

ICTR-99-54-T
04-07-2011
(102835-102831)

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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: 4 July 2011

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON REFILED PROSECUTION MOTION
TO RESCIND PROTECTIVE MEASURES FOR WITNESS ANAN**

Office of the Prosecutor
Mr. Hassan Bubacar Jallow
Mr. Richard Karegyesa
Mr. Fredrick Nyiti

Defence Counsel
Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci
Ms. Julie Hotte

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 "Refilling (sic) of Prosecutor's Urgent Motion to Rescind Protective Measures for Witness ANAN, Art. 28 & Rule 75", filed confidentially on 9 May 2011 (the "Prosecution Motion");

CONSIDERING the "Defence Response to Prosecutor's Urgent Motion to Rescind Protective Measures for Witness ANAN and Counter Motion Requesting the Trial Chamber to Issue an Order Directed at the French Republic (*Article 28 of the Statute and Rule 75 of the Rules of Procedure and Evidence*)", filed confidentially on 12 May 2011 (the "Defence Response");

NOTING the Prosecution did not file a Reply;

RECALLING the Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others of 7 May 2009;

RECALLING the Decision on Prosecution *Ex Parte* Motion to Rescind Protective Measures for Witness ANAN of 12 April 2011;

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

NOW DECIDES the Motion pursuant to Article 28 of the Statute and Rule 75 of the Rules.

INTRODUCTION

1. In its Decision of 12 April 2011, the Chamber noted that Prosecution Witness ANAN appeared to have signed a document on 13 January 2010 consenting to the rescission of the protective measures covering him in relation to the French investigation of an individual for international crimes committed in Rwandan territory in 1994. The Chamber observed that ANAN had allegedly given such consent more than one year prior to the filing of the original Prosecution Motion, and prior to his testimony before this Tribunal. The Chamber recalled that ANAN had repeatedly expressed concerns about his safety and possible prosecution throughout his testimony. Accordingly, the Chamber deferred its ruling on the original Prosecution Motion and instead directed the Prosecution, if it wished to pursue the matter, to prepare a new affidavit and have it signed by ANAN, and along with a declaration from the interpreter that the document



was translated into a language understood by ANAN and that he fully understood the contents thereof.¹

2. The Prosecution has now refiled its Motion.

SUBMISSIONS OF THE PARTIES

Prosecution Motion

3. The Prosecution requests that the protective measures covering Witness ANAN be rescinded in order to assist the French investigation of an individual for international crimes committed in Rwandan territory in 1994. This will enable the Prosecution to disclose to the French authorities the transcripts of ANAN's testimony in both open and closed sessions, Office of the Prosecutor (OTP) statements, exhibits tendered under seal and other information deemed necessary by the French authorities. The Prosecution submits an affidavit signed by ANAN on 18 April 2011 confirming that he consents to the lifting of the protective measures covering him to the aforementioned extent.²

Defence Response and Counter-Motion

4. The Defence has no objection to the Prosecution Motion, but files a Counter-Motion praying that the Chamber issue a cooperation order to France to provide the Defence with all documents in the state's possession concerning ANAN and documents that are in the Prosecution's possession but were not disclosed.³

DELIBERATIONS

5. The Chamber has already considered that Article 28(1) of the Tribunal's Statute concerning the obligation of States to cooperate with the Tribunal similarly applies to requests for cooperation by States sent to the Tribunal, and that the French investigation in question relates to international crimes within the Tribunal's jurisdiction. The Chamber has likewise concluded that the protective measures it issued on 7 May 2009 covering ANAN and other Prosecution witnesses apply *mutatis mutandis* in domestic proceedings by virtue of Rule 75(F)(i).⁴

6. The Chamber observes that in the new consent form, ANAN specifies that he consents to the lifting of protective measures covering him only in relation to the French judicial authorities. He clearly indicates that he does not consent to a complete lifting of

¹ Decision on Prosecution *Ex Parte* Motion to Rescind Protective Measures for Witness ANAN (TC), 12 April 2011 (hereinafter, "Original Decision"), paras. 7-8.

² Prosecution Motion, paras. 1, 3-4, 6, 7, 14-16.

³ Defence Response, paras. 6-27.

⁴ Original Decision, paras. 5-6.

such protective measures.⁵ Moreover, an OTP interpreter has submitted an Attestation indicating that he has translated the consent form from French into Kinyarwanda, which is a language understood by ANAN. The interpreter has further affirmed that ANAN fully understood the contents of the consent form.⁶

7. While the consent form was left blank with respect to the particular proceedings in France in relation to which ANAN consented to the partial lifting of the protective measures covering him,⁷ the Chamber is satisfied that ANAN has consented to such partial rescission and interprets such limited consent in accordance with the Prosecution's submission that the intended disclosure of information concerning ANAN to the French authorities will only be with respect to the latter's investigation of the individual identified by the Prosecution,⁸ for crimes within the Tribunal's jurisdiction.

8. The Chamber recalls that in the sealed excerpt of ANAN's testimony on 3 February 2010, Defence Co-Counsel discusses the Prosecution witnesses identified by ANAN, and mentions the names of most of the Prosecution witnesses.⁹ This portion of the transcript must be redacted before being disclosed to the French authorities.

9. The Chamber recalls that in issuing the protective measures covering ANAN and other Prosecution witnesses, it considered that "adequate protection of Prosecution witnesses requires also some protection of members of their families."¹⁰ In this regard, the Chamber stresses that in granting the Prosecution Motion, only the protective measures covering ANAN himself are partially lifted, while those covering his family will remain in place.

Defence Counter-Motion

10. The forms of relief requested by the Defence in its Counter-Motion are not the subject of a Motion dedicated to their consideration, and the Chamber will not consider them on the merits. The Chamber will address issues raised in Motions that have been properly filed before it.

⁵ Prosecution Motion, Annex A ("*Option deux: Je consens que mes documents confidentiels soient seulement communiqués aux autorités sans lever complètement mon statut de protégé, dans le(s) process de*").

⁶ *Id.*, Annex B.

⁷ *Id.*, Annex A (*Option deux*).

⁸ See Prosecution Motion, para. 1.

⁹ See T. 3 February 2010, pp. 83-85 (CS); T. 3 February 2010, pp. 82-84 (CS) (French).

¹⁰ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), 7 May 2009, para. 20.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion,

ORDERS the redaction of the identities of other Prosecution witnesses from the sealed excerpt of ANAN's testimony on 3 February 2010, as discussed in paragraph 8 above,

ORDERS the partial lifting of the protective measures covering ANAN insofar as necessary for disclosure to the French authorities of the transcripts of his testimony in the present case in both open and closed sessions (but only the redacted sealed excerpt of ANAN's testimony on 3 February 2010), along with other documents and information concerning ANAN which arose in these proceedings and deemed necessary by the French authorities to their investigation of the identified individual for crimes within the Tribunal's jurisdiction, and

ORDERS that the protective measures covering ANAN's family are to remain in place.

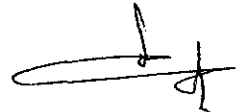
Arusha, 4 July 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge

