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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: 09 February 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON DEFENCE URGENT
MOTION FOR WITNESS PROTECTIVE MEASURES

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 "Chamber");

BEING SEIZED of the "Defence Urgent Motion for Witness Protective Measures", filed on 15 December 2009 (the "Motion");

CONSIDERING the "Prosecutor's Response to Defence Urgent Motion for Witness Protective Measures", filed on 18 December 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 Rules 69 (C), 73 (A) and 75 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. The Trial Chamber granted protective measures for Prosecution witnesses on 7 May 2009.¹ The trial started on 22 September 2009. The Trial Chamber heard six Prosecution witnesses and adjourned on 22 October 2009 until 25 January 2010 to hear the remaining 11 Prosecution Witnesses.

SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence Motion seeks the issuance by the Chamber of a set of protective measures to be applied to protect potential Defence witnesses. It submits that its request is meant to guarantee the safety and security of potential Defence witnesses and their families as soon as possible.² It further asserts that the testimonies of the potential Defence witnesses for whom protection is sought are fundamental to the rights of the Accused.³

3. The Defence submits that its Motion is similar to previous motions brought by both Parties, which were all granted in light of the situation that prevailed in Rwanda since 1994 and the conditions of Defence investigations and attempts to secure witness testimonies.⁴

¹ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7 May 2009.

² Motion, para. 37.

³ Motion, para. 39.

⁴ Motion, para. 16.

4. Witnesses for whom protective measures are sought live in and outside of Rwanda. They have all expressed their specific and strong concerns for their own and their family's safety and security, should they testify before this Tribunal.⁵ A majority of the potential Defence witnesses, including those living outside of Rwanda, will not testify until a decision issuing protective measures for them and their family is rendered.⁶ The Defence repeats the submissions made by the Prosecution in its earlier motion for protective measures⁷ and contends that there is a real substantial danger that potential Defence witnesses will be threatened, assaulted or killed if their identities are revealed and the disclosure of their identities could lead to dramatic consequences for these persons and their families upon their return to Rwanda.⁸ Some witnesses living in Rwanda explained to the Defence that they had been threatened to be denounced by other members of the population were they to testify, and that they feared to be cut from government subsidy programmes and deprived of survivors' funds as a result of their testimony.⁹ The Defence asserts that the fears expressed by potential Defence witnesses are genuine and objectively justified.¹⁰

5. The Defence cites a decision in the *Prosecutor v. Simba* case stating that "evidence of the volatile security situation in Rwanda and of potential threats against Rwandan living in other countries indicates that witnesses could justify fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security."¹¹ It further asserts that the situation has not changed since this decision was issued and nothing indicates that witnesses face a lesser risk today.¹² The Defence submits that the security concerns of potential Defence witnesses are now of common knowledge and have been thoroughly documented. It refers to several reports and briefs by Human Rights Watch and Amnesty International submitted in the annexes to the Motion.¹³ The Defence avers that the Appeals Chamber has recently recognised the existence of serious fears expressed by Defence witnesses in the context of Rule 11 bis decisions.¹⁴ It further notes that Trial Chambers have recently upheld identical Defence affirmations, which provided justification for the issuance of protective measures to Defence witnesses.¹⁵

6. According to the Defence, the climate of insecurity in Rwanda is particularly felt in the northern region, bordering the Democratic Republic of the Congo, due to the armed conflict around Goma and provides further reason to ensure the security of Defence

⁵ Motion, paras. 17-18.

⁶ Motion, paras. 19-20.

⁷ Prosecution's Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others, 24 April 2009.

⁸ Motion para. 21.

⁹ Motion, para 22.

¹⁰ Motion, para. 25.

¹¹ Motion, para. 26, citing *Prosecutor v. Simba*, Case No. ICTR-01-76, Decision on Defence Reauest for Protection of Witnesses, 25 August 2004, para. 6.

¹² *Ibid.*

¹³ Motion, paras. 28-30 and annexes 1 to 8.

¹⁴ Motion, para. 31, citing *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decisionon Referral Under Rule 11 bis, 9 October 2008.

¹⁵ Motion, para. 32.

witnesses, many of whom live or have relatives who live in the northern Prefecture of Gisenyi, very close to Goma.¹⁶ It asserts that the Trial Chamber in the Ntawukulilyayo case took into account the Prosecution investigator's affidavit, along with the rights of the Accused and the equality of arms in granting protective measures to Defence witnesses.¹⁷

7. Further, the Defence argues that, following the Trial Chamber's decisions on the cooperation of France and Belgium, the Defence intends to meet with representatives of both countries, which requires the Defence to provide these national authorities with an order of the Trial Chamber addressing the issue of protective measures as a prerequisite in order to be able to meet with these persons.¹⁸

8. The Defence recalls that it did not object to the protective measures sought by the Prosecution provided the same conditions would apply to Defence witnesses.¹⁹ According to the Defence, the measures sought are substantially similar to those ordered with regard to Prosecution witnesses and there is no possible prejudice to the Prosecution.²⁰ Further, trial fairness favours similar protective measures for Prosecution and Defence witnesses and any decision to the contrary would contradict the principle of equality of arms.²¹

9. The Defence thus seeks the following protective measures for two types of potential Defence witnesses: those residing inside or outside Rwanda and members of their families, who have not affirmatively waived their rights to protective measures; and the French and Belgian representatives referred to in Defence motions requesting the cooperation of France and Belgium, or any other representative from countries with whom the Defence is seeking cooperation and that requires anonymity.²²

- (i) The attribution of pseudonyms for the witnesses it intends to call;
- (ii) The sealing and confidentiality of identifying information for the witnesses;
- (iii) The expurgation and sealing of identifying information contained in existing records of the Tribunal;
- (iv) The confidentiality of the part of the proceedings which may reveal the identity of the witnesses is to be protected from being revealed by the public or the media;
- (v) The Prosecution is to keep and protect confidential and identifying information of witnesses;

¹⁶ Motion, para. 33. The Defence further quotes the annexes to the Prosecution's Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others, filed on 24 April 2009 in which the Chief of the Investigations Section in Kigali states that there is still great cause for concern regarding the security situation in Rwanda, and particularly Gisenyi, Motion, paras. 34-35.

¹⁷ Motion, para. 36, citing *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion for Protective Measures, 11 May 2009, paras. 13 and 14.

¹⁸ Motion, para. 38.

¹⁹ Motion, para. 40.

²⁰ Motion, para. 41.

²¹ Motion, paras. 42-43.

²² Motion, para. 44.

- (vi) The Prosecution or any of its representatives shall not make contact with a protected Defence witness and/or his or her family without authorization from the Chamber and after duly notifying the Defence and obtaining consent from the witness and ensuring that a representative of the Defence is present at the interview;
- (vii) The Prosecution is not to attempt to determine the identity of any protected witness or his or her family or encourage or otherwise aid anyone in doing so;
- (viii) The Prosecution shall notify its witnesses and their family members that they are not to threaten anyone willing to testify for the Defence;
- (ix) The Prosecution shall provide and update the Defence and WVSS with a list of officially authorized persons who will have access to any identifying information and guarantee that if any of the said person leave Prosecution they have remitted all material containing this information;
- (x) The Prosecution shall inform immediately the Defence and WVSS if it discloses the list of Defence witnesses to any Rwandan authority or requests the cooperation of such authority and should provide the Defence with the name and contact details of the Rwandan authority;
- (xi) The Defence shall disclose identifying information to the Prosecution upon court order to do so, no more than 21 days before the witnesses are scheduled to testify.²³

Prosecution Response

10. The Prosecution submits that, at about one third through the Prosecution's case, it is premature for the Defence to ask for protective measures for potential Defence witnesses.²⁴ The Prosecution adds that the Defence is not yet in a position to determine who the potential witnesses are, where they are or what they will testify on.²⁵ Thus, the Defence is trying to request the Chamber to issue protective measures in the abstract, in respect of unidentified witnesses and their families.²⁶
11. The Prosecution submits that the Chamber can only entertain such a Motion after the closing of the Prosecution's case and following the determination of a possible Defence Motion pursuant to Rule 98*bis* and the Pre-Defence Conference.²⁷
12. The Prosecution further contends that the Defence submitted an incomplete and vague alibi notice on 23 September 2009, which has been prejudicial to the preparation of the Prosecution's case in that the Prosecution is attempting to determine who the possible alibi witnesses are. Granting the Motion for protective measures at this stage would further hinder the Prosecution's investigations with regard to the alibi in that the Prosecution must investigate an alibi and that this entails contact with potential Defence

²³ Motion, para. 45.

²⁴ Response, para. 6.

²⁵ Response, paras. 7-8.

²⁶ Response, para. 9-10.

²⁷ Response, para. 11.



witnesses.²⁸ Further, were protective measures to be granted at this stage for the Defence, they would be impossible to enforce for the Prosecution, as they would infringe upon its right and duty to investigate.²⁹

13. Lastly, the Prosecution contends that due to the fluidity, vagueness and arbitrariness of the measures requested in paragraphs 45 (vii), (viii), (ix) and (x) of the Motion, it is unduly difficult if not impossible to enforce them.³⁰

14. The Prosecution thus requests the Chamber to dismiss the Motion on the grounds that it is premature, that it relates to unidentifiable witnesses and their families, who are not located, and that it seeks unreasonable measures, some of which cannot be enforced and conflict with the Statute and the Rules of this Tribunal.³¹

DELIBERATIONS

15. With respect to the timing of the Motion, the Chamber considers that it is not premature. There is no legal requirement for the filing of a Defence Motion of protective measures for witnesses after the close of the Prosecution case. The Chamber notes that in certain cases, protective measures to potential Defence witnesses have been granted before the Prosecution case ended.³²

16. The Chamber recalls 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.³³

17. 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

²⁸ Response, para. 12.

