



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-55A-T
23-05-2005
(2528-2523)

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OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 23 May 2005

THE PROSECUTOR

vs.

THARCISSE MUVUNYI

ICTR-2000-55A-T

JUDICIAL RECORDS ARCHIVES
ICTR
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**DECISION ON PROSECUTOR'S MOTION TO HAVE PROSECUTION
WITNESSES QCM AND NN TESTIFY BY CLOSED VIDEO-LINK PURSUANT TO
RULES 54 AND 71(D) OF THE RULES OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor

Mr Charles Adeogun-Phillips, Senior Trial Attorney
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[Signature]

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Motion to Have Prosecution Witnesses QCM and NN Testify by Closed Video-Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence” filed on 14 April 2005 (the “Motion”);

CONSIDERING the “Accused Tharcisse Muvunyi’s Response to the Prosecutor’s Motion to Have Prosecution Witnesses QCM and NN Testify by Closed Video-Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence” filed on 18 April 2005 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 54 and 71 (D) of the Rules;

NOW DECIDES the Motion pursuant to Rule 73(A) of the Rules on the basis of written submissions filed by the Parties.

SUBMISSIONS OF THE PARTIES

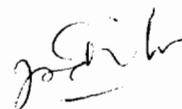
The Prosecution

a) Background

1. The Prosecution re-files this Motion pursuant to the Trial Chamber’s Scheduling Order of 24 March 2005 directing the Prosecution to file the previously filed *ex-parte* Motion afresh, with notice to the Defence.¹
2. The Prosecution requests the Trial Chamber to order and permit that the testimony of Prosecution Witnesses QCM and NN be presented using closed video-link facility for reasons of exceptional circumstances and in the interests of justice.
3. The Prosecution characterises both QCM and NN as “extraordinarily vulnerable” witnesses and prays the Chamber to grant that their testimony be given via closed video-link between the ICTR courtroom in Arusha and the ICTR Office in Kigali, in the case of QCM, and between the ICTR in Arusha and the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, in the case of NN.
4. The Prosecution acknowledges that protective measures are already in place pursuant to a Decision of this Chamber;² that the witness statements of QCM and NN have already been disclosed in both redacted and unredacted form to the Defence; and that

¹ *The Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55A-T, “Scheduling Order on Prosecutor’s *Ex-Parte* Motion to Have Prosecution Witnesses QCM and NN Testify by Closed Video-Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence”, 24 March 2005.

² *The Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55-I, “Decision on the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment”, 25 April 2001, TCII.



pursuant to the Chamber's Scheduling Order of 24 January 2005,³ the identities of both witnesses have already been disclosed to the Defence.

b) Witnesses QCM's and NN's exposure to serious danger

5. The Prosecution states that Witnesses QCM and NN have both received and continue to receive direct threats and intimidation from several sources. They are exposed to serious danger including the strong possibility that they themselves and members of their family may be killed. Witness NN has also sought refugee status and protection in the United Kingdom.
6. The Prosecution submits that both witnesses have "legitimately" indicated their unwillingness to physically appear in Arusha to testify in any case. The Prosecution further states that these witnesses are uniquely situated to observe the criminal actions of the accused and other witnesses.
7. The Prosecution points out that the failure of Witness NN to testify "would seriously undermine the interests of justice in this and other cases before which this witness is in [a] position to give evidence."

c) Affidavit in Support

8. In support of the arguments for a closed video-link conference because of the vulnerability of both witnesses, the Prosecution submits a copy of an affidavit dated 3 March 2005 signed by Mr Alfred Kwende, the Tribunal's Commander of Investigations.
9. Interestingly, Commander Kwende notes in his affidavit that both Witnesses QCM and NN have asked the Tribunal staff not to contact them anymore regarding their testimony. According to the affiant, efforts are now being made to get the witnesses to rescind their decision.
10. Annexed to Mr Kwende's affidavit are news accounts of the murder of a Prosecution witness who testified before the Tribunal in the *Simba* case.⁴ The Witness was murdered at his home in Rwanda, one month after having given testimony at the ICTR.

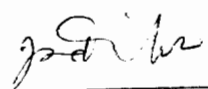
The Defence Response

11. The Defence acknowledges receipt of the disclosed statements of QCM and NN and asserts that the Prosecution in its Motion makes a blanket statement that Witness QCM has received threats and intimidation from "unknown persons" whom she "suspects to be members of the family of the accused person"⁵ but that the Prosecution does not give any reason why Muvunyi's family is suspected.

³ *The Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55A, "Scheduling Order", 24 January 2005.

⁴ *The Prosecutor v Aloys Simba*, ICTR-2001-76-T.

⁵ This statement is actually contained in paragraph 8 of Commander Kwende's affidavit, not in the Motion.



