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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: 14 December 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS DIVISION
2010 DEC 14 PM 6:01

**DECISION ON DEFENCE MOTION FOR VARIATION OF
PROTECTIVE MEASURES FOR PROSECUTION WITNESSES AND OTHERS**

Office of the Prosecutor

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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 Variation of the Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others, Issued on May 6, 2009”, filed confidentially on 25 October 2010 (the “Defence Motion”);

CONSIDERING:

- (a) The “Prosecution’s Consolidated Response and Counter Motion to Defence Extremely Urgent and Confidential Motion for Variation of the Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others, Issued on May 6, 2009”, filed confidentially on 28 October 2010 (the “Prosecution Response”); and
- (b) The “Defence Reply to Prosecution’s Consolidated Response and Counter Motion to Defence Extremely Urgent and Confidential Motion for Variation of the Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others, Issued on 6 May 2009”, filed confidentially on 1 November 2010 (the “Defence Reply”);

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

NOW DECIDES the Motion pursuant to Articles 19, 20 and 21 of the Statute, and Rules 73, 73^{ter} and 75 of the Rules.

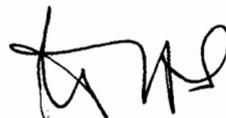
INTRODUCTION

1. In its Decision dated 6 May 2009 (the “Decision on Protective Measures for Prosecution Witnesses and Others”), the Chamber ordered various protective measures for Prosecution witnesses, including Witness ANAE. These protective measures included a provision under subparagraph (v) that “[t]he Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS.”¹

2. On 28 October 2009, the Chamber granted in part a Defence motion to meet with the husband of Prosecution Witness ANAE (the “husband”),² and ordered a WVSS

¹ Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), dated 6 May 2009 (“Decision dated 6 May 2009”), pp. 6-7.

² Due to concerns for witness protection, the Chamber will not identify the husband of Witness ANAE in this Decision.



representative to be present during the meeting. The Chamber also granted the Prosecution’s request to attend the meeting.³

3. On 19 January 2010, the Defence met with the husband, in the presence of a Prosecution team member and WVSS representatives. According to both Parties, the husband stated that he wished to testify as a Defence witness.⁴

4. On 20 January 2010, the Defence provided notice that it intended to call the husband as a Defence witness.⁵

5. On 9 February 2010, the Chamber ordered protective measures for potential Defence witnesses. These measures included an order for the Prosecution to notify the Defence if it wished to contact any protected Defence witness.⁶

6. On 21 May 2010, according to a confidential WVSS report, a representative of the Prosecution met with the husband, without having informed the Defence.⁷

7. On 15 October 2010, the Chamber denied a Defence request to remove the husband from the protective orders for Prosecution witnesses, and ordered WVSS to obtain a signed statement from the husband regarding his position on this matter.⁸

8. On 22 October 2010, WVSS provided a statement signed by the husband, and witnessed by a WVSS staff member. This statement reads, in pertinent part, “I wish to meet with the Defence Counsel of Ngirabatware Augustin without representatives of the

³ Decision on Defence Motion for Leave to Meet with the Husband of Witness ANAE and for Postponement of Her Testimony (TC), 28 October 2009, p. 6.

⁴ Notification of the Intention to Call ANAE’s Husband as a Defence Witness, 20 January 2010 (“Defence Notification of 20 January 2010”), paras. 1-2; Prosecutor’s Reply to Defence Notification to Call Witness ANAE’s Husband as a Defence Witness, dated 25 January 2010, paras. 2, 5.

⁵ Defence Notification of 20 January 2010, para. 6.

⁶ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, pp. 8-9. Subparagraph (v) of the protective measures reads: “The Prosecution shall notify the Defence in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Defence shall facilitate such contact, in the presence of a representative of the Defence, together with the WVSS”. *Id.*, p. 9.

⁷ See Defence Reply to Prosecutor’s Response and Counter-Motion to Defence Extremely Urgent and Confidential Motion for Reconsideration of the Trial Chamber Decision Rendered on 28 October 2009, 8 September 2010, Annex 3 (reproducing an e-mail from WVSS concluding that “a representative of the OTP, had met [Witness ANAE’s husband] on 21 May 2010. . . . The occasion was also seized to remind the representative of the OTP . . . of the January 2010 meeting [] and that he should cease further meeting with defence witnesses that are covered by protection orders unless through written notification to the defence.”).

