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The 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: 15 July 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION FOR SECOND RECONSIDERATION OF  
WITNESS PROTECTIVE MEASURES**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. William Egbe  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Mr. Michael Kalisa  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden-Gistucci

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**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 Extremely Urgent and Confidential Motion for Second Reconsideration of Witness Protective Measures (*Articles 19 and 21 of the Statute and Rules 54, 69, 73 and 74 of the Rules of Procedure and Evidence*)”, filed confidentially on 21 June 2010 (the “Motion”);

**CONSIDERING:**

- (a) The “Prosecution’s Response To Defence Extremely Urgent And Confidential Motion For Second Reconsideration Of The Trial Chamber’s Decision On The Defence Urgent Motion For Witness Protective Measures Rendered On 9 February 2010”, filed confidentially on 28 June 2010 (the “Response”);
- (b) The “Defence Reply to Prosecutor’s Response to Defence Extremely Urgent Motion for Second Reconsideration of Witness Protective Measures”, filed confidentially on 5 July 2010 (the “Reply”); and
- (c) The “Prosecutor’s Rejoinder to Defence’s Reply to Prosecutor’s Response to Defence Extremely Urgent Motion for Second Reconsideration of Witness Protective Measures”, filed confidentially on 7 July 2010 (the “Rejoinder”);

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

**NOW DECIDES** the Motion pursuant to Rule 73 of the Rules.

**INTRODUCTION**

1. On 9 February 2010, the Chamber issued a Decision (the “Impugned Decision”) ordering that various protective measures shall apply to potential Defence witnesses. It also declined to order some of the measures sought by the Defence, including that the Prosecution provide the Defence and WVSS with an updated list of persons who will have access to identifying information.<sup>1</sup>

2. On 31 March 2010, the Chamber denied a Defence motion to reconsider the Impugned Decision.<sup>2</sup>

<sup>1</sup> Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010 (“Impugned Decision”), paras. 9, 26-27, pp. 8-9.

<sup>2</sup> Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 (“Decision of 31 March 2010”), pp. 7-8.

## SUBMISSIONS OF THE PARTIES

### *Defence Motion*

3. The Defence requests that the Chamber reconsider the Impugned Decision and grant additional protective measures to Defence witnesses. The Defence proposes that the protective measures should oblige the Prosecution to:

- (a) Inform WVSS and the Defence of the persons with access to any identifying information, and provide an updated list as necessary;
- (b) Notify WVSS immediately if any person with such access leaves the Prosecution team, and confirm that all materials containing identifying information has been remitted; and
- (c) Inform WVSS and the Defence immediately if the Prosecution discloses the list of Defence witnesses to any authority, or if the Prosecution requests the cooperation of any authority. Furthermore, the Prosecution should provide WVSS and the Defence with the full name and contact details of any such authority, as well as with any Defence permission obtained.<sup>3</sup>

4. The Defence presents four allegations which it construes as new facts not previously known to the Chamber, as well as material changes in circumstances since the issuance of the Impugned Decision. These justify the use of the Chamber's inherent power to reconsider its own decisions.<sup>4</sup>

5. According to the Defence, the Prosecution violated the protective measures when it arranged a meeting with a potential Defence witness outside the presence of a representative of WVSS or the Defence.<sup>5</sup>

6. The Defence submits that the Prosecution again violated these protective measures by visiting, unannounced and unaccompanied, the residence of a potential Defence witness.<sup>6</sup>

7. The Defence alleges a third violation of the protective measures, when it claims that the Prosecution disclosed the list of Defence witnesses and their addresses to various State entities throughout Europe. The Defence further submits that, after this unauthorized disclosure, five of its witnesses were summoned to a Belgian police station,

<sup>3</sup> Motion, paras. 48, 66, p. 16. The Chamber notes that the Motion is not entirely clear as to whether the Defence requests reconsideration of the Chamber's Decision of 9 February 2010, its Decision of 31 March 2010, or both. The Motion refers to the former Decision as the "Impugned Decision", and the latter as the "Second Impugned Decision". *Id.*, paras. 8, 10. Later, the Motion "requests the Chamber to reconsider its Decision", *id.*, para. 48 (emphasis added), which leads the Chamber to deem the Motion as seeking reconsideration of only one decision. In light of the Motion's title requesting "Second Reconsideration of Witness Protective Measures", the Chamber concludes that the Defence seeks reconsideration of the Decision of 9 February 2010.

<sup>4</sup> *Id.*, paras. 47-52.

<sup>5</sup> *Id.*, paras. 14-27, 52, Attachments 1-3.

<sup>6</sup> *Id.*, paras. 28-30, 35-38, 51, Attachments 4-5.

and one of its potential witnesses was visited by a Dutch police officer and a Rwandan woman.<sup>7</sup>

8. The Defence contends that, if the requested measures had been in place, it could have informed its witnesses of the names of Prosecution team members, allowing those witnesses to avoid interactions with the Prosecution. Furthermore, with prompt notice that the Prosecution had disclosed identifying information to State authorities, the Defence could have contacted the compromised witnesses to mitigate their fear and anxiety. Instead, two potential witnesses have withdrawn their cooperation from the Defence, which disadvantages the Defence and the rights of Ngirabatware.<sup>8</sup>

### ***Prosecution Response***

9. The Prosecution submits that the Motion should be dismissed because the Defence has failed to show any exceptional circumstances justifying reconsideration. As for the requested protective measures, the Prosecution contends they would infringe on the Prosecution's right and duty to investigate, and would be unduly difficult to enforce.<sup>9</sup>

