UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
11-11-2003
(17092-17076)

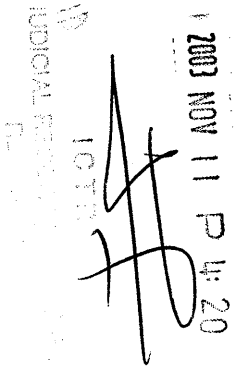
17092

TRIAL CHAMBER I

Before: Judge Erik Møse
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 11 November 2003



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MOTION BY NZIRORERA FOR DISCLOSURE OF CLOSED SESSION TESTIMONY OF WITNESS ZF

The Office of the Prosecutor
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Drew White
Segun Jegede
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17091

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Disclosure of Cosed Session Testimony and Exhibits Received Under Seal for Witness ZF", filed on 6 October 2003 by the Defense for Joseph Nzirorera, the defendant in the case of *Prosecutor v. Joseph Nzirorera*, Case No. 98-41-I, before Trial Chamber III;

CONSIDERING the Prosecution Response thereto filed on 10 October 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution in the case of *Prosecutor v. Joseph Nzirorera* has indicated its intention to call an individual who has previously testified as a witness in this case under the pseudonym of Witness ZF.[1] By this motion, the Defence seeks disclosure of the transcripts of the closed session testimony of Witness ZF and any exhibits filed with the Registry under seal during that testimony.

SUBMISSIONS

2. The Defence notes that although there is no specific provision of the Rules of Procedures and Evidence ("the Rules") authorizing such disclosure, Trial Chambers have done so in the past, and that authority to do so may be found in Rules 54 and 81(B). It contends that review of this closed testimony will materially assist Mr. Nzirorera's case by permitting impeachment of the witness for any discrepancies with testimony given during the trial of Mr. Nzirorera. It declares that it is willing to be bound by the provisions of the protective order applicable to closed session testimony in the *Bagosora* case.

3. The Prosecution states that, in principle, it does not oppose the motion, as long as "at least the same protective measures afforded by Trial Chamber III in *Bagosora* obtain".[2]

DELIBERATIONS

3. In accordance with past practice, the Chamber finds that it has the authority to revise Decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept by the Registry.[3] A valid reason for modifying an order governing the testimony of a protected witness is that the witness is to testify in another case before this Tribunal. A transcript of the witness's prior testimony is undoubtedly useful to the assessment of the consistency and credibility of the witness's testimony.

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[1] *Nzirorera*, "Prosecutor's Response to Josephe Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal for Witness ZF", para. 1.

[2] *Id.* para. 3.

[3] *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003. Whether this authority flows from Rule 54 or from the Chamber's inherent authority to supervise its own proceedings need not be decided here. See e.g. *Barayagwiza*, Decision (AC), paras. 76-77.

4. The Chamber follows past decisions in finding that its protective order should be modified only to the extent of permitting the moving party access to the protected material on condition that its terms shall apply *mutatis mutandis* to that party. The Trial Chamber's continuing interest in ensuring the protection of the witness's identity requires no less. However, the timing of disclosure of the material is a matter for the Chamber seized of the trial, which is in a better position to administer such decisions and ensure consistency of protective orders. The time period for disclosure set out by Trial Chamber III, thirty-five days prior to the protected witness's testimony, was modified by this Trial Chamber's decision of 18 July 2003, to require disclosure no later than thirty-five days before the commencement of the remainder of the Prosecution case. That decision did not otherwise modify the terms of the existing witness protection regime, set out in the order of 29 November 2001, which is appended hereto.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness ZF in the case of *Bagosora et al.*, Case No. ICTR-98-41-T, and exhibits filed under seal therewith, shall be made available by the Registry to the Trial Chamber seized of the *Nzirorera* case, which shall then be in a position to make any order which it sees fit in relation to the timing of its disclosure;

ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, filed on 29 November 2001 ("the Witness Protection Decision"), attached hereto as Annex A;

ORDERS the Registry to carry out the terms of this Decision, and to otherwise continue to enforce the terms of the Witness Protection Decision.

