



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
18-02-2010
(3077-3069)

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AM

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 18 February 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

PUBLIC

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JUDICIAL DEPARTMENT
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DECISION ON URGENT DEFENCE MOTION FOR PROTECTIVE MEASURES

Article 19, 20 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules

Office of the Prosecution:

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INTRODUCTION

1. On 9 February 2010, the Defence filed a motion seeking protective measures for all potential Defence witnesses living in Rwanda and elsewhere.¹
2. On 9 February 2010, the Prosecution responded to the Defence motion for protective measures.²
3. On 12 February 2010, the Defence filed its reply.³

SUBMISSIONS OF THE PARTIES*Defence Motion*

4. The Defence recalls that the Trial Chamber has already issued protective measures for two Defence witnesses, witness CNAO⁴ and RW-42, and requests that the same protective measures be extended to cover all potential Defence witnesses.⁵
5. In support of its application, the Defence submits that its witnesses have legitimate fears for their safety and security given the political situation in Rwanda since the events of 1994, and the difficult conditions under which the Defence has had to conduct its investigations and secure testimonies of witnesses.⁶ The Defence notes that its witnesses live not only in Rwanda but in other locations around the world.⁷
6. The Defence notes that potential Defence witnesses have uniformly expressed strong concerns for their personal safety and security as well as that of their relatives in the event they appear to give testimony at the Tribunal.⁸ This includes

¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Defence Urgent Motion for Witness Protective Measures, 9 February 2010. (“Motion”)

² *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Prosecutor’s Response to Defence Urgent Motion for Protective Measures, 9 February 2010. (“Response”)

³ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Nzabonimana’s Reply to Prosecutor’s Response to Defence Urgent Motion for Protective Measures, 12 February 2010. (“Reply”)

⁴ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Decision on the Status of Prosecution Witness CNAO and Associated Protective Measures, 7 December 2009. The Trial Chamber adopted the Pre-trial Chamber protective measures granted to CNAO, *see Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures, 13 February 2009.

⁵ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Decision on Nzabonimana’s Motion for Protection Measures and Deposition of Witness RW-42, 27 October 2009.

⁶ Motion, para. 13.

⁷ Motion, para. 14.

⁸ Motion, para. 14.

fears expressed by potential witnesses living abroad about repercussions against family members still living in the Great Lakes region if they were to testify at the Tribunal. As regards potential witnesses in Europe, the Defence asserts that more than 16 of these witnesses have expressed their reluctance to appear before the ICTR because testifying would place their families in Rwanda in danger of reprisals from the Rwanda authorities.⁹ Finally, some potential Defence witnesses have refused to travel to the Tribunal to testify unless protective measures are guaranteed.¹⁰

7. In support of its Motion, the Defence cites several human rights reports, as well as a report by a Mr. Filip Reyjtjens, alleging that witnesses have been subject to recrimination, arbitrary detention, harassment and false charges following testimony for the Defence in cases involving the 1994 genocide.¹¹ The Defence also cites ICTR jurisprudence recognizing the fears of potential Defence witnesses, particularly those living in Rwanda.¹² Finally, the Defence has appended to its Motion a report from its Lead Investigator in which he describes the fears expressed by potential witnesses and the impact on the work of the Defence team.¹³
8. The Defence therefore moves for an urgent order by the Trial Chamber granting protective measures to all potential Defence witnesses living in Rwanda and elsewhere who have not affirmatively waived their rights to protective measures.¹⁴

Prosecution Response

9. The Prosecution does not object to the protective measures sought by the Defence in paragraph 41 (a) to (i). However, the Prosecution does object to the measures sought in paragraph 41 (j) where the Defence proposes that the prosecution make a written request prior to contacting "... any protected victim or potential defence witnesses," arguing that the term "potential defence witness" is too vague.¹⁵

⁹ Motion, paras 16, 27-28.

¹⁰ Motion, para. 15.

¹¹ Motion, paras. 17-26.

¹² Motion, para. 21 See footnote 13 of Motion quoting numerous ICTR Jurisprudence including *Prosecutor v. Hategekimana*, Decision on Prosecutor's Request for the Referral of the case of Ildephonse Hategekimana to Rwanda (TC), 19 June 2008, para. 67:

¹³ Motion, paras 26-34, and Confidential Annex A.

¹⁴ Motion, para. 40.

¹⁵ Response, para.5 & 7.

10. The Prosecution also objects to the measures sought in paragraph 41 (k) as it refers to Defence disclosure of identifying information about its witnesses following the scheduled 5 March 2010 Status Conference in violation of the Trial Chamber's order of 3 February 2010 instructing that such disclosure take place by 22 February 2010.¹⁶

Defence Reply

11. The Defence notes that, with the exception of paragraphs 41(j) and (k), the Prosecution does not object to the protective measures sought. It agrees to withdraw its request with respect to paragraph 41 (k) of its Motion.¹⁷ With respect to paragraph 41(j), however, the Defence argues that its request is not unreasonable and contends that the protective measures sought are substantially similar to those granted to Prosecution witnesses by the Pre-trial Chamber in a protective measures Order dated 13 February 2009.¹⁸ It further submits that protective measures have been ordered for potential defence witnesses in other cases.¹⁹

DELIBERATIONS

Applicable Law

12. Article 19(1) and 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.²⁰

¹⁶ On 3 February 2010, the Trial Chamber Ordered *the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements and identifying information of each witness whom the Defence intends to call to testify.*

¹⁷ Reply, para. 12.

