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1679-674
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Vagn Joensen
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 4 March 2010

THE PROSECUTOR

v.

Grégoire NDAHIMANA

CASE NO. ICTR-2001-68-PT

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**DECISION ON THE PROSECUTION'S MOTION FOR PROTECTIVE MEASURES
FOR ITS WITNESSES**

*Articles 19, 20 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure
and Evidence*

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
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Defence Counsel for Grégoire Ndahimana:
Bharat B. Chadha
Beth S. Lyons
Marie-Pier Barbeau
Tharcisse Gatarama

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INTRODUCTION

1. On 16 November 2009, the Prosecution filed a motion seeking protective measures for its witnesses.¹ The Defence opposes some of the protective measures sought.²

DELIBERATIONS

2. Pursuant to Article 21 of the Statute, the Tribunal has the duty to provide for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of *in-camera* proceedings and the protection of victims' identities. To this end, Rule 69 of the Rules of Procedure and Evidence provides that under exceptional circumstances, either of the parties may apply to a Trial Chamber to order that the identity of a witness or victim who may be in danger or at risk not be disclosed, until the Chamber decides otherwise.

3. Rule 75 authorises a judge or a Chamber, *proprio motu* or at the request of either party, of the victim or the witness concerned, or of the Victims and Witnesses Support Section, to order appropriate measures to safeguard the privacy and security of victims and witnesses. These measures must be consistent with the rights of the Accused, including the right to a fair trial, and subject to the condition imposed by Rule 69 (C) which requires that the identity of the victim or witness shall be disclosed to the Defence in sufficient time prior to the trial to allow adequate time for preparation of the Defence case.

4. Protective measures for victims and witnesses are granted on a case-by-case basis where the Chamber determines the appropriateness of such protective measures.

5. The Prosecution is seeking protective measures for the following witnesses: CBK, CDL, CBR, CBN, CBY, CBI, CBS, YAU, CDZ, CNT, CNJ, CBT, CDK and CNA.³ The Prosecution has attached numerous annexes to support its Motion, including newspaper and news agency articles, reports from various NGOs and the United States Department of State,

¹ The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 16 November 2009 ("Motion").

² The Defence Response to the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 23 November 2009 ("Response"); Corrigendum to the Defence Response to the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, filed on 26 November 2009.

³ Motion, paras. 6 and 20.

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and an affidavit from the Commander of the Investigation Section of the Office of the Prosecutor.⁴

6. Grégoire Ndahimana opposes that the Defence be refrained from contacting Prosecution witnesses and their family members⁵ or from trying to determine the identity of witnesses⁶. Ndahimana submits that the Prosecution has not demonstrated there are exceptional circumstances as set out in Rule 69 and claims that the requested measures are inconsistent with the rights of the Accused to a fair trial.

7. The Chamber notes that at an informal meeting with the Parties on 23 October 2009, the Prosecution mentioned that some of the witnesses it would call to support its case have already testified before this Tribunal. However, in its motion, the Prosecution does not refer to the protection that some of its witnesses may already be entitled to from previous decisions of this Tribunal.⁷

8. The Chamber recalls that Rule 75 (F) (i) provides that once protective measures have been ordered with respect to a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rule. Rule 75 (G) sets out the methods by which a party may apply to rescind, vary or augment protective measures ordered in the first proceedings. Accordingly, pursuant to Rule 75 (G) (i), that party must apply to any Chamber, however constituted, remaining seized of the first proceedings. If no Chamber remains seized of the first proceedings, Rule 75 (G) (ii) provides that the Chamber seized of the second proceedings has jurisdiction to rescind, vary or augment protective measures ordered in the first proceedings.

9. Because the Prosecution has not provided this Chamber with relevant information regarding the protective measures that some of its witnesses may already enjoy and whether the Chamber seized of the first proceedings is still constituted, the Chamber is not in a position to rescind, vary or augment protective measures already ordered. Consequently, the Prosecution should provide the Chamber with a list of the witnesses who are already the

⁴ See Annexes 1 to 18 to the Motion and Annex A, Filing of an Annex A to Witness Prosecution Motion, filed on 17 November 2009.

⁵ Measure (a), Motion para. 20.

⁶ Measure (f), Motion para. 20.

