

ICTR-00-55C-T
23-08-2011

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(7917-7913)

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 23 August 2011

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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

**DECISION ON DEFENCE EXTREMELY URGENT MOTION
FOR PROTECTIVE MEASURES FOR DEFENCE WITNESS BNN07**

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:
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Defence Counsel for Ildephonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 19 August 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, (“Defence” and “the Accused” respectively) filed its fourth motion seeking protective measures for Witness BNN07,¹ who is to testify on 6 September 2011. 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 Witness BNN07, the Defence submits generally that the “situation in Rwanda has largely now been recognized as hostile, unstable and dangerous for Defence witnesses of the ICTR.”³ The Defence notes that the specifics with respect to Witness BNN07’s fears are included in *ex parte* Annex A, attached to the Defence Motion.⁴

3. Due to the imminent approach of the date upon which Defence Witness BNN07 is to testify, the Chamber exercises its discretion to render a decision before receiving the Prosecution response to the Defence Motion.

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.

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

¹ Defence Extremely Urgent Motion for Protective Measures for Defence Witness BNN07 (“Defence Motion”), 19 August 2011.

² Defence Motion, para. 8.

³ Defence Motion, para. 12.

⁴ Defence Motion, para. 11, Annex A.

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("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.⁵

7. The Chamber for the last time restates the definition of 'identifying information' set out in its four prior decisions on protective measures, namely "[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".⁶

Specific Application for Protective Measures

8. In support of the request for protective measures, Annex A of the Defence Motion includes an affidavit signed by Léopold Nsengiyumva specifying Witness BNN07's particular fears of intimidation. The Chamber finds that the Defence has demonstrated the existence of exceptional circumstances and a real fear for the Witness' safety which justifies the grant of protective measures for the Witness identified in Annexes A of the Motion.

9. The Chamber notes that the relief requested by the Defence is identical to that requested in the four previous Defence motions for protective measures for Defence witnesses.⁷ The relief requested in the prior four motions was not granted in the manner sought by the Defence.

10. The Chamber accordingly refers the Defence to the multiple decisions with respect to the relief sought in sub-paragraphs (ii),⁸ (viii)⁹ and (ix),¹⁰ rather than repeating itself for the

⁵ *Prosecutor v. 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. Bagosora et al.*, Case No. ICTR-96-7-1, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28.

⁶ Decision on Defence Motion Requesting Protective Measures for Defence Witnesses RWV07, RWV08, OUV06, CKN10, OUV01, RWV02 and OUV03 ("First Protective Measures Decision"), 11 January 2011, para. 8. (citations omitted); Decision on Defence Urgent Motion for Protective Measures for Defence Witnesses ("Second Protective Measures Decision"), 9 March 2011, para. 7; Decision on Defence Urgent Motion for Protective Measures for Defence Witness ("Third Protective Measures Decision"), 18 April 2011, para. 7; Decision on Extremely Urgent Motion for Protective Measures for Defence Witnesses Re Witnesses CKN 18, CKN20 and CKN22 ("Fourth Protective Measures Decision"), 6 May 2011, para. 8.

⁷ Motion, pp. 6-7; Defence Motion Requesting Protective Measures for Defence Witnesses RWV07, RWV08, OUV06, CKN10, OUV01, RWV02 and OUV03, 15 December 2010, pp. 6-7; Defence Urgent Motion for Protective Measures for Defence Witnesses, 28 February 2011, pp. 6-7; Second Defence Urgent Motion for Protective Measures for Defence Witnesses Re Witnesses CBN19 and CBN22, 4 April 2011, pp. 6-7.

⁸ First Protective Measures Decision, p. 5; Second Protective Measures Decision, para. 9; Third Protective Measures Decision, para. 9; Fourth Protective Measures Decision, para. 11.

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fifth time. The Chamber reminds the Defence of the fourth Protective Measures Decision, where the Chamber warned the Defence “that it will not entertain another attempt to re-litigate matters that have already been adjudicated on three prior occasions.”¹¹ Due to the imminent approach of the date upon which Witness BNN07 is to testify, the Chamber will refrain from taking further steps. The Chamber does, however, issue its last warning to the Defence and notes that any further duplicative applications for protective measures will not be taken lightly.

11. 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 Defence Witness BNN07 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, 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;

⁹ Second Protective Measures Decision, para. 10; Third Protective Measures Decision, para. 10; Fourth Protective Measures Decision, para. 11.

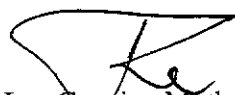
¹⁰ First Protective Measures Decision, para. 12; Second Protective Measures Decision, para. 11; Third Protective Measures Decision, para. 11; Fourth Protective Measures Decision, para. 11.

¹¹ Fourth Protective Measures Decision, para. 11.


- 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, 23 August 2011, done in English.


 Lee Gacunga Muthoga
 Presiding Judge


 Seon Ki Park
 Judge


 Robert Fremr
 Judge

[Seal of the Tribunal]

[Absent at the time of signing]

[Absent at the time of signing]

