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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4703
MFM

OR: ENG

TRIAL CHAMBER III

Before: Judge Dennis C.M. Byron, Presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date: 21 June 2011

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

JEAN UWINKINDI

Case No. ICTR-01-75-PT

**DECISION ON PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR
VICTIMS AND WITNESSES TO CRIMES ALLEGED IN THE INDICTMENT
(Pursuant to Article 21 of the Statute, Rules 54, 69, 73 and 75 of the
Rules of Procedure and Evidence)**

Office of the Prosecutor:

Mr. Richard Karegyesa
Mr. Rashid Rashid
Ms. Sharifah Adong

For the Defence:

Mr. Claver Sindayigaya
Mr. Iain Edwards
Ms. Bettina Spilker

18/11

INTRODUCTION

1. On 13 September 2010, in order to expedite disclosure to the Defence and facilitate its investigations, this Chamber *proprio motu* ordered the transmission of all non-redacted statements in respect of 22 witnesses on the Prosecution's list, subject to certain interim protective measures and conditions.¹ The Chamber noted in the Order that the measures would remain in effect until the filing of the Prosecution's Pre-Trial Brief or, if the Prosecution files a motion for protective measures prior to that date, until the Chamber issues a Decision on such a motion. The following day, the Registrar filed a submission in which he pointed out that the mandate of the Witnesses and Victims Support Section of the Registry (WVSS) is limited to providing support to those witnesses whose participation in a trial has been confirmed, and does not extend to "potential witnesses," who remain the responsibility of the Party intending to call them.²

2. By Motion filed on 21 September 2010, the Prosecution requests the Chamber to: (i) confirm the interim protective measures contained in the Order of 13 September 2010 in respect of 16 of the witnesses on its list and any other witnesses that the Prosecution may subsequently list for trial; (ii) set a deadline for the disclosure of the non-redacted statements of those 16 witnesses and any other witnesses that the Prosecution may add to its list; and (iii) vacate the Order of 13 September 2010 granting interim protective measures.³

3. The Defence opposes the Motion and submits that the Prosecution is "in clear breach of the Chamber's Order of 13 September 2010." In addition, the Defence urges the Chamber to instruct the Prosecution to comply with the said Order as well as to specify the four out of the initial 22 listed witnesses who are now deceased.⁴

¹ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Order for Protective Measures (Rules 69, 72 and 75 of the Rules of Procedure and Evidence), 13 September 2010 ("Order of 13 September 2010").

² *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Registrar's Submissions in Respect of Trial Chamber III "Order for Protective Measures" (Rule 33(B) of the Rules of Procedure and Evidence, 14 September 2010 (the "Registrar's Submissions").

³ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence of the ICTR), 21 September 2010 (the "Motion"); and Prosecutor's Reply to Defence "Reply to Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Motion for an Order that the Prosecutor Comply with the Chamber's Order of 13 September 2010," 5 October 2010 (the "Reply").

⁴ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Reply to Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Motion for an Order that the Prosecutor Comply with the Chamber's Order of 13 September 2010, 1 October 2010 (the "Response"); and Reply to the Prosecutor's Response to the Defence Motion for an Order that the Prosecutor Comply with the Chamber's Order of 13 September 2010, 11 October 2010 (the "Sur-Reply").

DELIBERATIONS

4. As a preliminary matter, the Chamber notes with grave concern that the Prosecution has failed to comply with the unambiguous Order of 13 September 2010.⁵ The Chamber specifically ordered the disclosure of unredacted Prosecution witness statements so as to expedite Defence investigations in preparation for trial. The Prosecution's claim that the Registrar's Submissions of 14 September 2010 rendered the Order "largely inoperable"⁶ is unacceptable. By failing to immediately disclose the relevant documents, the Prosecution is undermining the very purpose of the Order and frustrating the administration of justice. The Chamber has inherent powers, pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules"), to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. The Parties are hereby reminded that they are required to comply with the orders of the Chamber unless and until such orders are overturned by the Appeals Chamber or otherwise modified by the Chamber. It is for the Chamber, not the Parties, to decide on the appropriate protective measures in light of all the circumstances of the case.⁷

Applicable Law

5. Article 19(1) of the Statute of the Tribunal (the "Statute") requires the Chamber to conduct the proceedings with full respect for the rights of the Accused and due regard for the protection of victims and witnesses. Article 20(2) of the Statute also entitles the Accused to a fair and public hearing, subject to Article 21 of the Statute, which provides for the protection of victims and witnesses.