10. The Prosecution disputes that it has breached the protective measures. As soon as the Prosecution learned that it had arranged a meeting with a Defence witness, the Prosecution ended the meeting. As for the second allegation, the Prosecution denies that it went to a potential Defence witness's residence. Finally, the Prosecution refers to its correspondence with the Defence as showing the latter's consent to the release of identifying information to State authorities in Europe.<sup>10</sup>

### ***Defence Reply***

11. The Defence submits that because the Prosecution filed its Response after the time limit had expired, it should be disregarded by the Trial Chamber.<sup>11</sup>

12. The Defence denies the Prosecution's version of events, and repeats its position that the Prosecution intentionally summoned a protected Defence witness in violation of the protective measures. Furthermore, the Prosecution has failed to explain why it told the Defence it would visit the potential Defence witness's residence. As for the issue of consent to release witness identifying information, the Defence never agreed to this release, and the alleged consent does not even cover all of the unauthorized disclosures.<sup>12</sup>

13. These incidents, and the Prosecution's behavior, amount to new facts and a material change in circumstances that warrant reconsideration of the Defence protective

<sup>7</sup> *Id.*, paras. 39-45, 49-50.

<sup>8</sup> *Id.*, paras. 61-65, 67-68.

<sup>9</sup> Response, paras. 7-8, 11, 13, 26-27. The Chamber notes that the Prosecution Response contains two paragraphs numbered 26 and 27. Here, the Chamber cites to the latter two paragraphs numbered 26 and 27. Below, reference is made to the former two paragraphs.

<sup>10</sup> *Id.*, paras. 14, 17-22, 26-30, Annexures A-D.

<sup>11</sup> Reply, paras. 1-3, 5-6.

<sup>12</sup> *Id.*, paras. 7-22, 24 (l)-(m), 27-32, 34-40, 45, Annexes 1-3.

measures. Violations of the current protective measures have led to the withdrawal of crucial witnesses, which has disadvantaged the Defence.<sup>13</sup>

14. The Defence submits that an obligation for the Prosecution to identify its team members is neither vague nor difficult to enforce, as the Defence is bound by similar measures.<sup>14</sup>

### DELIBERATIONS

15. As a preliminary matter, the Chamber notes that the Prosecution filed an unsolicited Rejoinder to the Defence Reply. In part because no compelling reason is proffered for the filing of the Rejoinder,<sup>15</sup> the Chamber neither sets out its substance above, nor considers it when evaluating the other three submissions by the Parties.

16. As for the Prosecution Response, the Chamber considers that it was filed within the five-day time limit. The Defence filed its Motion on 21 June 2010, and so the deadline for the Prosecution Response would have expired on 26 June 2010,<sup>16</sup> which was a Saturday. Pursuant to Rule 7ter (B), the time limit was automatically extended to the subsequent working day. The Prosecution filed its Response on Monday, 28 June 2010,<sup>17</sup> and the Chamber will therefore take this submission into account.

17. The Chamber recalls the Tribunal's jurisprudence on reconsideration:<sup>18</sup>

The Chamber notes at the outset that the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear

<sup>13</sup> *Id.*, paras. 41, 46.

<sup>14</sup> *Id.*, para. 42.

<sup>15</sup> See generally Rejoinder, para. 8 ("The Prosecution herein seeks to respond to the Defence's Reply of 5 July 2010.").

<sup>16</sup> See *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement (AC), 15 March 2010, note 20 (concluding that a four-day time limit for a submission filed on 17 August 2009, placed the deadline for any reply on 21 August 2009).

<sup>17</sup> The Response bears a time stamp of 5.46 p.m. on 28 June 2010. See Response, p. 1.

<sup>18</sup> Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16, citing Decision of 31 March 2010, para. 21; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("Bagosora et al."), Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004 ("Bagosora et al. Decision of 15 June 2004"), para. 7.

that reconsideration is an exceptional measure that is available only in particular circumstances.<sup>19</sup>

18. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.<sup>20</sup>

19. The Defence alleges various incidents that, it submits, violate the current protective measures and warrant heightened protective measures in their place. In the Chamber's view, the alleged incidents could be adequately addressed under the current measures. The Defence has not demonstrated how the current protective measures fail to address the concerns which it has raised.

20. The Chamber therefore considers that the Defence has not met its burden of showing new facts or a material change in circumstances justifying reconsideration. Accordingly, the Chamber denies the Motion.

21. Having carefully reviewed the submissions of the Parties, as well as the allegations and counter-allegations therein, the Chamber concludes that both Parties appear to lack transparency, courtesy and mutual respect. The Chamber reminds the Parties of their obligation to act in strict conformity with the witness protective measures set forth by the Chamber in its Decisions of 6 May 2009 and 9 February 2010.<sup>21</sup> The Chamber expects both Parties to fulfill their professional obligations responsibly and in good faith, and to remain alive to the interests of justice.

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<sup>19</sup> *Bagosora et al.* Decision of 15 June 2004, para. 7.

<sup>20</sup> Decision of 7 July 2010, para. 17, citing *Impugned Decision*, para. 22; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

<sup>21</sup> Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), dated 6 May 2009; Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010.

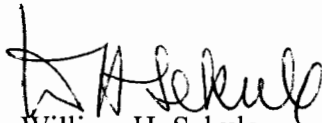


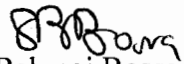
**FOR THE ABOVE REASONS, THE CHAMBER**

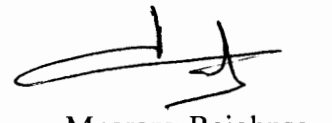
**DENIES** the Motion; and

**REMINDS** the Parties of their obligation to act in strict conformity with the witness protective measures set forth in the Decisions of 6 May 2009 and 9 February 2010.

Arusha, 15 July 2010

  
William H. Sekule  
Presiding Judge

  
Solomy Balungi Bossa  
Judge

  
Mparany Rajohnson  
Judge

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