Arusha, 11 November 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

17089

ANNEX A

ICTR-98-41-I
29-11-2001
(5196 — 5184)

17088

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: **29 November 2001**

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
ANATOLE NSENGIYUMVA
GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-98-41-I

DECISION ON THE PROSECUTION MOTION FOR HARMONISATION AND MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:
Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Defence Counsel:
Mr. Raphael Constant
Mr. Jean Yaovi Degli
Mr. Clemente Monterosso
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'omanwa

The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III composed of Judges Lloyd George Williams, Presiding, Yakov Ostrovsky, and Pavel Dolenc (the "Chamber");

BEING SEISED OF the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses dated 5 July 2001 and filed on 10 July 2001 (the "Motion");

CONSIDERING Nsengiyumva's Defence Response to the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses dated 24 August 2001 and filed on 31 August 2001;

CONSIDERING Bagosora's "Mémoire en Replique" filed on 3 September 2001;

RECALLING the three extant witness protection orders in the three cases that have been joined for trial: *Prosecutor v. Nsengiyumva*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, ICTR-96-12-T, 26 June 1997 (the "Nsengiyumva Decision"); *Prosecutor v. Bagosora*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, ICTR-96-7-I, 31 October 1997 (the "Bagosora Decision"); and *Prosecutor v. Kabiligi and Ntabakuze*, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, ICTR-97-34-I, 19 May 2000 (the "Kabiligi-Ntabakuze Decision") (collectively, the "Extant Orders");

CONSIDERING the oral submissions of the Prosecutor and Counsel for all four Accused at the hearing on the Motion of 6 September 2001 (the "Hearing");

NOW DECIDES the matter on the basis of the written briefs and oral submissions of the Prosecutor and the Defence.

I. SUBMISSIONS

A. SUBMISSIONS OF THE PROSECUTOR

1. In the Motion, the Prosecutor seeks to harmonise the time frame within which she must disclose to the Defence unredacted statements and identification data of protected prosecution witnesses. The Prosecutor proposes that the Chamber replace the relevant sections of the three Extant Orders with a harmonised measure that requires her to make such disclosure "when the witness has been brought under the protection of the Tribunal or at least twenty-one (21) days before the witness is to testify at trial, whichever is the soonest". In support of this proposition, the Prosecutor underscores that this disclosure period is currently in place in the Kabiligi-Ntabakuze Decision. Moreover, submits the Prosecutor, such a disclosure period is also consistent with recent witness protection orders imposed in other cases. The Prosecutor also submits that the proposed modification would not prejudice the Accused in the preparation of their defence because the proposal for modification is being made well in advance of trial.

2. Further, the Prosecutor expostulates that Rule 69 of the Rules of Procedure and Evidence (the "Rules") strikes a balance between the rights of an Accused and the safety and security of witnesses. That balance, posits the Prosecutor, is best achieved by applying the

five-pronged test pronounced in the matter of *Prosecutor v. Tadic* (IT-94-1-T), Decision on the Prosecutor's Motion requesting Protective Measures for Victims and Witnesses, (10 August 1995). Relying on a report by the Chief of the Witness and Victims Support Section-Prosecution (the "WVSS-P"), prepared in the context of the so-called Butare Case, currently being tried before Trial Chamber II (Judge Sekule Presiding), the Prosecutor submits that the witnesses suffer from a real and objective fear. The Prosecutor contends moreover that her witnesses are vulnerable and "not easily encouraged to testify in court". She also invites the Chamber to take judicial notice of the present state of armed conflict in Rwanda.

3. The Prosecutor indicates that she intends to call more than 200 witnesses in her case-in-chief during the trial proceedings. In response to the Defence arguments that the twenty-one-day before testimony disclosure period does not afford them adequate time to place in context such a large number of witnesses, Prosecutor remonstrates that the redacted witness statements she has already disclosed afford the Defence sufficient insight into the global context of her case against the Accused.

4. The Prosecutor also seeks to modify the three Extant Orders by adding a provision requiring the Defence to make a written request to the Trial Chamber, on prior notice to the Prosecution, before contacting prosecution witnesses.

5. Finally, the Prosecutor requests that the Chamber not make any more harmonising provisions than those she has proposed because it would be "confusing and unwieldy to replace the existing orders in their entirety by a new single harmonised order". Moreover, the Prosecutor argues that more extensive harmonisation would prejudice parties who have relied on or implemented the earlier orders.

