



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
04-11-2010
(3785 - 3780)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3785

1094

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 4 November 2010

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

2010 NOV 14 P 3:11
JUDICIAL RECORDS ARCHIVES
RECEIVED

DECISION ON PROSECUTOR'S THIRD MOTION FOR PROTECTIVE MEASURES FOR THE VICTIMS AND WITNESSES TO CRIMES ALLEGED IN THE INDICTMENT

Article 21 of the Statute and Rules 69, 72 and 75 of the Rules of Procedure and Evidence

Office of the Prosecution:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani
Astou Mbow

Defence Counsel for Ildephonse Nizeyimana:

John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

3784

INTRODUCTION

1. On 30 April 2010, the Prosecution filed a motion seeking protective measures for its prospective witnesses.¹ On 9 June 2010, the Chamber issued a Decision denying this request, finding that it was too broad and imprecise to allow a case-by-case assessment as required by the jurisprudence.² The Prosecution subsequently filed a second motion seeking protective measures for its prospective witnesses, accompanied by an Annexed list of sixty identified potential witnesses the Prosecution was seeking protective measures for.³ On 3 September 2010, the Chamber issued a Decision denying the request and finding that the Second Motion is largely identical to the First Motion and relies upon almost the exact same basis the Chamber originally found to be lacking in the first instance.⁴ The Chamber further ordered the Prosecution to disclose all unredacted statements and protective measures for potential Prosecution witnesses. The Prosecution subsequently submitted to the Defence the unredacted statements on 14 September 2010 and filed this third Motion seeking protective measures for its prospective witnesses.⁵ The Defence did not respond to the Third Motion.

DELIBERATIONS

Applicable Law of Protective Measures

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, the victim or witness concerned, or of the Witnesses and Victims Support Section

¹ The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 30 April 2010 ("First Motion").

² *Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2001-55-PT ("*Nizeyimana*"), Decision on the Prosecution's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 9 June 2010 ("First Decision"), para. 8.

³ The Prosecutor's Second Motion for Protective Measure for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 16 July 2010 ("Second Motion").

⁴ *Nizeyimana*, Decision on the Prosecution's Second Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 3 September 2010

⁵ The Prosecutor's Third Motion for Protective Measure for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 22 September 2010 ("Third Motion").



("WVSS"), 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 his or her right to a fair trial, and are 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.⁶ The jurisprudence also holds that a real fear for a witness's safety and that an objective justification exists for that fear may be expressed by persons other than the witnesses themselves.⁷

Third Motion for Protective Measures

5. The Chamber notes that while the First Motion did not identify potential witnesses and the Second Motion enumerated sixty potential witnesses, the Prosecution is now seeking protective measures for forty five identified potential witnesses. In its Second Motion, the Prosecution submitted the witnesses' full names,⁸ country of residence and possible pseudonym⁹ and identified potential witnesses which are currently subject to protective measures which will continue to apply.

6. In support of its Third Motion, the Prosecution has submitted an altered affidavit of the Prosecution's Officer in Charge of Investigations Alfred Kwende¹⁰ and four Annexed reports depicting the victims' and witnesses' security situation in Rwanda and abroad. Additionally, the Prosecution provided an Annex on an *ex parte* basis, listing each potential witness' individual fear for his or her safety. The Chamber finds the Prosecution has demonstrated the existence of exceptional circumstances and a real fear for the witnesses' safety. However, the Chamber notes that the information regarding witnesses 10 and 40

⁶ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential *Ex Parte* Under Seal Motion for Additional Protective Measures for Defence Witness WBNM (TC), 17 June 2005, paras. 8,9 (citing *Prosecutor v. Théoneste Bagosora, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protective Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para.28).

⁷ See e.g., *Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-PT, Decision on Prosecution Extremely Urgent Motion for Protective Measures, 16 January 2009, para 4; *Prosecutor v. Simon Bikindi*, Decision on Protective Measures for Prosecution Witnesses (TC), 4 September 2006, para. 7; *Prosecutor v. Tharcisse Renzaho*, Decision on Prosecutor's Motion for Protective Measures For Victims and Witnesses to Crimes Alleged in the Indictment (TC), 17 August 2006, paras. 7,10.

⁸ See Second Motion, Confidential Annex A, filed *ex parte* on 16 July 2010.

⁹ See Second Motion, Annex A.

