

ICTR-2001-64-I
20-5-2003
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams Q.C., presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr Adama Dieng

Date: 20 May 2003

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

SYLVESTRE GACUMBITSI

Case No. ICTR-2001-64-I

**DECISION ON PROSECUTION MOTION FOR PROTECTIVE
MEASURES FOR VICTIMS AND WITNESSES**

The Office of the Prosecutor:
Mr Richard Karegyesa
Ms Andra Mobberley

Counsel for the Accused:
Mr Kouengoua

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”), sitting as Trial Chamber III, composed of Judges Lloyd G. Williams Q.C., presiding, Yakov Ostrovsky and Pavel Dolenc (“Chamber”);

BEING SEISED of the Prosecutor’s Motion for Protective Measures for Victims and witnesses (Pursuant to Art. 21, RR 54, 69, 73, and 75), filed 4 December 2002 (“Motion”);

CONSIDERING the *Réponse a la Requête du Procureur en Prescription de Mesures de Protection des Victimes et des Témoins* filed 7 May 2003 (“Defence Response”);

THE TRIBUNAL NOW DECIDES the matter solely on the basis of the written briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”).

PROSECUTOR’S SUBMISSIONS

1. The Prosecutor seeks protection for victims and potential witnesses, all of whom she alleges face a “real and substantial danger” of being “threatened, assaulted, or killed if their identities are revealed”. The Prosecutor explains that, because supporters of the Accused might travel to any country, witnesses might be at risk regardless of where they live. Therefore the Prosecutor seeks protection for the following:
 - (a) Victims and potential prosecution witnesses who may presently reside in Rwanda and who have not affirmatively waived their right to protective measures;
 - (b) Victims and potential prosecution witnesses who may presently reside outside Rwanda but who live in other countries in Africa and who have not affirmatively waived their rights to protective measures; and
 - (c) Victims and potential prosecution witnesses who may reside outside the continent of Africa and who have not affirmatively waived their rights to protective measures.
2. The Prosecutor requests the following orders:
 - a) Requiring the Prosecution to designate a pseudonym for each victim or potential prosecution witness, irrespective of his/her place of residence, who has not waived his/her right to protective measures (“Protected Person”) also requiring that the pseudonym shall be used whenever referring to such Protected Person in Tribunal proceedings, communications, and discussions both between the parties and with the public.
 - (b) Requiring that the names, relations, addresses, whereabouts and other information which might identify or assist in identifying any Protected Person (“Identifying Information”) be sealed by the Registry and not included in any records of the Tribunal (past, present, or future) other than the CONFIDENTIAL material provided to the Trial Chamber in support of this motion, and also requiring that Identifying Information be communicated to the



Witness and Victims Support Unit only in accordance with established procedure and only in order to implement protection measures for such Protected Persons.

(c) Requiring, to the extent that any names, addresses, relations, whereabouts or and [*sic*] other information concerning or tending to identify such victims and actual or potential prosecution witnesses is contained in existing records of the Tribunal and that such Identifying Information be expunged from those documents.

(d) Prohibiting the disclosure to the Defence of any Identifying Information and any information in the supporting material on file with the Registry and requiring the Prosecution to disclose any materials provided to the Defence in a redacted form, until such time as the Trial Chamber is assured that the witnesses have been afforded adequate protection, but in any event, no earlier than twenty-one (21) days before the witness is due to testify at trial;

(e) Prohibiting the disclosure to the public or the media, prior to, during, and after the termination of this trial and of any appeal, of any Identifying Information concerning Protected Persons.

(f) Prohibiting the Accused or any member of the Defence Team from attempting to make any independent determination of the identity of any Protected Person or encouraging or otherwise aiding any person to attempt identify any such Protected Person.

(g) Requiring the Defence to provide to the Trial Chamber and to the Prosecutor a designation of all persons working on the immediate defence team who will have access to any Identifying Information; also requiring the Defence to notify the Trial Chamber and the Prosecutor in writing of any person leaving the Defence team and to confirm in writing to the Chamber and to the Prosecutor that such person has remitted all material containing Identifying Information.

(h) Requiring the Accused and/or Defence Counsel to make a written request to the Trial Chamber, with reasonable notice to the Prosecution, prior to contacting any Protected Person or any relative or associate of such person; also requiring the Prosecution, at the direction of the Trial Chamber to facilitate such contact, provide that such person (or that parents or guardian of such person if he/she is under the age of eighteen years) consents to an interview by the Defence.

(i) Prohibiting the Defence and the Accused from directly or indirectly sharing, discussing, or revealing any Identifying Information to any person or entity other than the Accused, assigned Defence Counsel, or other persons the Registry designates as working on the Defence team.