B. Submissions of the Defence

6. During the hearing, Counsel for Kabiligi made an oral submission that the Accused Kabiligi be afforded the same disclosure conditions for unredacted witness statements as enjoyed by the Accused Bagosora and Nsengiyumva.

1. Timing of Disclosure of Witnesses' Identity

7. The Defence submits that the identity and unredacted witness statements of all protected witnesses must be revealed before the commencement of trial. Any other provision, i.e., one measured from the date of testimony of a particular witness would result in substantial prejudice to the rights of the Accused to be accorded sufficient time to adequately prepare their defence. In support of this contention the Defence, invokes the provisions of Article 20 of the Statute, Rules 66, 67, 69, and 75 of the Rules of Evidence and Procedure and the practice under the civil code or the common law in the national jurisdictions. More significantly, the Defence argues that the harmonisation and modification sought by the Prosecutor, as well as the earlier case law pronouncing similar orders, is inconsistent with Rule 66(A)(ii) and 69(C) and Article 20(4)(b) of the Statute because these provisions require that the Prosecutor make disclosure of witness identifying data *before trial*. The Defence also stresses that pursuant to Rule 69, the imposition of protective measures is reserved for "exceptional circumstances". Consequently, argues the Defence, the Prosecutor cannot legitimately withhold disclosure of witness identification data for all the witnesses she intends to call at trial.

8. Addressing themselves to the practicalities, the Defence maintains that the Chamber should carefully consider the particular factual predicate of this case, in which the Prosecutor intends to call more than 200 witnesses in her case in chief. Such an unwieldy number of witnesses and the length and complexity of witness statements are factors which should be considered when determining a reasonable time frame for disclosure of witness identifying information. In this regard, the Defence indicates that they have already received 872 witness statements in redacted form. Some of the witnesses' statements have been so overly redacted, rendering them effectively incomprehensible and useless in the preparation of the Defence. Consequently, the Defence contends, it will be necessary to consider the unredacted versions of all witness statements simultaneously in order to fairly glean an understanding of the gestalt of the Prosecutor's case against each of the Accused. In this manner, notes the Defence, the factual circumstances in this case are eminently distinguishable from others in which there is only one Accused involving a far more modest number of Prosecution witnesses.

9. Furthermore, in this regard, the Defence submits that it is veritably impossible to cross-examine a particular witness without having recourse to the complete, unredacted statements of all the other witnesses with respect to a particular issue or incident. Therefore, contends the Defence, the Prosecutor must be directed to provide unredacted witness statements and to disclose the identities of witnesses before the commencement of trial so as to afford the Defence a fair opportunity to assess and investigate each witness' credibility, bearing in mind the interrelationship between the various claims in all witnesses' unredacted statements.

10. During the Hearing, Counsel for Bagosora provided further practical insight by describing the manner in which the Defence exploits the unredacted witness statements. Once disclosed by the Prosecutor, an unredacted statement is carefully studied by the entire Defence team, including the lawyers, the legal assistants, investigators, and then by the Accused. Thereafter, the contents of each statement must be compared with the charges in the Indictment and with the statements of other witnesses. Based upon this extensive review, Counsel and the Accused discuss and prepare the battery of cross-examination questions. This involved process, notes the Defence, will necessarily require that the Prosecutor disclose unredacted witness statements more than twenty-one days in advance of a particular witness' testimony.

11. The Defence of Nsengiyumva submits that in the context of a criminal trial, when balancing the rights of the Accused and the interests of the witnesses who wish to temporarily conceal their identities, the rights of the Accused must be deemed superior. In this vein, the Defence observes that neither the Accused, who is detained at the Tribunal's detention facility, nor any member of the Defence teams pose any danger to the Prosecutor's witnesses. Therefore, argues the Defence, the Prosecutor's witnesses' fears are purely subjective, with no basis in objective facts. Notably, the Defence contends that in other cases the Prosecutor was required to disclose unredacted witness statements sixty days prior to the trial, with no resulting difficulties. Moreover, stresses the Defence, witnesses in the national courts of Rwanda and Belgium testify publicly in open court without the benefit of any protective measures.

12. In response to the Prosecutor's submissions, Counsel for Bagosora reminds the Chamber that the Extant Orders already strike a correct balance between the interests of the Accused and the interest of the protected witnesses. Counsel suggests that the provisions of the Extant Orders and respect for the rights of the Accused militate in favour of harmonising

witness protective measures to conform to the more liberal and least restrictive measures among the Extant Orders. The Defence submits that the Prosecutor should be required to disclose unredacted witness statements within a shorter delay period, thereby affording all Accused the benefit of the adequate time to prepare their defence.