⁸ Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010 (“Decision of 15 October 2010”), paras. 33-34, p. 10.



Prosecution or the WVSS”, “I wish to be covered by the Defence protective measures”, and “I wish to testify as a defence witness in the case of Ngirabatware Augustin”.⁹

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence prays the Chamber to vary its Decision on Protective Measures for Prosecution Witnesses and Others by removing Witness ANAE’s husband from those protective measures. The Defence also requests the Chamber to extend to him the protective measures for Defence witnesses, to note his addition to the list of Defence witnesses, and to order that the Defence may meet him without the presence of the Prosecution or WVSS.¹⁰

10. Because the husband has confirmed his desire to testify for the Defence and to be covered by the Defence protective measures, he should be added to the Defence witness list. This is in the interest of justice and the search for the truth.¹¹

11. The husband has also stated his wish to meet with the Defence alone, and jurisprudence supports that the Prosecution has no right to attend meetings between the Defence and one of its witnesses.¹²

Prosecution Response

12. The Prosecution asks the Chamber to order an investigation to determine whether the Defence met illicitly with the husband, and to stay any decision on the Defence Motion until the completion of this investigation. In the event that the Chamber decides to grant the Defence Motion, the Prosecution requests that the protective measures for Defence Witnesses should not be extended to Witness ANAE’s parents, siblings and other near relatives. The Chamber should only consider applying the Defence protective measures to the husband, and to his parents and siblings.¹³

13. The Prosecution notes that, before WVSS filed the husband’s signed statement, the Defence provided a will-say statement for the husband. According to the Prosecution, this will-say statement contained information not obtained by the Defence during the

⁹ See, for example, Defence Motion, Annex 1 (Certification of Acknowledgement of Receipt of Information).

¹⁰ Defence Motion, paras. 43-44, 46. The Defence also asks the Chamber to issue an expedited schedule for any Response and Reply. *Id.*, para. 46.

¹¹ *Id.*, paras. 42-44, Annex 1.

¹² *Id.*, paras. 42, 45, quoting *The Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-T, Decision on Defence Written Request to Interview Prosecution Witnesses (TC), 20 September 2005, para.5.

¹³ Prosecution Response, paras. 3, 10-12, 17-18.



meeting on 19 January 2010. This information must have been solicited in violation of the protection orders for Prosecution witnesses.¹⁴

Defence Reply

14. In addition to its original prayer for relief, the Defence asks the Chamber to sanction the Prosecution for making serious, unsupported allegations against the Defence, and to dismiss this aspect of the Prosecution Response.¹⁵

15. The Defence denies that it violated the protective measures covering the husband. The contents of the husband's will-say statement were derived from the 19 January 2010 meeting with him, and from information obtained through other witnesses.¹⁶

16. The Defence submits that the Prosecution's behavior is an abuse of process and deliberately obstructive, especially in light of the husband's confirmation that he wishes to testify as a Defence witness. Moreover, a WVSS report has established that the Prosecution has violated the protective measures concerning the husband.¹⁷

DELIBERATIONS

Prosecution Allegations of Wrongdoing

17. The Prosecution alleges that the Defence violated the protective orders concerning Prosecution Witness ANAE's husband. This violation, according to the Prosecution, is evident from the husband's will-say statement, which contains information that the Defence could only have obtained illicitly.¹⁸

18. The Defence denies these allegations, identifies how it compiled this information, and requests that the Chamber sanction the Prosecution for making baseless accusations.¹⁹

19. As a preliminary matter, the Chamber notes that there appears to be no demonstration that some of the information in the "will-say statement" was derived from the husband himself. Instead, it appears that the Defence constructed this statement from other sources.

20. The Chamber recognizes that the sources for the Defence will-say statement may have been unclear initially, and considers that this may explain the allegations made in the Prosecution Response. The Defence Reply provides an explanation as to how the Defence could have filed a will-say statement which it has attributed to the husband,

¹⁴ *Id.*, paras. 3, 10-12.