²⁹ Response, para. 13.

³⁰ Response, para. 14.

³¹ Response, para. 15.

³² See, e.g., *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members, 20 March 2001. See also *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Defence Motion for Protective Measures, 25 February 2009, see also in the same case Setako Defence Motion for Witness Protection Measures, para. 1, protective measures were issued about half way through the Prosecution's evidence.

³³ See Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7 May 2009, para. 14.

there is an objective justification for this fear. Subjective fears of potential witnesses are not *per se* sufficient.³⁴

18. 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.³⁵

19. 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.³⁶

20. The Trial Chamber notes that thus far, the Defence has not disclosed any list of witnesses. However, with regard to the inclusion of witnesses the Defence 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 determined³⁷ and deems this measure appropriate in the present case.

³⁴ See Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7 May 2009, para. 15, citing *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-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.

³⁵ *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.

³⁶ *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.

³⁷ *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; *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Defence Motion for Protective Measures, 25 February 2009.

21. Thus, the Chamber will now 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 and, if so, which measures to impose.

22. After reviewing the relevant information provided by the Defence and bearing in mind the rights of the Accused to a fair trial and, *inter alia*, the equality of arms principle, the Chamber considers that the existence of objective fear on the part of the Defence witnesses who reside in or out of Rwanda and the Great Lakes Region has been established, as the relevant reports submitted by the Defence show the occurrence of frequent violent incidents perpetrated against 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.

23. The Chamber notes that a number of decisions extend some of the protection granted to witnesses to their family members.³⁸ In view of the frequent violent incidents perpetrated against potential witnesses and the circumstances of this case, the Chamber considers that adequate protection of Defence witnesses also requires protection of members of their families.

24. Regarding the notice of alibi, the Chamber notes that the issue of disclosure of the alibi witnesses' particulars is a separate issue which will be dealt with in a separate decision. However, measures ordered to protect witnesses coming to testify before the Tribunal are in no way to be interpreted as creating a situation in which the parties could avoid their obligations pursuant to the Rules and the Statute.

25. The Chamber further notes that it has a duty to preserve the equality of arms in the exercise of its discretion. In its Decision on Prosecution's Motion for Protective Measures,³⁹ the Trial Chamber had ordered the Prosecution to disclose the particulars of the protected witnesses to the Defence 30 days before trial. The Chamber thus orders that in the same timeframe of 30 days prior to the commencement of the Defence case, if it has not been done yet, the identifying information of all the protected witnesses be disclosed to the Prosecution pursuant to Rule 69 (C) of the Rules.

³⁸ *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).

³⁹ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7 May 2009.

26. However, the Chamber considers that the protective measures requested in paragraph 10 (vii), (viii) and (x) are not justified and do not find any support in the Tribunal's caselaw.

27. Lastly, regarding the protective measure requested at paragraph 10 (ix), the Chamber considers that this measure is not necessary since the Prosecution is bound to ensure that confidential information is not disclosed but the mechanism to prevent such disclosure and the range of persons within the Office of the Prosecutor who have such access, rests within its sole discretion.⁴⁰ Consequently, the Chamber grants the Motion, except for the protective measures requested by the Defence in paragraph 10 (vii), (viii), (ix) and (x) of the Motion.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion in part;

ORDERS that the following protective measures shall apply to potential Defence witnesses, as well as to other witnesses the Defence 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 Defence 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;
- (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, nor make any disclosure of the hearings or material which may reveal the identity of the protected witnesses without leave of the Chamber;

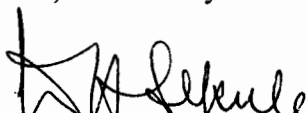
⁴⁰ See *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Defence Motion for Protective Measures, 25 February 2009, para. 8; citing *The Prosecutor v. Bagosora et al.*, Decision Amending Defence Witness Protective Orders, 2 December 2005, para. 5, applying a Decision of the Appeals Chamber in the same case titled Decision on Interlocutory Appeals of decision on Witness Protection Orders, 6 October 2005.

- (v) The Prosecution shall notify the Defence in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Defence shall facilitate such contact, in the presence of a representative of the Defence, together with the WVSS;
- (vi) The Prosecution 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 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;


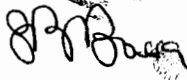
ORDERS the Defence to disclose to the Prosecution no less than 30 days prior to the commencement of the Defence case the identifying information of all the protected witnesses;

DENIES the Motion in all other respects.

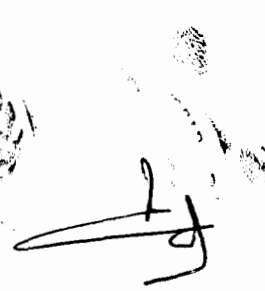
Arusha, 09 February 2010


William H. Sekule

Presiding Judge



Solomy Balungi Bossa

Judge


Mparany Rajohnson

Judge

[Seal of the Tribunal]