13. All Defence Counsel indicated that they would be agreeable to a harmonised order in conformity with the Rules requiring the Prosecutor to disclose the unredacted statements of her protected witnesses at least sixty days before trial. Moreover, Counsel for Bagosora conceded that if disclosure of unredacted witness statements were made sixty days before trial, the Prosecutor could be permitted to disclose the identity of the witness at some later date.

2. The No-Contact Order

14. The Defence of Kabiligi, the sole Counsel to address the specifics of Prosecutor's proposed modifications with respect to an injunction requiring the Defence to obtain leave of the Chamber and give prior notice to the Prosecutor before contacting the Prosecutor's protected witnesses, submits that the requested order presents a practical absurdity. In this regard, argues the Defence, they can hardly be asked to refrain from contacting protected witnesses whose identities have not been disclosed to or known by the Defence.

II. DELIBERATIONS

A. Introduction

15. The Prosecutor has requested the harmonisation of two measures in the Extant Orders, arguing that it would be unwieldy and prejudicial to harmonise all the witness protection provisions. The Chamber finds that harmonisation of the witness protection orders in a joint trial is in the best interests of the parties and of justice. It would be totally impractical and illogical for the Chamber to proceed with the trial of the Accused in a joint trial where the disclosure orders differ from one Accused to the next. The extent to which the Chamber may properly modify the Extant Orders, however, is limited by operation of the provisions of Rules 69 and 75. While the Tribunal may order appropriate witness protection measures pursuant to Rule 75 *proprio motu*, the parties must affirmatively request any relief pursuant to Rule 69. Consequently, the Chamber is constrained by Rule 69 to consider only that very circumscribed measure of relief sought by the Prosecutor with respect to the temporary non-disclosure of witnesses' unredacted statements and other identifying data. With respect to the Prosecutor's proposal for the modification of the Extant Orders to control contact of her witnesses by the Defence, the Chamber is free pursuant to Rule 75 to fashion relief *sua sponte*, unencumbered by the relief sought by the Prosecutor.

16. The protection of witnesses who appear before the Tribunal is governed by Article 21 of the Statute and Rules 69 and 75. In view of the statutorily guaranteed rights of the Accused under Article 20(1), (4)(a) to a fair and public trial and to be afforded adequate time to prepare their Defence, the Motion calls upon the Chamber to engage in a delicate balancing process, weighing the rights of the Accused against the mandate of the Tribunal to provide effective protection measures for victims and witnesses.

17. Stated in its most simple terms, the instant Motion fundamentally thrusts the Chamber into resolving the main polemic on which there is a seemingly irreconcilable difference of opinion between the Defence and the Prosecution: Which method of calculating the disclosure period of unredacted witness statements and other identifying data is most consonant with the letter and spirit of Article 21 of the Statute and Rule 69 -- one measured from the date of *trial* or one measured from the date a particular protected witness is to give *testimony* before the Trial Chamber? Also, implicit in the foregoing dialectic is the following issue. Assuming one measures the Prosecutor's disclosure obligation from the expected date of testimony of a particular protected witness, does Rule 69 (or any other Rule for that matter) permit the Chamber to make a *rolling disclosure* order or does it only countenance that disclosure is to be made before the commencement of trial?[1]

B. Timing of Disclosure of Witnesses' Identities

18. Each of the three Extant Orders contains an order permitting the Prosecutor to delay the disclosure of the identit and related identifying information of her witnesses to the Defence. The specific provisions are reproduced as follows (with added emphasis):

(a) The Nsengiyumva Decision:

> (6) The Prosecutor is authorised to withhold disclosure to the Defence of the *identity* of the victims and witnesses and to temporarily redact their names and addresses in the written statements, *until such time as the said victims or witnesses are brought under the protection of the Tribunal.*
>
> (7) Subject to the provisions in Rules 69(A) and 69(C) of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the *identity* of the said protected victims and witnesses as well as *their non-redacted* statements within sufficient time *prior to the trial* in order to allow the Defence a sufficient amount of time to prepare itself.