(j) Prohibiting the photographing and audio and/or video recording or sketching of any Protected Person at any time or place, without leave of the Trial Chamber and the parties;

(k) Prohibiting the Accused both individually or through any person working for the Defence from personally possessing any material that contains any Identifying Information, including but not limited to, any copy of a witness statement even if the statement is in redacted form, unless the Accused is, at the

time in possession, in the presence of Counsel; also instructing the United Nations Detention Centre authorities to ensure compliance with the prohibition set out in this paragraph.

(l) Requiring closure to the public of all trial proceedings where any Protected Person is to give testimony, which might reveal or assist in revealing his/her identity or whereabouts or which might reveal or assist in revealing the identity or whereabouts of a member of his/her family or of any other Protected Person.

(m) Any other order or orders the Trial Chamber may deem appropriate in the interest of justice.

3. In support of her request, the Prosecutor has submitted 22 Annexes, providing specific and general information regarding risks to witnesses, the security situation in Kibungo Prefecture, security concerns in Rwanda, and insecurity in the region.
4. In support of specific requested measures, the Prosecutor submits that the 21 day rolling disclosure deadline has "crystallised" as the Tribunal's practice.
5. The Prosecutor submits that proposed measure (k) is particularly important in light of the sharing of witness statements amongst accused persons at the detention facility.

DEFENCE SUBMISSIONS

6. The Defence does not formally oppose all of the measures requested by the Prosecution, but submits that certain measures should not be granted.
7. In particular, the Defence opposes the blanket use of pseudonyms because this practice should only be permitted, pursuant to Rule 69, in exceptional circumstances, which have not been established by the Prosecution in this case. The Defence observes that in genocide trials in Rwanda the witnesses testify in public without worry. Moreover, the Defence opposes protective measures for those witnesses who are Rwandan prisoners who have already been convicted for genocide.
8. The Defence submits that the identity of witnesses and victims must be communicated to the Defence prior to the commencement of the trial pursuant to Rules 66 and 67, in order to permit the preparation of the Defence and in accordance with the rights of the Accused guaranteed by Article 20(4)(a) and (b) of the Statute. The Defence also notes that non-disclosure of records pursuant to Rule 75 (B)(b) is only available in relation to the public, and cannot be used to prevent disclosure to the Defence.
9. The Defence submits that it would be violation of the rights of the Accused, inconsistent with Article 75, to prevent the Accused from conducting investigations. The Defence notes that the Defence Counsel are legally bound to maintain professional confidentiality pursuant to Article 8 of the ICTR Code of Professional Conduct for Defence Counsel.
10. The Defence observes that the Prosecutor has already disclosed to the Defence three lots of documents, including redacted witness statements. The Defence submits that



the Prosecutor cannot now ask for these documents to be returned after the Accused has already studied them.

DELIBERATIONS

11. Witness protection is governed by Article 21 of the Statute and Rules 69 and 75. In addressing witness protection pursuant to these provisions, the Chamber is sensitive to the need to safeguard both the rights of the Accused and the security and privacy of victims and witnesses who may be in danger or at risk. The protection of witnesses should not, however, serve to frustrate or hinder an effective defence.
12. The Chamber has reviewed and considered the materials submitted in the Annexes to the Motion. Based on the Affidavit of Mr. Nkole, Annex A, and the Declaration of Mr. Abdulrahman, as supported by the other Annexes describing the security situation in the region, the Chamber is satisfied that there is a potential safety risk to witnesses in Rwanda and neighbouring countries.
13. The Chamber is not, however, convinced by the Prosecutor's argument that *all* witnesses are at risk. In relation to witnesses not residing in Rwanda or in neighbouring countries, the Chamber considers that the Prosecutor has not provided sufficient evidence of threats that justify their protection even under the wide scope of Rule 75. Such witnesses may be granted witness protection measures only where circumstances exist to justify this protection. The Chamber will consider any such circumstances which may arise at the appropriate time.
14. The Chamber considers that proposed measures (a), (b), (c), and (e) are intended to protect witnesses against disclosure of their identities to the public and the media pursuant to Rule 75(A). The Chamber considers that these proposed measures should be granted in this case with certain small modifications. In particular, the Chamber notes that the identities of protected witnesses are necessarily included in a variety of confidential materials in the possession of the Registry, the Chamber, and the parties. It would serve no purpose for these matters to be expunged from these confidential documents. Moreover, the Chamber considers that the second part of proposed measure (b) concerning communication to the Witness and Victims Support Section ("WVSS") is unnecessary because nothing in the granted measures stops the Prosecutor from making such confidential communications that are necessary to ensure that the witnesses are available to appear at trial.
15. With respect to requested measure (d), the Chamber considers that identifying information of protected witnesses should be disclosed to the Defence, at the latest, 21 days prior to the date that the witness is scheduled to testify before the Tribunal. In doing so, the Chamber notes that pursuant to Rule 66(A)(ii), the Defence will receive, or has already received, from the Prosecutor a copy of the redacted statements of witnesses intended to be called, at least 60 days prior to the date set for trial.
16. Regarding the Prosecutor's request in paragraph (g) of the Motion, the Chamber finds it to be more suitable for notice of the relevant information to be given to the Registry rather than to the Chamber or to the Prosecutor, as proposed by the Prosecution. If a problem arises in relation to the composition of the Defence team