12. The Defence also notes that the Prosecution “fails to provide any details of the content of the purported threats” and that it is impossible for the Trial Chamber to determine whether Witness QCM is “simply showing a case of nervousness” or is using the threats to avoid the inconvenience of travelling to Arusha to testify.
13. The Defence questions the need for the affidavit from the ICTR’s Commander of Investigations, considering that both Witnesses QCM and NN have issued pre-trial statements and that they “appear to be literate and perfectly capable of making their own sworn affidavits.”
14. The Defence interprets the Commander’s affidavit as basically stating that both Witnesses QCM and NN are afraid to testify before the Tribunal and they want the Prosecution not to talk to them again. According to the Defence, there is no evidence in the Prosecution’s Motion to suggest that even if the additional measures were granted, these witnesses would in fact testify by video-link.
15. The Defence notes that the Prosecution does not appear to have requested the issuance of any *subpoenas* compelling the attendance of these two witnesses, and that there is no indication that *subpoenas* so issued would not or could not be enforced.
16. Citing the Tribunal’s jurisprudence in the *Simba* and *Bagosora* cases,⁶ the Defence asserts that Rule 71(D) allows for a witness’s testimony to be taken by video-conference in lieu of a physical presence where it is in the interests of justice, based on the assessment of the importance of the testimony, and the witness is unable or unwilling to appear in court.
17. The Defence maintains, however, that the Prosecution has failed to discharge the legal burden of proving that Witnesses QCM and NN are unwilling to attend the proceedings and has failed to show how video-conferencing is the only way testimony the Prosecution perceives as critical to its case can be made available to the Tribunal.
18. The Defence therefore concludes that the Prosecution has failed to meet the standards set by the Tribunal and urges the Chamber to deny the Motion in all its aspects.

HAVING DELIBERATED,

19. The Chamber recalls Rules 54 and 71(D) of the Rules.
20. In the light of the Tribunal’s jurisprudence⁷ the Chamber has to consider whether granting such a measure would be in the interests of justice; whether the Accused

⁶ *The Prosecutor v Simba*, Case No. ICTR-01-76-T, “Decision on the Defence Request for Taking the Evidence of Witness FMP by Deposition”, 9 February 2005; *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, “Decision on Ntabakuze’s Motion to Allow Witness DK 52 to Give Testimony by Video-Conference”, 22 February 2005.

⁷ *The Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-I, “Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures”, 14 September 2001; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, “Decision on Prosecutor’s Extremely Urgent Motion Requesting that the Extraordinarily Vulnerable Witnesses X/006 and 039 Testify by Closed Video Transmission Link with a Location at The Hague and Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75 of the Rules of Procedure and Evidence”, 4 June 2004, para. 8.; *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, “Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY”, 3 October 2003, para. 10.

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would be in a fair position to confront the witness; and whether the witness was unable or unwilling to come to the Tribunal to testify in person.

21. The Chamber notes that the Commander of Investigations, in his sworn affidavit, declares that both Witnesses QCM and NN have asked the Tribunal staff not to contact them anymore regarding their testimony. Unless the Prosecution can demonstrate that the *status quo* has changed, this would seem to indicate that even if the authorisation to use closed video-link facilities were granted, the witnesses would still not be willing to testify. That would amount to the Chamber issuing a futile order.
22. The Chamber also agrees with the Defence that there is no indication that the Prosecution has requested the issuance of a *subpoena* to compel the witnesses to appear and testify in person before the Tribunal. The Chamber therefore finds that it may be premature to request the use of closed video-link facilities for the testimony.
23. In this respect, the Chamber echoes the reasoning of the Chamber in the *Nahimana* case, which stated that “the witness should only be permitted to testify by video-link if he refused to testify in Arusha **after being informed of the security measures that could be undertaken on his behalf here.**”⁸ The Chamber also notes that there is no indication that the Prosecution has informed the witnesses of the security measures in place for their protection if or when they come to testify in Arusha.
24. In sum, it is the Chamber’s view that the Prosecution has not taken all the necessary steps to ensure that Witnesses QCM and NN can testify in person before the Tribunal. The Chamber is of the view that only after all else has failed should video-conferencing be substituted for live, in-person testimony.
25. With respect to the Prosecution’s prayer for “other special protective measures to Witnesses QCM and NN”, the Chamber notes that all the measures specified are already in place pursuant to prior decisions and sees no need to issue any additional orders in that regard at this time.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER DENIES the Motion without prejudice, and

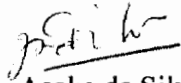
DIRECTS the Prosecution to take the following preliminary measures before seeking to use closed video-link facilities:

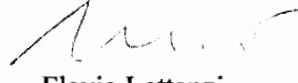
- i) Demonstrate that the *status quo* has changed and that Witnesses QCM and NN are now willing to testify in this matter, subject to a satisfactory resolution of their security concerns;
- ii) Inform the witnesses of the various security measures that can be undertaken on their behalf in Arusha.

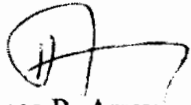
⁸ *The Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-I, “Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures”, 14 September 2001, para. 38 (Emphasis added).

Arusha, 23 May 2005




Asoka de Silva
Presiding Judge


Flavia Lattanzi
Judge


Florence R. Arrey
Judge

[Seal of the Tribunal]