
Anne-Marie Verwiel

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INTRODUCTION

1. On 27 October 2009, Michel Bagaragaza filed a motion seeking protective measures for his witnesses.¹ On that same day, Bagaragaza also filed a Motion seeking admission of written statements and other documentary evidence.² Bagaragaza only intends to hear one witness *viva voce*.
2. The Prosecution did not respond to the Motion on protective measures.

DELIBERATION

3. Pursuant to Article 19 (1) of the Statute of the Tribunal ("Statute"), Trial Chambers shall ensure that proceedings before the Tribunal are conducted with due regard for the protection of victims and witnesses. Article 21 of the Statute and Rules 69 and 75 of the Rules of Procedure and Evidence ("Rules"), provide for the protection of victims and witnesses.
4. Pursuant to Rule 69, a party may apply to a Trial Chamber 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) of the Rules, a Judge or a Chamber may order appropriate measures to safeguard the privacy and security of victims and witnesses. Measures for the protection of witnesses are to be determined on a case-by-case basis based on a showing that witnesses for whom protective measures are sought must have a real fear for their safety or the safety of their family, and that there must be an objective justification for this fear.³ 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

¹ Public Defence Motion for Protective measures with Confidential Annex, filed on 27 October 2007 ("Motion").

² Public Defence Motion for Admission of Written Evidence With Confidential Annex, filed on 27 October 2009 ("Defence Motion for Admission of Written Evidence").

³ *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. Idelphonse 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.

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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.⁴

5. 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.

6. Michel Bagaragaza submits that there is a real and substantial danger that Defence witnesses will be threatened, assaulted or killed if their identities are revealed. Bagaragaza further submits that the dangers outlined in the agreed facts between the Parties and in the Defence Motion for Admission of Written Evidence are real and extremely serious and apply to any witness who would testify or offer a written statement on behalf of the Accused.⁵ In support of his application, Bagaragaza attaches an affidavit from his investigator.⁶

7. Michel Bagaragaza then proceed to list all the protective measures he seeks the Chamber to order for his witnesses, including that the Chamber hear the testimony of his *viva voce* witness in closed session.⁷

8. The Chamber has reviewed the information provided by the Defence and considers that Michel Bagaragaza has demonstrated that the potential Defence witnesses in this case have a real fear that can be objectively justified.

9. Consequently, the Chamber considers that information that would lead to the identification of a witness should not be disclosed to the public.

10. With respect to Bagaragaza's request concerning the modalities in case the Prosecution wishes to meet with a Defence witness, the Chamber notes that any such meeting prior to the scheduled sentencing hearing will only be feasible as to the one *viva voce* witness and would take place in Arusha wherefore the protection of that witness does not require any other measure than the Prosecution notifying the Defence whereupon the Defence together with the Witnesses and Victims Support Section shall facilitate the meeting.

11. Furthermore, should the Prosecution at a later stage wish to meet with protected witnesses, the Chamber does not find that the protection of the witnesses require other

⁴ *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.

⁵ Motion, para. 4.

⁶ Annex 1 to Motion (confidential).

⁷ Motion, para. 6.

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measures than that the Prosecution shall notify the Defence in writing, whereupon the Defence shall facilitate such contact together with the Witnesses and Victims Support Section.

12. With respect to Bagaragaza's request that his *viva voce* witness be heard in closed session, the Chamber will hear the witness on this issue in closed session and then decide, if it is warranted to hear the full testimony of the witness in closed session.

13. Notwithstanding the foregoing, the Chamber considers that protective measures that may already have been ordered in other proceedings before this Tribunal for any of the Defence witnesses shall not be varied.

FOR THESE REASONS, THE CHAMBER

- I. GRANTS** in part the Defence Motion; and
- II. DECIDES** that the protective measures for witnesses already ordered in other proceedings before this Tribunal shall not be varied; and
- III. ORDERS** that the following protective measures shall apply to other Defence witnesses and that, in accordance with Rule 75 of the Rules, these measures shall remain in force until 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.

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(iv) No person shall disclose identifying information of protected witnesses or any information that might lead to the identification of a witness to the public or the media.

(v) No person, other than the Tribunal's Audio and Video Section, 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.

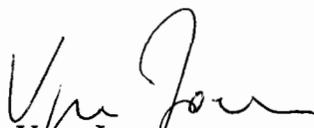
(vi) The Prosecution shall notify the Defence in writing if it wishes to contact any protected witness and, if the witness consents, the Defence shall facilitate such contact together with the Witnesses and Victims Support Section.

(vii) The Prosecution shall keep confidential all information identifying any protected witness, and shall not, directly or indirectly, share, discuss or reveal any such information.

(viii) 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.

IV. DECIDES that it will assess in closed session at the beginning of the hearing on Tuesday 3 November 2009 whether there is a need for the Defence witness who will testify in court to testify fully in closed session.

Arusha, 2 November 2009, done in English.


Vagn Joensen
Presiding Judge

[Seal of the Tribunal]