(b) The Bagosora Decision:

> In the body of the Decision, the Tribunal explains "the trial chamber is of the considered opinion that the Prosecutor should disclose the identity of its witnesses in *sufficient time prior to the trial* to allow the defence to rebut any evidence that prosecution witnesses may raise." The Order reads, "the names addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under the seal of the Tribunal and shall not be disclosed to the defence *until further orders*".

[1]. Inasmuch as the English version of Rule 69(C) speaks of "before trial", whereas the French version speaks of "before the commencement of trial", the two terms are used interchangeably in this Decision.

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(c) The Kabiligi and Ntabakuze Decision:

> Prohibiting the disclosure, in advance, to the Defence of the names, addresses, whereabouts of, and any other identifying data, including any information in the supporting material on file with the Registry, which would reveal the identities of the Protected Persons, and requiring the Prosecutor to make such a disclosure, including of any material provided earlier to the Defence in a redacted form, not *later than 21 days before the protected witness is to testify at trial*, unless the Trial Chamber decides otherwise pursuant to Rule 69(A) of the Rules.

19. The Tribunal must determine the appropriate timing of disclosure and in doing so, must reassess what is "strictly necessary" for the protection of witnesses in the circumstances of the joint trial. Such an evaluation must be made on a case-by-case basis. There has been a recent trend in some other cases allowing the Prosecutor to withhold the identity of witnesses until twenty-one days prior to the date on which the witness is scheduled to testify. However, disclosure of identity is of heightened importance in this case, given the size of the Prosecution's case and in particular the expected number of witnesses.

20. It is the Chamber's considered belief that deliberation about the foregoing issues cannot be done in a factual vacuum. Rather, the Chamber must approach these issues with a reasoned appreciation of the practicalities of implementing any resulting order and an understanding of the idiosyncratic factual circumstances of this particular case. First, it is important to recall that this case involves four Accused who are to be tried jointly. Second, in the context of this case in which the Prosecutor intends to call more than 200 witnesses and has already produced 872 redacted witness statements, the Chamber is mindful of its statutory duty to provide effective protection to witnesses who are considered to be vulnerable. It is anticipated that the trial of this matter may take upwards of one to two years. Moreover, the Chamber must take into account the importance and high profile and influence of the four Accused in this case and their possible connections and influences notwithstanding the fact that they are confined at the Tribunal's Detention Facility. Rule 69(C) sanctions such considerations inasmuch as it envisioned exceptional circumstances that would warrant the temporary non-disclosure of the identities of witnesses to the Defence.

21. The Chamber must consider how long a period of temporary non-disclosure of the witnesses' unredacted statements and identification data is strictly necessary to protect vulnerable witnesses. This consideration also entails the concomitant determination of how much advance disclosure is necessary to fairly avail the Defence of sufficient time to adequately and effectively prepare their respective cross-examination of the Prosecutor's protected witnesses. No consideration of witness protective measures is complete without an understanding of the capabilities and resource-imposed limitations of the Witness and Victims Services Section.

22. Consideration of the foregoing peculiar factual circumstances militates in favour of harmonising the Extant Orders to conform with the least restrictive or more liberal order among them, namely the order now in place in the matter of the *Prosecutor v. Bagosora* (ICTR-96-7-I), Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses (31 October 1997 (orally) and 26 November 1997 (written)) (Judges Sekule, (Presiding), Ostrovsky and Khan). Mindful of its obligation to provide meaningful protection to vulnerable witnesses and to protect the interests of the Accused to receive disclosure of the

unredacted statements and identities of protected Prosecution witnesses in sufficient time to make effective use of them in preparing a Defence, the Chamber finds that it is in the interest of justice to harmonise the Extant Orders to conform to the order now in operation in the Bagosora Decision. Thus, the witness protection orders in the other two cases, i.e., *Prosecutor v. Nsengiyumva* and *Prosecutor v. Kabiligi and Ntabakuze*, shall be harmonised to conform to the Bagosora Decision.

23. To recall, the entire order with respect to disclosure of witness identifying data to the Defence in the Bagosora Decision reads as follows:

> The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under the (sic) seal of the Tribunal and shall not be disclosed to the Defence (sic) *until further orders*.