which may affect witness protection concerns, then the Registry may bring the situation to the attention of the Chamber.

17. In relation to requested measure (h), the Chamber does not consider that it is necessary for the parties to seek the permission of the Chamber each time they wish to contact an opposing party's witness. Such requests for contact should be initially arranged between the parties in consultation with the WVSS. Where such co-operation fails, either party may approach the Tribunal for assistance. The Prosecutor must recall that, prior to disclosure of the identifying information, the Defence will not be on notice that a particular witness is being called by the Prosecutor.
18. In relation to requested paragraph (j), the Chamber finds that the formulation of this measure is so broad that it would be difficult to enforce as worded. However, the Chamber will grant this proposed measure in modified form.
19. The Chamber denies the orders sought in paragraphs (f), (i), and (k) because they are overly broad and affect the Accused's right to prepare his Defence. In doing so, the Chamber notes that any attempt to directly ascertain the identity of a Prosecution witness from the information, statements, or other evidence disclosed by the Prosecutor would fall afoul of other witness protection measures. While the Defence is prohibited by the other granted measures from disclosing identifying information concerning protected witnesses to the public or to the media, the Defence cannot be prevented from making legitimate investigations and inquiries into the circumstances surrounding the events alleged by the Prosecutor. In doing so, the Defence team should limit the exposure of witness identifying information and should ensure that they do not disclose to any person the fact that a protected witness has been, or will be, a witness before the Tribunal.
20. The Chamber considers that it is premature to grant a pre-trial order requiring trial testimony to be heard in closed session. The decision to move to a closed session hearing will be made by the Trial Chamber at the appropriate time during the proceedings in accordance with Rules 75 and 79.
21. The Chamber therefore **ORDERS** for all anticipated prosecution witnesses residing in Rwanda or in neighbouring countries who have not waived protective measures ("Protected Prosecution Witness"):
 - (i) The Prosecution to designate a pseudonym for each Protected Prosecution Witness and requiring that the pseudonym be used whenever referring this person in Tribunal proceedings, communications, and discussions both between the parties and with the public.
 - (ii) That the disclosure to the public or to the media of any identifying information concerning Protected Prosecution Witnesses shall be prohibited.
 - (iii) That the photographing, audio and/or video recording, or sketching of any Protected Prosecution Witness in relation to his or her cooperation with or appearance at the Tribunal at any time or place, shall be prohibited without leave of the Trial Chamber and the permission of the Protected Prosecution Witness concerned.

(iv) That the names, relations, addresses, whereabouts, and any other information tending to identify any Protected Prosecution Witness be sealed by the Registry and not included in any public or non-confidential records of the Tribunal.

(v) That, to the extent that any names, addresses, relations, whereabouts, or any other information tending to identify a Protected Prosecution Witness is contained in existing public or non-confidential records of the Tribunal, it shall be expunged from these documents.


(vi) That the Prosecution may withhold the name and other identifying information about Protected Prosecution Witnesses from disclosure to the Defence until twenty-one (21) days before the witness is due to testify at trial.

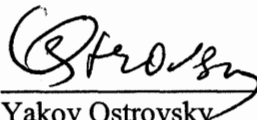
(vii) The Defence to provide to the Registry a designation of all persons working on the immediate Defence team who will have access to any identifying information concerning Protected Prosecution Witnesses and requiring the Defence to notify the Registry in writing of any person leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.

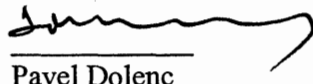
(viii) The Defence, in making legitimate investigations and inquiries, to limit the exposure of witness identifying information and to not disclose to any person the fact that a Protected Prosecution Witness has been, or will be, a witness before the Tribunal.

22. The Chamber **DENIES** the Motion in all other respects.

Arusha, 20 May 2003.


Lloyd G. Williams, Q.C.
Judge, Presiding


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

