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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 30 September 2010

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THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

DECISION ON PROTECTIVE MEASURES FOR DEFENCE WITNESSES

Office of the Prosecutor:
Holo Makwaia, Senior Appeals Counsel
Althea Alexis-Windsor, Appeals Counsel
Segun Jegede, Trial Attorney
Lansana Dumbuya, Case Manager

Counsel for the Defence
Bharat J.B. Chadha, Lead Counsel
Wilfred Ngunjiri Nderitu, Co Counsel
Tharcisse Gatarama, Legal Assistant
Marie-Pier Barbeau, Legal Assistant

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Introduction

1. On 20 September 2010, the Defence filed a Motion requesting protective measures for a number of its witnesses (“Motion”).¹
2. On 22 September 2010, the Chamber granted Interim protective measures for Defence witnesses pending a final decision on the Motion.²
3. On 23 September 2010, the Prosecution filed its response to the Defence Motion for protective measures (“Response”).³

Submissions of the Parties

4. The Defence submits that the witnesses seeking protective measures have expressed grave concerns for their safety and that of their families. The witnesses fear that they, and members of their families, would be subject to retaliation, intimidation, and other harm if they testify openly before the ICTR.⁴ Witnesses living outside Africa fear for members of their families still living in Rwanda and in East African countries.⁵ The Defence argues that most of the witnesses were eyewitnesses to the massacres of thousands of Rwandans in the Democratic Republic of Congo (“DRC”), and are thus particularly concerned about their safety because of the forthcoming United Nations report on crimes committed by the RPF soldiers in the DRC.⁶
5. Further the Defence witnesses fear repercussions from the Association of Survivors of Genocide in Rwanda (IBUKA), if they testify for the Defence.⁷ The Defence cites a 2009 Amnesty International report on “Human Rights in Republic of Rwanda,”⁸ and a Human

¹ *Prosecutor v. Ndahimana*, ICTR-01-68-T, Defence Motion for Protective Measures of Witnesses, 20 September 2010.

² *Prosecutor v. Ndahimana*, ICTR-01-68-T, Interim Order on Protective Measures for Defence Witnesses, 22 September 2010.

³ *Prosecutor v. Ndahimana*, ICTR-01-68-T, Prosecution’s Response to Defence Motion for Protective Measures, 23 September 2010.

⁴ Motion, paras. 13-14.

⁵ Motion, paras. 16.

⁶ Motion, paras. 17(f). (Defence Annex II)

⁷ Motion, paras. 17(g). (Defence Annex III)

⁸ Motion, paras. 17(a) (Defence Annex I).

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Rights Watch (“HRW”) brief, both opposing a Rule 11 *bis* transfer to Rwanda in another case,⁹ to illustrate the potential difficulties of witnesses who testify for the Defence.

6. In its response, the Prosecution argues that although the Defence is entitled to ask for protective measures, the Defence has not provided the Chamber with sufficient information to issue such a decision. In particular, it notes that the Defence has not provided a list of witnesses with their names, present location and the level of risk to which they are exposed. It also stated that the Defence provided the “pseudonyms” for its witnesses before the Chamber had issued an order for protective measures pursuant to Rule 75(B) (i) (d) of the Rules of Procedure and Evidence (“Rules”). The Prosecution submits that the procedure adopted by the Defence is “totally at variance” with the practice known to the jurisprudence of this Tribunal.”¹⁰
7. The Prosecution also requests that in granting protective measures for Defence witnesses the Trial Chamber make an exception for “alibi witnesses whose assertions and whereabouts the Prosecution is entitled to investigate. This entails making contact with them and questioning them prior to giving evidence in court.”¹¹

Applicable Law

8. Pursuant to Article 19 (1) of the Statute of the Tribunal (“Statute”), Trial Chambers shall ensure that proceedings are conducted with due regard for the protection of victims and witnesses. Article 21 of the Statute further obliges the Tribunal to provide in its Rules for the protection of victims and witnesses, including, but not limited to, the accommodation of in-camera proceedings and the protection of witnesses’ and victim’s identities.
9. Furthermore, the Tribunal must at all times ensure that the rights of accused are respected in accordance with Articles 19 and 20 of the Statute.

⁹ Motion, paras. 17(b). The Defence cites *Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-RII *bis*, “Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11 *bis* Transfer”, 3 January 2008. para I01

¹⁰ Response, paras. 5-8.

¹¹ Response, para. 9.

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10. Rule 69 (A) of the Rules of Procedure and Evidence (“Rules”) allows either party to apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk. Pursuant to Rule 69 (C), the identity of a witness shall be disclosed within such time as determined by a Trial Chamber to allow adequate time for preparation of the Prosecution and Defence.

11. In addition, Rule 75 (A) provides that:

A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or the 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.

12. Rule 75 (B) further elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal’s public records; assigning a pseudonym to a witness; and permitting witness testimony to be taken in closed session.

DELIBERATIONS

Preliminary Matter

13. The Chamber wishes to express its concern regarding the confidential filing of motions. The transparency of the proceedings is served by the public filing of documents.¹² The instant Motion was filed “confidentially” but does not contain identifying information about any witness. Submissions should be filed confidentially only in exceptional circumstances – for instance, where the protection of a witness is at stake. The Chamber considers that the instant Motion contains no such confidential information, and therefore issues its Decision publicly.