24. In addition, in the deliberations portion of the Bagosora Decision (at para. (ii) of the Deliberations) the Chamber, comprised of Judges Sekule, Presiding, Ostrovsky, and Khan, reiterated the words of the Rule 69 (C) as follows:

> The Trial Chamber is of the considered opinion that the Prosecutor (sic) should disclose the identity of the witnesses in sufficient time prior to the trial to allow the defence (sic) to rebut any evidence that the prosecution witnesses may raise [.]

25. Harmonising the Extant Orders to conform to the one in the Bagosora Decision has several advantages. Notably, it provides the fluidity necessary to reassess the practicalities at every instance so as to modify the order to address unexpected difficulties the WVSS-P invariably encounters in locating and providing protection to a large number of prosecution witnesses. Secondly, adopting the Bagosora Decision has the added advantage of forestalling any argument of prejudice that may be raised by the Accused Bagosora and Nsengiyumva, who were heretofore the beneficiaries of the more liberal orders. The orders in those cases are based on the language of Rules 69 (A) and 69(C), leaving the Chamber free to impose an appropriate specific deadline for the Prosecutor to disclose witness-identifying data by a subsequent order.

26. It is equally imperative that the Chamber considers the limits of the abilities of the WVSS-P in providing protective measures for the witnesses because it is only after a witness comes under the protection of the Tribunal that any disclosure of the witness-identifying data may be made to the Defence. The resources and staffing of the WVSS-P are not limitless. In addition, those resources are strained even further when all three of the Tribunal's Trial Chambers are engaged in trial proceedings, all trying two or more cases simultaneously. The Chamber would be remiss if it failed to consider these practicalities and their attendant repercussions thereby reducing "witness protection" to hollow words.

27. It is not desirable for the Chamber to make a more specific order at this juncture without a fair understanding of the workings and capacities of the WVSS-P. Consequently, the Chamber refrains from making an order as proposed by the Defence, directing the Prosecutor to make disclosure of unredacted witness statements and other identification data sixty days before the commencement of trial. Moreover, the Chamber notes that it is not desirable to adopt the proposal of the Defence for Bagosora requiring the Prosecutor to

disclose unredacted statements sixty days in advance of trial but permitting her to withhold the identity of witnesses until some later date. This proposal is not feasible because the very detailed information in the unredacted statements may very well be used to determine the identity of protected witnesses.

28. In order to make a more concrete and informed determination of the number of days in advance of trial or testimony that the Prosecutor must disclose unredacted witness statements and identities, it will be necessary for the Chamber to consult with the WVSS-P pursuant to Rule 69(B) to assess its capacity to place witnesses under the protection of the Tribunal and in what time frame such protection can be put in place. Rule 69(B) provides, "In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit." Upon consulting with the WVSS-P and making an assessment of its capacity to place the protected witnesses under protection, the Chamber shall then issue, no later than 11 December 2001, another order specifying when the Prosecutor is to disclose the witness statements and whether such disclosure will be made in a disclosure in advance of trial or on a rolling disclosure basis measured from the date of testimony of particular witnesses.

29. The Prosecutor relies heavily upon some previous jurisprudence of the various Trial Chambers of this Tribunal finding that requiring the Prosecutor to disclose unredacted witness statements and other identifying data twenty-one days in advance of testimony adequately addressed and reconciled the concerns of the Accused and those of the protected witnesses. The Chamber finds, however, that there is no talismanic magic attached to the twenty-one-day in advance of testimony disclosure measure in place in the Kabiligi and Ntabakuze Decision. The twenty-one-day figure does not derive from the letter of Rule 69(C). Rather, it is a discretionary measure fashioned out of consideration of the particular factual circumstances as they existed at the time those particular decisions were rendered.

30. Mindful of its obligation to provide meaningful protection to vulnerable witnesses and to protect the interests of the Accused to receive disclosure of the unredacted statements and identities of protected Prosecution witnesses in sufficient time to make effective use of them in preparing a Defence, the Chamber finds that it is in the interest of justice to harmonise the Extant Orders to conform to that now in operation in the Bagosora Decision. Accordingly, the following order, borrowed verbatim from the Bagosora Decision shall become effective immediately with respect to this joinder case, comprising the cases of the four Accused, Bagosora, Nsengiymva, Kabiligi and Ntabakuze: "The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under the (sic) seal of the Tribunal and shall not be disclosed to the Defence until further orders."

