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ICTR-00-55C-T
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Am

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 18 April 2011

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JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

**DECISION ON DEFENCE URGENT MOTION
FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES**

Articles 19 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
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Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

[Signature]

INTRODUCTION

1. On 4 April 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, (“Defence” and “the Accused” respectively) filed a second motion seeking protective measures for witnesses CBN19 and CBN22.¹ The Defence submits that its witnesses and those of the Prosecution should enjoy similar protective measures in the interests of trial fairness.² With respect to the two witnesses it requests protective measures for, the Defence submits generally that the “situation in Rwanda has largely been recognized as hostile, unstable and dangerous for Defence witnesses of the ICTR.”³ The Defence notes that specifics with respect to individual witnesses’ fears are included in an attached *ex parte* annex.⁴
2. On 7 April 2011, the Prosecution filed a response to the Motion.⁵ The Prosecution submits, *inter alia*, that any protective measures ordered should follow the approach adopted in the “Decision on Defence Urgent Motion for Protective Measures for Defence Witnesses”, issued on 9 March 2011 (“Protective Measures Decision”).⁶ The Prosecution further relies on all the arguments set out in its Response filed on 3 March 2011.⁷
3. The Defence did not reply.

DELIBERATIONS

Applicable Law of Protective Measures

4. The Chamber recalls that 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 (“Rules”) 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 that Chamber decides otherwise.

¹ Second Defence Urgent Motion for Protective Measures for Defence Witnesses re Witnesses CBN19 and CBN22, 4 April 2011 (“Motion”).

² Motion, para. 12.

³ *Ibid.*

⁴ Motion, para. 10, Annex A and B.

⁵ Prosecution Response to Second Defence Urgent Motion for Protective Measures for Defence Witnesses re: Defence Witnesses CB N19 and CB N22, 7 April 2011 (“Response”).

⁶ Response, paras. 4, 8.

⁷ Response, para. 3.

5. 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 (“WVSS”), to order appropriate measures to safeguard the privacy and security of victims and witnesses.

6. Protective measures for victims and witnesses are granted on a case-by-case basis where a chamber determines the appropriateness of such protective measures.⁸

7. The Chamber recalls its “Decision on Defence Motion Requesting Protective Measures for Defence Witnesses RWV07, RWV08, OUV06, CKN10, OUV01, RWV02 and OUV03”, issued on 11 January 2011 (“Alibi Witness Decision”), and more recently, its “Decision on Defence Urgent Motion for Protective Measures for Defence Witnesses, issued on 9 March 2011, where it found that identifying information with respect to protected witnesses should be defined as “[t]he names, address(es), whereabouts and information of a private, personal or descriptive nature that either directly reveals the identity of the protected witness or makes the identity of the witness a matter of deduction”.”⁹

Specific Application for Protective Measures

8. In support of the request for protective measures, Annex A and B of the Motion include affidavits signed by the witnesses specifying particular fears of intimidation. The Chamber finds that the Defence has demonstrated the existence of exceptional circumstances and a real fear for the witnesses’ safety which justify the grant of protective measures for the two witnesses identified in Annexes A and B of the Motion.

9. The Chamber notes that, similar to the motion for protective measures filed by the Defence on 25 February 2011,¹⁰ sub-paragraph (ii) of the requested relief defines “identifying information” as “information that might identify or assist in identifying the protected witness”.¹¹ The Chamber refers the Defence to the Protective Measures Decision, where this very matter was already dealt with.¹² The Defence once more provide no argument as to why

⁸ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Decision on Nyiramasuhuko’s Strictly Confidential *Ex-Parte*-Under Seal-Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005 (“Nyiramasuhuko Decision”), paras. 8, 9, citing *Prosecutor v. Bagosora et al.*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 28.

⁹ Protective Measures Decision, para. 7; see also Alibi Witness Decision, para. 8 (citation omitted).

¹⁰ Defence Urgent Motion for Protective Measures for Defence Witnesses (“First Defence Motion”), 28 February 2011, p. 6.

¹¹ Motion, pp. 6-7.

¹² Protective Measures Decision, para. 9.

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this definition should change. The formulation set out first in the Alibi Decision¹³ and then again in the Protective Measures Decision¹⁴ will therefore be maintained.

10. The Chamber notes that sub-paragraph (viii) of the requested relief attempts to limit the use of “identifying information” by the Prosecution, through a prohibition on its direct or indirect disclosure.¹⁵ The Chamber again refers the Defence to the Protective Measures Decision, in which it adopted the following formulation: “The Prosecution shall keep confidential the fact that the witness is a witness and shall not express, share, discuss or reveal directly or indirectly that status to any unauthorized person or entity.”¹⁶ The Chamber finds no reason to revisit this approach and therefore maintains the formulation contained in the Protective Measures Decision.

11. Sub-paragraph (ix) of the requested relief requires the Prosecution to provide a written list of all people who will have access to the identifying information.¹⁷ The Chamber has not altered its decision on this matter and remains of the view that this proposed measure is not necessary since the Prosecution is bound to ensure that the confidential information is not disclosed, no matter which of its staff members have access to the information.¹⁸

12. The Chamber strongly advises the Defence to carefully consider prior Decisions before requesting identical relief that has already been adjudicated. The Chamber finds that the protective measures requested are otherwise consistent with the fair trial rights of the Accused and considers that they should be ordered as set out below.

FOR THESE REASONS, THE CHAMBER

I. GRANTS the Motion in part;

II. ORDERS that the Defence witnesses CBN19 and CBN22 of the Motion be subject to the following protections which will remain in effect until further order:

- i. If it has not already done so, the Defence is to designate a pseudonym for each protected witness. The pseudonyms shall be used when referring to such protected witnesses in ICTR proceedings, communications, and discussions,

¹³ Alibi Witness Decision, para. 8.

¹⁴ Protective Measures Decision, para. 9.

¹⁵ Motion, p. 7.

¹⁶ Protective Measures Decision, para. 10.

¹⁷ Motion, p. 7.

¹⁸ Protective Measures Decision, para. 11; *see also* Alibi Witness Decision, para. 12.



both between the parties and with the public. The use of such pseudonyms shall last until such time as the Trial Chamber orders.

- ii. Names, address(es), whereabouts and information of a private, personal or descriptive nature that either directly reveals the identity of the protected witness or makes the identity of the witness a matter of deduction (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 order;
- v. Until such time as Identifying Information is provided to the Prosecution pursuant to a Trial Chamber order, no member of the Prosecution shall attempt, encourage or otherwise aid any person in an attempt to make any independent determination of the identity 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. No member of the Prosecution shall make any contact with a protected witness, unless the consent of the person concerned has first been confirmed. The Prosecution shall contact the Defence, 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 Prosecution shall keep confidential the fact that the witness is a witness and shall not express, share, discuss or reveal directly or indirectly that status to any unauthorized person or entity; and

III. DENIES the Defence motion in all other respects.



Arusha, 18 April 2011, done in English:

[Handwritten signature of Lee Gacunga Muthoga]
Lee Gacunga Muthoga
Presiding Judge

[Handwritten signature of Seon Ki Park]
Seon Ki Park
Judge

[Handwritten signature of Robert Fremr]
Robert Fremr
Judge

[Seal of the Tribunal]

