

ICTR-95-1B-T
6-7-2004
(1295 - 1290)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Djeng

Date: 6 July 2004

The PROSECUTOR

v.

Mika Muhimana

Case No. ICTR-95-1B-T

2004 JUL -6 AM 11:26
ICTR
ORIGINAL RECORD

**DECISION ON DEFENCE MOTION FOR PROTECTIVE MEASURES
FOR DEFENCE WITNESSES**

Office of the Prosecutor:

Mr. Charles Adeogun-Philips
Mr. Wallace Kapaya
Mr. Peter Tafah
Ms. Renifa Madenga
Ms. Florida Kabasinga
Ms. Maymuchka Lauriston

Counsel for the Defence:

Professor Nyabirungu mwene Songa
Me Kazadi Kabimba

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber III, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Trial Chamber”);

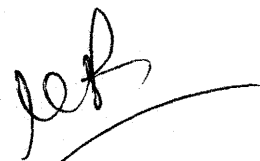
BEING SEIZED of the “Requête de la Défense aux fins de la protection des témoins”, filed on 29 June 2004, (the “Motion”);

CONSIDERING the Statute of the Tribunal (the “Statute”) particularly Articles 14, 19, 20 and 21 of the Statute and the Rules of Procedures and Evidence (the “Rules”), specifically Rules 69 and 75 of the Rules;

NOTING that during the Status Conference held on 2 July 2004, the Prosecution indicated to the Chamber that it does not oppose the Motion;

SUBMISSIONS

1. The Defence seeks an Order from the Chamber granting protective measures for its potential witnesses. It justifies this request on the basis of fears for their safety and also the safety of their families should it be known that they have traveled to Arusha to give testimony. The Defence cites insecurity in Rwanda, particularly threats it claims many witnesses have faced because they testified before the Tribunal.
2. The Defence notes that on 9 March 2000 the Trial Chamber (composed differently) granted protective measures for Prosecution witnesses, and does not think that the safety of witnesses has since improved. In making this assessment, the Defence takes into consideration the current situation in the eastern part of the Democratic Republic of Congo (DRC) and the Rwandan border, specifically the militia groups active there, including the *Interahamwe*. Rwandan refugees fear for their lives when they think about all those who have been threatened or killed whilst living abroad. According to the Defence, it is the feeling of many potential witnesses that testifying before the Tribunal will complicate their return to Rwanda. They also fear for the lives, safety and well-being of their family members currently living in Rwanda.
3. The Defence, therefore requests the Chamber to order, in essence, the following measures:
 - [1] The names, addresses and other identifying information concerning Defence witnesses and their whereabouts be kept under seal and not included in any records of the Tribunal;
 - [2] A prohibition on the disclosure to the public or the media of the names and addresses of Defence witnesses as well as their whereabouts and other identifying information;



[3] A requirement that the Prosecution and the Witness and Victims Support section limit to a minimum the numbers of persons with access to information concerning protected witnesses once their names have been communicated by the Defence;

[4] The Defence should only have to disclose the identifying and other relevant information concerning its protected witnesses twenty-one days prior to Trial;¹

[5] A prohibition on the Office of the Prosecutor revealing to anyone whomsoever the names and addresses as well as other identifying information concerning their protected witnesses;

[6] A requirement that the Prosecutor and his representatives, acting on his instructions, shall notify the Defence of any request to contact Defence witnesses and for the Defence to make the necessary arrangements to that end;

[7] A prohibition on the photography and/or video recording, or sketching of any Defence witnesses at any time or place without leave of the Trial Chamber;


[8] A requirement that the Defence should designate a pseudonym to each Defence protected witness, and use this pseudonym whenever referring to such protected witness in proceedings, communications and discussions between the parties to the trial, and to the public;

[9] That the Defence witnesses shall be entitled to protection by the Victims Witness Support Section under the same conditions as those granted to Prosecution witnesses;

HAVING DELIBERATED

4. The Trial Chamber notes that the Defence brings the Motion on the basis of Articles 20 and 21 of the Statute and Rules 69 and 75 of the Rules.
5. Pursuant to Article 21 of the Statute, the Tribunal provides provision for the protection of victims and witnesses, articulated in Rules 69 and 75 of the Rules. Such protection measures include, but are not limited to the conduct of *in camera* proceedings and the protection of witness's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the Accused.