C. Controlled Contact Order

30. The Prosecutor seeks to add what she considers to be a new measure to each of the Extant Orders. The Chamber finds that two of the three Extant Orders already contain a controlled contact provision. The Bagosora Decision provides that "the defence or its representatives who are acting pursuant to their instructions shall notify the Prosecutor of any request for contacting the prosecution witnesses, and the Prosecutor shall make arrangement for such contacts". Similarly, the Kabiligi-Ntabakuze Decision also requires the Defence to:

> Make a written request on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any Protected Person or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such Protected Person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

31. Regardless of the characterisation of this measure, the Tribunal finds that it is equitable to harmonise the existing provisions so that all Defence teams will be operating under the same clear constraints concerning contact with Prosecution witnesses. The Chamber is, however, mindful of the arguments of the Defence that such an order can logically operate only after the Defence has been informed of the identities of the protected witnesses. Prior to such time, the Defence could not fairly know whether or not their representatives were approaching a protected person.

32. The Chamber also finds that it is not necessarily practicable that the Defence seek permission of the Chamber each time they wish to contact one of the 200 witnesses the Prosecutor has indicated she intends to call at trial. The Chamber also recognises that there are likely to be more requests for contact with witnesses in a joint trial with multiple defendants. Such requests for contact should be initially arranged between the parties in consultation with the Registry. Only upon the failure of such co-operative efforts would either party be authorised to seek the intervention of the Chamber to obtain appropriate relief.

D. Measures to Protect Witnesses' Identities from Public and Media

32. A number of measures in the Extant Orders, granted pursuant to Rule 75, are designed to prevent the public and media from discovering the identity of protected witnesses. These measures are generally awarded to both Prosecution and Defence witnesses appearing before this Tribunal in recognition of the special risks to privacy and security of the protected witnesses. Although such measures impact on the right of the Accused to a public trial, these measures have been viewed to be appropriate limits on the rights of the accused in response to the potential risks facing the protected witnesses. All three Extant Orders contain strikingly similar provisions, and the harmonisation of the measures into a single Order, *proprio motu*, will serve to simplify the proceedings.

E. Notification of the WVSS-P

33. Two of the Extant Orders, namely the Bagosora Decision and the Nsengiyumva Decision, contain provisions requiring the Prosecutor to communicate the names and particulars of witnesses to the Witnesses and Victims Support Section in order to initiate protective measures. The Bagosora Decision requires that the Prosecutor furnish these details while the Kabiligi-Ntabakuze Decision orders the Registry to take these steps. The Tribunal finds that this measure is superfluous, as the Prosecutor is free to communicate this information to the Registry, when and if the witnesses are selected to testify at Trial. The Prosecutor should take these steps at the earliest opportunity in order to facilitate the work of the WVSS and to ensure that the witnesses come under the protection of the Tribunal in advance of the disclosure of their identities to the Defence.

F. Prohibition on Revealing Witnesses' Identities

34. Two of the Extant Orders prohibit the Defence from revealing the identity of the protected witnesses. The Bagosora Decision is very specific and operates only after the information has been disclosed to the Defence:

> (v) The defence shall not reveal to anyone except to their immediate team, the names addresses, whereabouts of the prosecution witnesses and any other information identifying them once such information has been revealed to it by the prosecution.

The Kabiligi-Ntabakuze Decision, in contrast, is very broad:

> (g) Prohibiting the immediate Defence team and the Accused from sharing, discussing or revealing, directly or indirectly, any document or any information contained in any document, or any other information which could lead to the identification of any Protected Person to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate defence team, as designated by the assigned Counsel or the Accused.

35. The Chamber observes that the wording of this measure in the Kabiligi-Ntabakuze Decision is overly broad and unenforceable. Even the most cautious defence investigation might incidentally or indirectly reveal information that could somehow lead to the identification of potential prosecution witnesses.

36. The Chamber recalls, however, that witness protection measures are binding, *inter alia*, on both the Prosecution and the Defence. Therefore, the names, addresses and other protected identifying information which could reveal the identities of the witnesses cannot be disclosed to the public or to the media by any person *including the Defence and the Accused.*

37. Relying on the recent decision of the Appeals Chamber in *Prosecutor v. Musema* (ICTR-96-13-A), Decision on Extremely Urgent Motion for Protective Measures for Witnesses (22 May 2001), the Chamber recognizes an implicit exception to this general rule for the limited sharing of general information by the Defence Counsel and the immediate Defence team acting pursuant to the request of Counsel to individual members of the public *where necessary to prepare the defence*. Such exception applies only where the disclosure is limited to what is necessary and is done in such a way as to minimize the risk of the information being divulged further.