¹⁵ Defence Reply, paras. 4-6, 21-24, 26-28.

¹⁶ *Id.*, paras. 7-13, 25.

¹⁷ *Id.*, paras. 14-20, 26.

¹⁸ See, for example, Prosecution Response, paras. 3(c)(vi), 10-11.

¹⁹ See, for example, Defence Reply, paras. 5, 12, 24, 28.



without having violated the witness protective measures.²⁰ This, however, cannot be said to be a will-say statement of the husband, and the Chamber directs the Defence to provide a summary of the husband's anticipated testimony, pursuant to Rule 73ter (B)(iii)(b), based on information that he provides.

21. Under these circumstances, the Chamber considers that no case for investigation has been demonstrated. Accordingly, the Chamber will not exercise its discretion to order an investigation into whether the Defence met with the husband after 19 January 2010, nor will the Chamber sanction the Prosecution for alleging a breach of the protective measures.

Protective Measures for the Husband

22. In its Decision dated 6 May 2009, the Chamber ordered protective measures for Prosecution witnesses. In doing so, the Chamber noted that "protective measures must be strictly necessary for the protection of the relevant witness", and that "adequate protection of Prosecution witnesses requires also some protection of members of their families".²¹ These measures are intended to guarantee the welfare of the witnesses, although they may also benefit family members. The Chamber will exercise appropriate caution when determining whether to vary these protective measures.²²

23. The Chamber recalls that, in exercising its discretion, it has a duty to strike a fair and proper balance between the rights of the Accused to a fair trial and the protection of the witness for whom protective measures were sought, in the interests of justice.²³

24. Variations to a witness list must be supported by good cause and be in the interests of justice. The following factors are relevant to the Chamber's analysis of these issues:²⁴

- 1) The materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; 2) the complexity of the case; 3) any potential prejudice to the opposing party; 4) the justification offered for the late variation of the witness list; 5) the timing of the late disclosure; and 6) any delays in the proceedings occasioned by the proposed variation.

25. The husband has signed a statement indicating that he wishes to testify as a Defence witness, to be covered by the protective measures for Defence witnesses, and to meet with the Defence without a representative of the Prosecution or WVSS.²⁵

26. In light of this statement, and pursuant to Rule 73ter, the Chamber orders that the Defence witness list be varied to include the husband. As he will be listed as a Defence

²⁰ See Defence Reply, para. 12. See also Defence Response to Mr. Gabaake's Reply to the Notification of the Intention to Call ANAE's Husband as a Defence Witness, 1 February 2010, para. 3.

²¹ Decision dated 6 May 2009, paras. 17, 20.

²² Decision of 15 October 2010, para. 30.

²³ *Id.*, para. 31, citing Decision dated 6 May 2009, para. 15.

²⁴ Decision on Prosecution Motion of 24 June 2010 for Leave to Vary Its Witness List (TC), 15 July 2010, paras. 29-30.

²⁵ See paragraph 8 of this Decision.

witness, the Chamber also extends to him the protective measures for Defence witnesses, and orders that the Defence may meet with him in the absence of any Prosecution or WVSS representative.

27. The Chamber notes the Prosecution position that any variation in protective measures for the husband should not be extended beyond his parents and siblings.²⁶ The Defence has not made any submissions on this issue. Accordingly, the Chamber considers that the variation applies only to the husband, his parents and any siblings that he may have.

28. Accordingly, any protective measures that were extended to the husband as a member of Witness ANAE's family are hereby revoked.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion;

VARIES the Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, and **REMOVES** the husband of Prosecution Witness ANAE from the protective measures set out in that Decision;

ORDERS that the husband of Prosecution Witness ANAE be added to the Defence witness list;

ORDERS that the husband of Prosecution Witness ANAE be covered by the protective measures set out in the Decision on Defence Urgent Motion for Witness Protective Measures;

ORDERS that the Defence may meet with the husband of Prosecution Witness ANAE, in the absence of any Prosecution or WVSS representative; and

DIRECTS the Defence to provide a summary of the husband's anticipated testimony, pursuant to Rule 73ter (B)(iii)(b), based on information that he provides.

Arusha, 14 December 2010

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]



²⁶ See Prosecution Response, para. 18.