¹⁸ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures, 13 February 2009.

¹⁹ Reply paras. 8-10.

²⁰ Article 19(1) of the Statute provides, "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the Accused and due regard for protection of victims and witnesses." Article 21 of the Statute states that "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

13. 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.
14. Pursuant to Rule 75(A) “a judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or Victims and Witnesses Support Unit, 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.”
15. Measures for the protection of witnesses are to be determined on a case-by-case basis.²¹ 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.²² These fears may be expressed by persons other than the witnesses themselves.²³
16. In determining whether this fear is justified, the representations made by the parties must be examined in the context of the broader security situation affecting the concerned witnesses.²⁴ However, generalised fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate these fears.²⁵
17. 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

²¹ *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Defence Motion for Protection of Witnesses, 9 February 2006, para. 2; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006 para. 7; *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. 12; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, 25 February 2000, para 4.

²² *Nahimana*, para. 11 (citing *Prosecutor v. Bagosora*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Nutyahaga (TC), 13 September 1999, para. 28); *Rugambarara*, para 9; *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses, 26 July 2006, para. 5; *Bikindi*, para. 7.

²³ *Bikindi*, para. 7.

²⁴ *Kamuhanda*, Protective Measures Decision, para 12 (citing *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, para. 9); *Nahimana*, para 4.

²⁵ *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 (citing *Prosecutor v. Milosević*, Case No. IT-02-54, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7).

measure can secure the desired level of protection.²⁶ Hence, 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.²⁷

18. The Trial Chamber notes that pursuant to Rule 75(F), 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.

Preliminary Matter

19. The Trial Chamber notes that the Defence Reply to its Motion was filed one day later than the official filing date,²⁸ and is therefore out of time. However, the Trial Chamber has decided to consider the submissions made therein in the interests of justice.

Protective Measures

20. The Trial Chamber further notes that the Prosecution does not object to the protective measures requested by the Defence in paragraphs 41 (a)-(i) of its Motion, and that these measures are similar to those accorded to Prosecution witnesses by the Pre-Trial Chamber in its order of 13 February 2009. The Trial Chamber recalls that the evidence of the volatile security situation in Rwanda and the Great Lakes region, as well as the potential for threats against Rwandans living in other countries.²⁹ It therefore accords these measures, as well as those in paragraph 41(j), to those defence witnesses whose identities the Defence will disclose to the Prosecution on or by 22 February 2010 as ordered by this Trial Chamber. The Trial Chamber further considers the issues raised with regard to paragraph 41(k) to be moot because the Defence in its reply agreed to drop this request.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

²⁶ *Renzaho*, para. 28.

²⁷ *Rugambarara*, para. 10; *Bikindi*, para. 7.

²⁸ The Defence filed its Reply on 15 February 2010 (Court Management filing date on the document), yet the official filing date was set for the 12 February 2010.

²⁹ See *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures, 13 February 2009.

GRANTS the Motion in part and;

HEREBY ORDERS the following protective measures to those Defence witnesses whose identities the Defence discloses to the Prosecution on or by 22 February 2010 as ordered by the Trial Chamber; wherever they reside and who have not affirmatively waived their right to protective measures.

- a. That the names, addresses, whereabouts, of, and other identifying information concerning Defence witnesses who are the subject of unredacted disclosure by the Defence shall be sealed by the Registry and not included in public or non-confidential Tribunal records;
- b. That the names, addresses and whereabouts of, and other identifying information concerning the individuals cited above shall be communicated only to the Victims and Witness Support Unit (“WVSS”) personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;
- c. That the Defence shall designate a pseudonym for each Defence witnesses, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time as the Chamber otherwise decides;
- d. That, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals are contained in existing records of the Tribunal, that such information be kept confidential or under seal including, where appropriate, the documents in question;
- e. That disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of these individuals, is prohibited and this order shall remain

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in effect pending a final order and, if appropriate, after the termination of the trial;

- f. That the Prosecution and any other representative acting on its behalf, is prohibited from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than persons working on the immediate Prosecution team;
- g. That the Prosecution shall designate to the WVSS, the Chamber and the Defence the names of all persons working on the immediate Prosecution team who, pursuant to paragraph (e) above, will have access to any information referred to in paragraphs (a) through (d) above, and requiring the Prosecution to advise the Chamber in writing of any changes in the composition of its team and to ensure that any member leaving the Prosecution team has remitted all materials that could lead to the identification of the Defence witnesses;
- h. That the photographing, audio/or video recording, or sketching of any Defence witness at any time or place without leave of the Chamber and the Parties is prohibited;
- i. The Prosecution, and any other representative acting on its behalf, shall make a written request, on reasonable notice to the Defence, the Chamber or a Judge thereof, to contact any protected victims or Defence witness or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, that the Defence shall undertake all necessary arrangements to facilitate such interview.

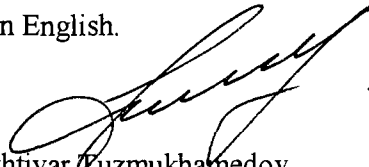
ORDERS that in accordance with Rule 75 of the Rules, these measures shall remain in force unless the Trial Chamber orders otherwise;

DISMISSES the protective measures sought by the Defence in paragraphs 41(k) of its Motion.

Arusha, 18 February 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhatmedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

