

ICTR-98-44B-R71bis  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

## PROCEEDINGS BEFORE A SINGLE JUDGE

**Before:** Judge Vagn Joensen

**Registrar:** Mr. Adama Dieng

**Date:** 17 March 2011

**THE PROSECUTOR**

v.

**Félicien KABUGA**

**Case No. ICTR-98-44B-R71bis**

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H. J. J. J.

## ORDER FOR DISCLOSURE AND PROTECTIVE MEASURES

*Rules 54, 69 and 75 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Mr. Hassan B. Jallow  
Mr. Richard Karegyesa  
Mr. Bill Egbe  
Mr. Peter Tafah  
Mr. Disengi Mugeyo  
Mr. Sharifah Adong

**For the Accused:**

Mr. Bahame Tom Nyanduga (Duty Counsel)

H.

## INTRODUCTION

1. On 15 March 2011, Trial Chamber III granted the Prosecution's request for the preservation of evidence by special deposition for a future trial and ordered the Prosecution, *inter alia*, to disclose redacted witness statements to the Duty Counsel by 16 March 2011.<sup>1</sup> As the Single Judge designated by the President, pursuant to Rule 71 *bis* (J) of the Rules of Procedure and Evidence (the "Rules"),<sup>2</sup> I have reviewed the materials disclosed to the Duty Counsel in compliance with the said order. Given the circumstances of the case, I am not satisfied that the disclosed materials, in their current form, would allow the Duty Counsel the facilities to conduct investigations or to undertake the meaningful and effective cross-examination of Prosecution witnesses during the forthcoming depositions in preparation for a future trial.

## DELIBERATIONS

2. Pursuant to Rule 54, a Judge, acting *proprio motu*, may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of a trial.

3. Article 21 of the Statute of the Tribunal imposes a 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. Additionally, Rule 69 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. Furthermore, under Rule 75 a Judge may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Support Section ("WVSS"), 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

<sup>1</sup> *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial (Pursuant to Rule 71 *bis*), 15 March 2011.

<sup>2</sup> Notice of Designation - *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-R71*bis*, Ref: ICTR/PRES/021/11, 15 March 2011. [It should be noted that, pursuant to Rule 71 *bis* (K), Rules 46, 54, 56, 66-70, 73-73 *ter*, 75-77, 80-81, 90-91, 93 and 95-97 shall apply, *mutatis mutandis*, to the special deposition proceedings, except that the single Judge shall have the same powers as a Trial Chamber and the Duty Counsel shall have the same rights and duties as a Defence Counsel.]

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 usually granted on a case-by-case basis, following a Judge's or Trial Chamber's assessment of the appropriateness of such protective measures. It is for the moving party to demonstrate how the witness is relevant and important to its case and to explain why the requested measures are necessary.<sup>3</sup> A real fear for a witness's safety must exist and an objective justification for that fear may be expressed by persons other than the witnesses themselves.<sup>4</sup> At this stage, however, neither the Prosecution nor the Duty Counsel has made any request for the protection of potential witnesses.

5. In light of the circumstances of the case, I determine that, in order to expedite the investigation process by the Duty Counsel while ensuring protection for potential Prosecution witnesses, it is appropriate to *proprio motu* order the immediate disclosure of the non-redacted statements of all potential Prosecution witnesses to the Duty Counsel. These statements will be subject to normal protective measures to ensure that the identities of the witnesses are not disclosed or publicised. These protective measures will stay in effect until further notice.

## FOR THESE REASONS, I

- I. ORDER** the immediate disclosure of all non-redacted statements of potential Prosecution witnesses as listed in Annex "A" to the Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial, filed on 7 February 2011, as well as any subsequent potential Prosecution witnesses notified in writing to the Duty Counsel, subject to the following protections which will remain in effect until further notice:

<sup>3</sup> *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).

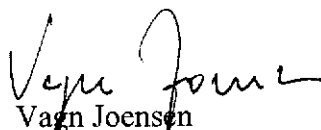
<sup>4</sup> See e.g., *Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-PT, Decision on Prosecution Extremely Urgent Motion for Protective Measures, 16 January 2009, para. 4; *Prosecutor v. Simon Bikindi*, Decision on Protective Measures for Prosecution Witnesses (TC), 4 September 2006, 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.

- (i) The pseudonyms given to the witnesses by the Prosecution shall be used whenever referring to such protected witnesses in ICTR proceedings, communications, and discussions, both between the parties and with the public.
- (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;
- (v) No member of the Duty Counsel's team shall attempt, or encourage or otherwise aid any person in an attempt to make any independent determination of the identity of any protected witness;
- (vi) No member of the Duty Counsel's team shall make any contact with a protected witness, unless the consent of the person concerned has first been confirmed. A member of the Duty Counsel's team shall then contact the Prosecution and the WVSS, who shall determine whether such consent exists. In the event that such consent exists, the WVSS shall facilitate the interview;
- (vii) The Duty Counsel's 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
- (viii) The Duty Counsel's team shall provide, in writing, to the WVSS and the Prosecution, a designation of all officially authorised persons working on the Duty Counsel's team who will have access to any Identifying Information. The Duty Counsel's team shall notify the WVSS and the Prosecution, in writing, of any such person leaving the Duty Counsel's team, and confirm that such person has remitted all materials containing Identifying Information;



**II. ORDER** that these protections will remain in effect until any further Order of the Single Judge or a future Trial Chamber.

Arush: , 17 March 2011, done in English.

  
Vagn Joensen  
Judge

[Seal of the Tribunal]