6. Pursuant to Rule 66(A)(ii) of the Rules, the Prosecution shall disclose the statements of all the witnesses it intends to call to testify no later than 60 days before the date set for trial, but this stipulation is not absolute. It remains subject to Rule 69(A), which allows the Chamber, in exceptional circumstances, to order the temporary non-disclosure of the identity of a victim or witness who may be in danger or at risk. However, under Rule 69(C) and subject to Rule 75, it is within the Chamber's discretion to determine when the identity of the victim or witness shall be disclosed, taking into consideration the amount of time required for

⁵ The Chamber is aware that on 21 September 2010, the Prosecution filed a Motion for Leave to Amend the Indictment against Uwinkindi and that on 4 November 2010, it filed a separate Motion for the Referral of the case to the Courts of the Republic of Rwanda. However, the Prosecution has not argued that either of those circumstances was the reason for its failure to comply with the Chamber's Order of 13 September 2010.

⁶ The Reply, para. 5.

⁷ See *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, paras. 27-28.

the adequate preparation of the parties. In other words, there are many instances in which "the Prosecutor should not wait for the 60th day before the commencement of trial to disclose statements of witnesses whom [he] intends to call."⁸ On the contrary, the Prosecution should endeavour to disclose relevant material to the Defence as far in advance of the trial as possible.⁹

Objective justification

7. Measures for the protection of witnesses are to be determined on a case-by-case basis. In the exercise of its discretion, the Chamber has a duty to strike a careful balance between the rights of the Accused to a fair trial, on the one hand, and the protection of the witnesses, on the other. According to the jurisprudence of this Tribunal, witnesses for whom protective measures are sought must have a real fear for their safety or the safety of their family, and there must be an objective justification for this fear. The fear may be expressed by persons other than the witnesses themselves¹⁰ but the subjective fear of the witnesses is not *per se* sufficient.¹¹

8. In determining whether a witness's fear is justified, the Chamber must examine the representations made by the parties in the context of the broader security situation affecting the concerned witness. However, generalized fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate these fears.¹²

⁸ *Le Procureur c. Jean Mpambara*, Affaire No. ICTR-2001-65-I, Décision – Requête de la Défense aux fins de la communication de documents et objection relatives à la légalité des procédures (Articles 40, 40bis, 53, 54, 66, 69, 70, 72 et 73 du Règlement de procédure et de preuve), 28 février 2002, para. 24 [trans.]; *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-I, Decision on the Defence Motion for Disclosure of Evidence, 4 February 2000, para. 18; *The Prosecutor v. Bagambiki, Imanishimwe and Munyakazi*, Case No. ICTR-97-36-I, Decision on the Defence Motion for Disclosure in Respect of Samuel Imanishimwe, 21 October 1998.

⁹ *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2, Order on the Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999.

¹⁰ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Prosecutor's Extremely Urgent Motion for Protective Motions for Victims and Witnesses (Articles 19 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence), 24 November 2008, para. 6; *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses, 26 July 2006, para. 5; *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006, para. 7.

¹¹ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Urgent Motion for Witness Protective Measures, 9 February 2010, para. 17; and Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, para. 15; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on Prosecution's Confidential Motion for Leave to Vary the Witness List, for Protective Measures for Witness BRW and for the Testimony of Witness BRW via Closed-Video Link, 7 April 2009, para. 16; *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, Decision on Prosecution Motion for Protective Measures, 8 November 2007, para. 3.