Request for Protective Measures

14. The Chamber notes that measures for the protection of witnesses are granted on a case-by-case basis. The jurisprudence of this Tribunal and of the International Criminal

¹² *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Order for Transfer of Detained Witnesses (TC), 1 March 2007, para. 5; *Prosecutor v. Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

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Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. Trial fairness, also an important consideration, favours similar or identical measures for Defence and Prosecution witnesses.¹³

15. The Defence has submitted that its witnesses fear for their safety and that these fears are justified by the dangers and insecurities described in the reports attached as annexes to its Motion. Following previous decisions made at this Tribunal regarding protective measures, the Trial Chamber accepts the existence of these fears amongst Defence witnesses and their objective justification.¹⁴ The conditions for ordering witness protection measures are therefore satisfied.

16. The Trial Chamber concurs with the submission made by the Prosecution in paragraph 5 of its response, that under Rule 75 (B) (d) the decision on whether to assign pseudonyms rests with the Trial Chamber and not with the party requesting the protective measures. Nevertheless, the Trial Chamber observes that in its Motion seeking protective measures for its own witnesses, the Prosecution provided the Defence and the Trial Chamber with a list of pseudonyms rather than with the full names and current addresses of the witnesses for whom it was seeking protective measures.¹⁵ Thus, in order to ensure the equality of arms between the parties, pursuant to Article 20 (4) (c), the Trial Chamber will not

¹³ *Prosecutor v. Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006; *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Prosecutor v. Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses) (TC), 14 August 2002, p. 4. *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-PT, Decision on Prosecution Extremely Urgent Motion for Protective Measures (TC), 16 January 2009, para. 4; *Prosecutor v. Kalimanzira*, Case No. ICTR-2005-88-I, Decision on Prosecution Motion for Protective Measures (TC), 8 November 2007, para. 3; *Prosecutor v. Setako*, Case No. ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures (TC), 18 September 2007, para. 4; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, paras. 4-5.

¹⁴ See the decisions referred to in footnote 12. See also *Prosecutor v. Semanza*, Decision on the Defence Motion for Protection of Witnesses (Rule 75) (TC), 24 May 2001, p. 3; *Prosecutor v. Ruggiu*, Decision on the Defence's Motion for Witness Protection (TC), 9 May 2000, p. 3.

¹⁵ *Prosecutor v. Ndahimana*, ICTR-2002-78-I, The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 16 November 2009.

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require that the Defence disclose the full names and current addresses of prospective defence witnesses in this case, at this time.

- 17. The Chamber rejects the Prosecution request that it differentiate between alibi and other defence witnesses, and that it be permitted to interview alibi witnesses without first notifying the Defence and verifying through WVSS that the witness consents to such an interview. Accordingly, protective measure (f) below applies to all defence witnesses.

- 18. With regard to measure (k), the Defence requests that identifying information be disclosed to the Prosecution 21 days before the testimony of the protected witness. The Chamber considers such “rolling disclosure” unnecessary in the present circumstances of a relatively short single accused trial. Further, the Chamber recalls that “rolling disclosure” was not granted in relation to the identifying information of Prosecution protected witnesses. Accordingly, the Chamber considers it appropriate in this case that the identifying information of all Defence witnesses should be disclosed to the Prosecution no later than 21 days prior to commencement of the Defence case.

- 19. Finally, while the Trial Chamber has agreed to grant protective measures to 51 prospective witnesses, this decision is no way intended to prejudge an eventual determination on the total number of witnesses the Defence will be permitted to call, bearing in mind the undertaking regarding that number that the Defence has made at the Informal Meeting of Parties with this Trial Chamber on 14 September 2010.

THE CHAMBER

GRANTS the following Protective Measures to Defence Witnesses ND1, ND2, ND3, ND4, ND5, ND6, ND7, ND8, ND9, ND10, ND11, ND12, ND13, ND14, ND15, ND16, ND17, ND20, ND21, ND22, ND23, ND24, ND25, ND26, ND27, ND28, ND29, ND30, ND31, ND32, ND33, ND34, ND35, KR3, KR4, KR5, FP8, CD11, FP9, FP2, BV4, BX2, BX7, BX1, BM1, FB1, GK1, FB1, BX3, MB1, and BM2:

- a. The names, addresses, whereabouts, and other identifying information concerning the Defence witnesses listed above shall be sealed by the Registry and not

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- included in any non-confidential Tribunal records, or otherwise disclosed to the public.
- b. The names and identities of the Defence witnesses shall be forwarded by the Defence to the Registrar in confidence, and they shall not be disclosed to the Prosecution, 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 Defence 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 Defence 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. Prosecution Counsel and any representative acting on his behalf, shall notify the Defence prior to any contact with any of its witnesses, and the Defence 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 Defence.
 - g. The Prosecution shall provide the Registry with a designation of all persons working on the Prosecution 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 Prosecution team and to confirm in writing that such person has remitted all material containing identifying information.
 - h. The Prosecution 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 assigned counsel or other persons working on the immediate Prosecution team.

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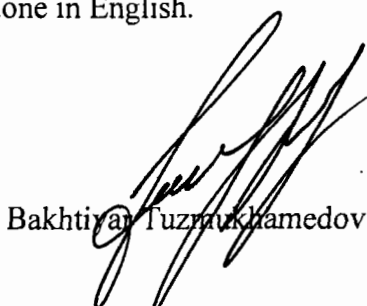
- i. The Defence may withhold disclosure to the Prosecution of the identity of the protected witnesses and temporarily redact their names, addresses, locations and other identifying information from material disclosed to the Prosecution. However, such information shall be disclosed by the Defence to the Prosecution at least 21 days prior to commencement of the Defence case, in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69(C) of the Rules.

Arusha, 30 September 2010, done in English.



Florence Rita Arrey

Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge



Aydin Sefa Akay

Judge
(Absent at the time of
signature)