⁷ Response.

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beneficiary of protective measures and state in which cases these protective measures were ordered.

10. Nevertheless and in order to avoid delays in the preparation of the Parties' cases, the Chamber considers that it should rule on the motion for protective measures for the witnesses who are not already the beneficiaries of protective measures.

11. The Chamber considers that the Prosecution has demonstrated the volatile security situation in the parts of Rwanda and the adjacent territories of neighbouring states where many of the fourteen witnesses in this case reside.⁸ The Chamber also considers that this situation gives rise to a justified and real fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security. Accordingly, the Chamber considers that, in the present case, there exist exceptional circumstances warranting the non-disclosure of the identity of the fourteen witnesses listed in the Motion to the public.

12. However, the Chamber considers that not all the protective measures sought by the Prosecution are necessary to ensure the security of the witnesses and their families in light of the Defence's right to a fair trial and, in particular, to have adequate time to prepare its case. By measure (a) the Prosecution seeks to prohibit the Defence from contacting all Prosecution witnesses and their family members, victims and other potential Prosecution witnesses by any mean until such time identifying information is provided to the Defence. The Chamber also notes that measure (f), by prohibiting the Defence from trying to identify any persons protected by this order until the identifying information is disclosed by the Prosecution to the Defence, would result in prohibiting the Defence from starting any investigation until the identities of the Prosecution witnesses are disclosed. The Chamber also considers that the Defence should not be banned from meeting with Prosecution witnesses, should they agree to do so, after verification of their willingness by the Witnesses and Victims Support Section with the assistance of the Prosecution. The Chamber further notes that it is not in a position to determine the necessity to order protective measures for other witnesses than those listed in the Motion as it cannot ascertain itself of the objective situation of unknown potential witnesses. Consequently, the Chamber cannot order blanket protective measures for witnesses who are not listed in the Motion.

FOR THESE REASONS, THE CHAMBER

⁸ See Annex A: Affidavit of Alfred Kwende, Commander of Investigations in the Office of the Prosecutor.

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- I. GRANTS** the Prosecution's motion in part;
- II. ORDERS** the following protective measures for Prosecution witnesses CBK, CDL, CBR, CBN, CBY, CBI, CBS, YAU, CDZ, CNT, CNJ, CBT, CDK and CAN, provided that they are not already the beneficiary of protective measures by this Tribunal:
- a. The names, addresses, whereabouts, and other identifying information concerning the Prosecution witnesses listed above shall be sealed by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public.
 - b. The names and identities of the Prosecution witnesses shall be forwarded by the Prosecution to the Registrar in confidence, and they shall not be disclosed to the Defence, until such time as the said witnesses are under the protection of the Tribunal.
 - c. In cases where the names, addresses, locations and other identifying information of the Prosecution witnesses appear in the Tribunal's public records, this information shall be expunged from the said records.
 - d. No person shall make audio or video recordings or broadcastings and shall not take photographs or make sketches of the protected Prosecution witnesses, without leave of the Trial Chamber or the witness.
 - e. Protected Witnesses will be referred to by their pseudonyms during trial proceedings, and during discussions between the Parties in proceedings.
 - f. Defence Counsel and any representative acting on his behalf, shall notify the Prosecution prior to any contact with any of its witnesses, and the Prosecution shall make arrangements for such contacts should the witness consent upon verification of their willingness by the Witnesses and Victims Support Section with the assistance of the Prosecution.
 - g. The Defence shall provide the Registry with a designation of all persons working on the Defence team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any persons leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.

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- h. The Defence and the Accused are 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 the Accused, assigned counsel or other persons working on the immediate Defence team;
- i. The Prosecution is authorised to withhold disclosure to the Defence, of the identity of the witness and to temporarily redact their names, addresses, locations and other identifying information from the supporting material on file with the Registry, until such time as the said witnesses are under the protection of the Tribunal; and

III. ORDERS that the Prosecution file under confidential cover within five (5) days of this Decision the list of its witnesses (using pseudonyms) who are already the beneficiary of protective measures. The Prosecution shall also specify the contents of these protective measures and in which cases these protective measures were ordered.

Arusha, 4 March 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Vagn Joensen
Judge

[Seal of the Tribunal]


Aydin Sefa Akay
Judge