¹² *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, para. 9; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, para. 7; *The Prosecutor*

Moreover, protective measures must be strictly necessary for the protection of the relevant witness, and it is always preferable to adopt a less restrictive measure if that measure can secure the desired level of protection.¹³

9. In support of its Motion, the Prosecution provides a sworn Affidavit from Commander Alfred Kwende, the Officer in Charge of Investigations in the Office of the Prosecutor, together with several annexes purporting to detail the objective circumstances underpinning the various witnesses' fears. In his Affidavit, Commander Kwende avers that it has come to his knowledge, in the course of his role as Commander in Chief of the Investigation Section of the Office of the Prosecutor in Kigali, that "survivors and witnesses to the genocide and their family members face a high risk of reprisals in the form of death threats, intimidation and actual physical harm."¹⁴ Commander Kwende also states that there is an objective danger to the safety of these witnesses due to the current uncertain security situation in various parts of Rwanda.

10. The Chamber has considered Commander Kwende's representations of the general security risks to witnesses, including the existence of a volatile security situation in many parts of Rwanda. The Chamber also notes that some of the other reports annexed to the Motion are more than a decade old and may no longer accurately reflect the security situation across Rwanda. Nevertheless, the Chamber is satisfied, based on all the information before it, that there is a real and objective basis for the fears expressed by these Prosecution witnesses.

11. Bearing in mind its duty to strike an acceptable balance between the rights of the Accused to a fair trial and the need to ensure that appropriate measures are adopted to safeguard the privacy and security of the witnesses, the Chamber finds that the adoption of protective measures is warranted in this case and that the conditions for ordering such protective measures for these witnesses are satisfied.

12. The Chamber recalls that the Prosecution's Motion prays for the protective measures to be granted not only in respect of the 16 specified witnesses, but also for the benefit of "any other witnesses that the Prosecutor may subsequently list for trial." As already noted, protective measures are to be granted on a case-by-case basis and the Chamber must be satisfied that there is an objective justification in case of each individual witness. As the

v. Tharcisse Renzaho, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 10.

¹³*The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 10; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009, para. 8.

¹⁴ Affidavit of Officer in Charge of Investigations, Commander Alfred Kwende, dated 17 September 2010, filed as Annex "A" to the Motion, para. 5.

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Chamber has not yet had the opportunity to assess the security situation of future witnesses, it is unwilling at this time to order blanket protective measures for all Prosecution witnesses, known and unknown.

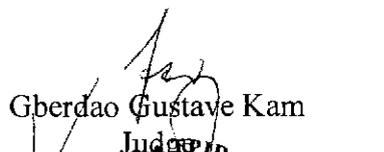
13. Finally, the Chamber observes that, in response to the Defence request to know specifically which four out of the initial 22 witnesses are now deceased, the Prosecution states that although its investigations are still ongoing, the preliminary indications are that Witnesses CDB, CDE, CCV and BZK are now dead and, consequently, have been removed from the witness list.¹⁵ Therefore, there is no longer any need for their statements to be disclosed to the Defence.

FOR THESE REASONS, THE CHAMBER

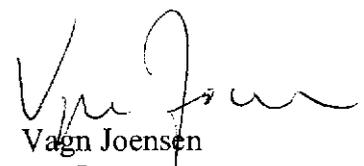
- I. **GRANTS** the Motion in part;
- II. **CONFIRMS** all the protections issued under Order I (i) through (viii) contained in the Order of 13 September 2010 in respect of the 16 Prosecution witnesses with the following pseudonyms: CDD, CDF, CDH, CDI, CDG, CCU, CCW, CCX, CCY, CCZ, BZE, BZF, BZG, BZH, BZI and BZJ;
- III. **ORDERS** the Prosecution to comply with the Chamber's Order of 13 September 2010 and immediately disclose to the Defence the unredacted witness statements and other relevant documents in respect of Prosecution Witnesses CDD, CDF, CDH, CDI, CDG, CCU, CCW, CCX, CCY, CCZ, BZE, BZF, BZG, BZH, BZI and BZJ; and
- IV. **DENIES** the Motion in all other respects.

Arusha, 21 June 2011, done in English.


Dennis C.M. Byron
President


Gberdao Gustave Kam
Judge

[Seal of the Tribunal]


Vagn Joensen
Judge

¹⁵ The Reply, para. 15.