G. Independent Investigation of Witnesses' Identities

38. The Kabiligi-Ntabakuze Decision also contains a measure prohibiting the Defence from "attempting to make an independent determination of the identity of any Protected Person or encouraging or otherwise facilitating any person to attempt to determine the identity of any such person". While the other Extant Orders do not contain such a provision, the Chamber observes that any such independent investigation into the identity of a protected person would violate the object and spirit of all witness protection measures.

39. It is unclear whether this measure in the Kabiligi-Ntabakuze Decision was granted pursuant to Rule 69 or pursuant to Rule 75. It appears that its purpose is two-fold: to ensure the integrity of the non-disclosure of identity to the Defence and to ensure that protected information is not passed on to the public in an attempt by the Defence to circumvent the non-disclosure order. Since Rule 69 deals only with non-disclosure by one party to the other, the Chamber finds that the Order preventing the Defence from conducting an independent investigation of identity must have been granted as an auxiliary measure pursuant to Rule 75(A) to protect the witnesses from the public and media. As such, the Chamber has the power to vary this measure *proprio motu*.

40. Such a measure might be a desirable clarification of the ethical obligations of the parties. However, 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 Extant Orders from disclosing protected information 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.

H. Notification of Defence Team Members

41. The final provision that is unique to the Kabiligi-Ntabakuze Decision requires the Defence "to provide to the Registrar a designation of all persons working on the immediate Defence team who will have access to any information which might disclose identifies, or could lead to the identification of, any protected Person and to advise the Registrar in writing of any change in the composition of this team" and an "Order Requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all materials that could lead to the identification of the Protected Persons".

42. Pursuant to Rule 75, for the purpose of ensuring diligence in the handling of protected materials, the Tribunal finds that it is prudent to require Defence Counsel of all teams in this case to notify the Chamber in writing of any person leaving the Defence team and to confirm in writing that Counsel has ensured that all confidential materials dealing with protected witnesses have been remitted to Counsel.

43. The Chamber therefore grants in part the Prosecutor's request for harmonization of witness protective measures. Pursuant to the Prosecutor's request and *proprio motu* the Chamber:

(a) **ORDERS** that this Decision replace the three Extant Orders: *Prosecutor v. Nsengiyumva*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, ICTR-96-12-T, 26 June 1997; *Prosecutor v. Bagosora*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, ICTR-96-7-I, 31 October 1997; and *Prosecutor v. Kabiligi and Ntabakuze*, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses," ICTR-97-34-I, 19 May 2000;

(b) **ORDERS** that the Prosecution designate a pseudonym for each protected witness that shall be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties and the public;

(c) **ORDERS** that the names, addresses, whereabouts and other identifying information of the protected witnesses ("identifying information") be sealed by the Registry and not included in any public records of the Tribunal;

(d) **ORDERS** that any identifying information relating to the protected witnesses that is contained in existing records of the Tribunal be expunged;

(e) **ORDERS** that the disclosure to the public or to the media of any identifying information relating to the protected witnesses prior to, during and after the trial is prohibited;

(f) **ORDERS** that the names, addresses and other identifying information of the protected victims and witnesses, as well as their locations, shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further orders;

(g) **ORDERS** that the Defence make a written request to the Prosecutor if it wishes to contact any protected prosecution witnesses, and that if the witness consents then the Prosecutor shall facilitate such contact;

(h) **ORDERS** Defence Counsel to notify the Chamber in writing of any person leaving the Defence team and to confirm in writing that Counsel has ensured that all confidential materials dealing with protected witnesses have been remitted to Counsel;

(i) **GRANTS** the oral request of Kabiligi;

(j) **DISMISSES** the Prosecutor's Motion in all other respects.

Arusha, 29 November 2001.

Lloyd George Williams	Yakov Ostrovsky	Pavel Dolenc
Judge, Presiding	Judge	Judge

Seal of the Tribunal