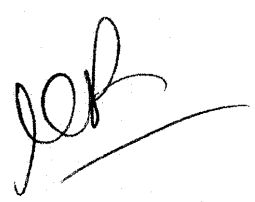
¹ During the Status Conference of 2 July 2004, the Defence agreed that all the witness identities should be disclosed at least 21 days prior to the commencement of the Defence Case, and not the 21 days prior to each individual witness testimony as seemed to be the request in the written Motion.



6. The Trial Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.
7. Rule 69 of the Rules provides *inter alia* that in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
8. The Trial Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses" rendered on 13 July 1998, at para. 9, that:

[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses.

9. The Trial Chamber takes notice of the facts cited by the Defence in support of the Motion, which describe the particularly volatile current security situation in Rwanda and in neighboring countries such as the DRC.
10. The Trial Chamber understands the fears that potential witnesses and their families may hold in relation to the effects of testifying before the Tribunal without protective measures, and takes note that the Prosecution was granted similar measures upon request, and also that the Prosecution has not objected to this Motion.
11. The Trial Chamber considers that the Defence has indeed demonstrated fears, which pertain to the safety of potential witnesses residing in Rwanda, insecure African countries such as the DRC and elsewhere. The Trial Chamber is therefore convinced that the Defence request is justified.
12. Pursuant to Rule 75(B) of the Rules, the Trial Chamber is empowered to order the measures as requested by the Defence (numbered above as [1]-[9]).
13. The Trial Chamber is of the view that there is a sufficient showing of a real fear for the safety of potential Defence witnesses were their identity to be disclosed. Consequently, the Chamber grants measures [1], [2], [3], [4], [5], and [7] as requested in the Motion.



14. As regards measure [6], the Trial Chamber notes the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana*² and grants the said measure, requiring the Prosecutor and his representatives to notify the Defence of any request for contacting the protected Defence witnesses, and the Defence shall make arrangements for such contacts.
15. As regards measure [8], the Trial Chamber recalls the Decision in *Prosecutor v. Bicomumpaka*³ in which the measure was granted, requiring the Prosecutor to designate a pseudonym for each protected Prosecution witness. Similarly, with respect to the present Motion, the Trial Chamber grants measure [8] as requested.
16. As regards measure [9], the Trial Chamber, mindful of Article 20(1) of the Statute that all Parties are equal before the Tribunal, considers the Defence request in Measure [9] to be justified and proper. Therefore, to the extent possible, Defence witnesses should be accorded the same conditions as those granted to Prosecution witnesses whilst under the protection of the Victims and Witness Support Section.
17. Finally, the Trial Chamber notes that, in conformity with the Tribunal's well-established jurisprudence, protective measures are granted on a case-by-case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Defence should furnish to the Victims and Witnesses Support Section of the Registry as soon as possible all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Defence requests in measures [1], [2], [3], [4], [5], [6], [7], [8] and [9] of the Motion, as outlined above, for its witnesses residing in Rwanda, neighboring countries such as the DRC, and for those potential witnesses residing in other areas of Africa and Europe.

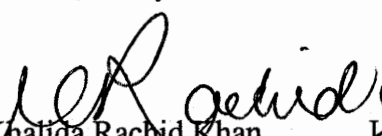
ORDERS that the Defence shall disclose to the Prosecution, no later than 21 days prior to the start of the Defence case scheduled for 16 August 2004, all relevant information concerning its witnesses, so as to allow the Prosecution adequate time to prepare its case, pursuant to Rule 69 (C) of the Rules.

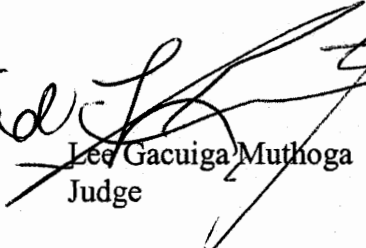
²*The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-96-11-T, "Decision on Defence's Motion for Witness Protection", 25 February 2000.

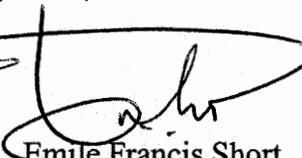
³ *The Prosecutor v. Jérôme-Clément Bicomumpaka*, Case No. ICTR-99-50-T, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", 12 July 2000, para. 15.



Arusha, 6 July 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge

(Seal of the Tribunal)