¹⁰ See Annex A to the Prosecutor's Third Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment.

3782

provided in the Annex B witnesses list¹¹ have not yet been provided and expects the Prosecution to submit it seven days following this Decision.

7. The Prosecution also requests that the Chamber restrict the public or the media from making audio or video recordings or broadcasts, or taking photographs of any protected witness or his/her family members, in relation to the testimony of the protected witness at the ICTR, without leave of the Chamber.¹² Recalling its First Decision¹³ and bearing in mind that the Prosecution has not submitted a definition of who would be considered as a "family member", the Chamber finds that this request is only granted for accompanying immediate family members (parents, siblings, children and partners).

8. The Chamber finds the protective measures requested are consistent with the fair trial rights of the Accused and considers that they should be ordered as follows.

FOR THESE REASONS, THE CHAMBER

I. GRANTS the Prosecution's Motion; and

II. ORDERS the Prosecution to provide information regarding witnesses 10 and 40 listed in Annex B seven days following this Decision;

III. ORDERS that the potential Prosecution witnesses, where protection is requested listed in Annex B to the Motion, are subject to the following protections which will remain in effect until further notice:

- i. If it has not already, the Prosecution is to designate a pseudonym for each protected witness. The pseudonyms shall be used whenever referring to such protected witnesses in ICTR proceedings, communications, and discussions, both between the parties and with the public. The use of such pseudonyms shall last until such time as the Trial Chamber orders otherwise or until the witness affirmatively waives their right to protective measures in writing or on oath.

¹¹ See Annex B to The Prosecutor's Third Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment.

¹² See Third Motion, para. 15(vi)

¹³ See First Decision, para. 7



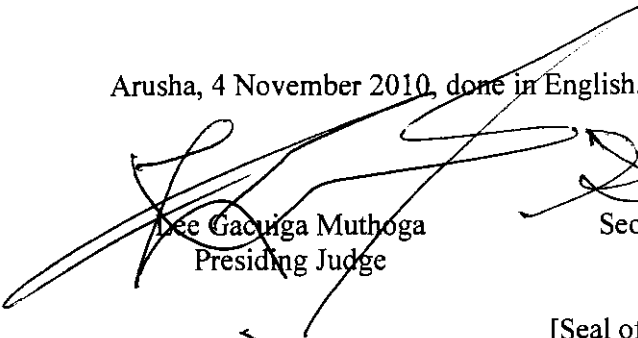
- ii. The names, addresses, whereabouts, and other information that might identify or assist in identifying any protected witness (hereinafter "Identifying Information") must be sealed by the Registry and not be included in public or non-confidential ICTR records;
- iii. To the extent that any Identifying Information is contained in existing records of the Tribunal, such Identifying Information must be expunged from the public record of the Tribunal and placed under seal;
- iv. Identifying information shall not be disclosed to the public or the media. This order shall remain in effect until further notice;
- v. Until such time as Identifying Information is provided to the Accused or any member of the Defence team pursuant to a Trial Chamber order, the Accused or any member of the Defence team shall not attempt, or encourage or otherwise aid any person in an attempt to make any independent determination of the identify of any protected witness;
- vi. Nowhere and at no time shall the public or the media make audio or video recordings or broadcasts, or take photographs of any protected witness or his/her family members (meaning, parents, siblings, children and partners), in relation to the testimony of the protected witness at the ICTR, without leave of the Trial Chamber;
- vii. The Accused nor any member of the Defence team shall not make any contact with a protected witness, unless the consent of the person concerned has first been confirmed. The Accused or any member of the Defence team shall contact the Prosecution, who with the services of the WVSS, shall determine whether such consent exists. In the event that such consent exists, the WVSS shall facilitate the interview;
- viii. The Accused or Defence team shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any such information to any other person or entity; and
- ix. The Accused or Defence team shall provide in writing to the WVSS, and Parties, a designation of all officially authorized persons working on the Defence team who will have access to any Identifying Information. The Accused or Defence team shall notify in writing to the WVSS, and Parties, of

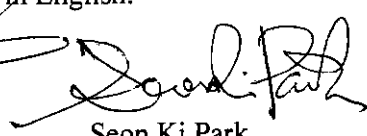


3780

any such persons leaving the Defence team, and confirm that such person has remitted all materials containing Identifying Information.

Arusha, 4 November 2010, done in English.


Lee Gacunga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

