



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 3 June 2005

THE PROSECUTOR
v.
Gaspard KANYARUKIGA

Case No. : ICTR-2002-78-1

DECISION ON PROSECUTION MOTION FOR PROTECTIVE MEASURES

The
William
Amina Ibrahim

T.

Prosecution
Egbe

The
Ernest Midagu Bahati

Defence

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Judge Erik Møse, designated by Trial Chamber I in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;[\[1\]](#)

BEING SEIZED OF the Prosecution “Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment”, filed on 28 April 2005;

CONSIDERING that the Defence has filed no response;

HEREBY DECIDES the motion.

1. The Prosecution requests an order for the protection of its witnesses, arguing that they face a real and substantial risk of harassment and intimidation. This risk is said to

affect witnesses residing inside or outside Rwanda, whether in Africa or elsewhere in the world. Voluminous documentation is annexed to the motion in support of this claim. The measures requested include delaying disclosure of the identity of witnesses to the Defence until twenty-one days before their testimony (ie. “rolling disclosure”); permanent non-disclosure of the witnesses’ identity to the public; and requiring that protected information only be shared with the Accused while in the presence of Defence counsel.

2. Measures for the protection of witnesses are granted on a case by case basis. The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for their safety or that of their family, and that there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. A further consideration is trial fairness, which favours similar or identical protection measures for Defence and Prosecution witnesses.^[2]

3. In light of the Prosecution submissions, the Chamber follows prior decisions in finding that witnesses, wherever they may reside, do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.^[3]

4. Most of the measures requested by the Prosecution are well-established and uncontroversial. There are two exceptions. Proposed measure “xi” is a prohibition on

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 witness statement is in redacted form, unless the Accused is, at the time in possession, in the presence of counsel.

The aim of this prohibition is said to be to ensure that protected information is not transmitted between accused persons at the United Nations Detention Facility (UNDF) or elsewhere. While the Chamber is concerned by the examples cited in the motion, it is not persuaded that the measure would achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that witness identities may not be shared with other accused persons, and that any violation of this requirement is a serious matter. Furthermore, depriving the Accused of the statements of witness’s against him could interfere with the preparation of the defence. Previous decisions have rejected this measure in the absence of a specific showing of misconduct by the Accused.^[4]

5. Proposed measure “iv” is that the witness’s identity be disclosed to the Defence twenty-one days before the date that the witness is expected to testify. The Prosecution asserts that this “rolling disclosure” has crystallised as the ordinary practice of the Tribunal.^[5] The Chamber disagrees. Numerous decisions have required that the identity of all witnesses disclosed before the start of trial, particularly in the trials of a single Accused, where there is little likelihood of a long delay between disclosure of the witness’s identity and their testimony.^[6] The Chamber considers, in light of Rule 69 (C),

that an appropriate deadline is that witness identities, and unredacted witness statements, be disclosed to the Defence thirty days before the start of trial.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that:

1. The Prosecution shall be permitted to designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, for use in trial proceedings, and during discussions between the Parties in proceedings.
2. Names, addresses, whereabouts, and other information concerning the protected witnesses shall be sealed by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public.
3. Names, addresses, locations and other identifying information of the protected witnesses which may appear in the Tribunal's public records shall be expunged.
4. The names and identities of the protected witnesses shall be forwarded from the Prosecution to the Registry in confidence, and shall not be disclosed to the Defence unless otherwise ordered.
5. No person shall make audio or video recordings or broadcasts, or take photographs or make sketches of protected witnesses, in relation to their testimony, without leave of the Chamber or the witness.
6. The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to any contact any protected witness and, if the witness consents, the Prosecution shall facilitate such contact.
7. The Defence team in this case shall keep confidential to itself any information identifying a witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information.
8. The Defence shall provide the Registry with a designation of all persons working on the Defence team in this case who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any such person leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.
9. The Prosecution may withhold disclosure to the Defence of the identity of the witness and temporarily redact their names, addresses, locations and other identifying information from material disclosed to the Defence, in accordance with paragraph 11 below.

10. The information withheld in accordance with paragraph 10 shall be disclosed by the Prosecution to the Defence thirty days prior to commencement of the Prosecution case, in order to allow adequate time for the preparation of the Defence pursuant to Rule 69 (C) of the Rules.

Arusha, 3 June 2005

Erik Møse

Judge

[Seal of the Tribunal]

[1] The motion was addressed to Trial Chamber III, perhaps because the initial appearance of the Accused was before a Judge of that Trial Chamber. However, the case was subsequently assigned to Trial Chamber I for determination of pre-trial matters and is, accordingly, properly decided by this Chamber.

[2] *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5; *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004, p. 2; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Bagosora, et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses) (TC), 14 August 2002, p. 4.

[3] *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para 6; *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, para. 14; *Musabyimana*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 19 February 2002; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members (TC), 20 March 2001, para 13.

[4] See e.g. *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para 8; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, para 8; *Gacumbitsi*, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para 19; *Zigiranyirazo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003, paras 15-16; *Rukondo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 24 October 2002; *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002 para 14; *Muvunyi et al.*, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 25 April 2001, para 27; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 27 March 2001, para 24.

[5] Motion, para 31.

[6] *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003 ("Seromba Decision"); *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, p. 7. See also *Bagosora et al.*, Decision on Defence Motion for

Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 (requiring immediate disclosure of identifying information of all Prosecution witnesses). Similarly, disclosure of the identity of all Defence witnesses is frequently required before the start of the Defence case. *Ndindabahizi*, Decision on the Defence Motion for Protection of Witnesses (TC), 15 September 2003, p. 4; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 4. These decisions were all rendered after 6 July 2002 when Rule 69 (C), which had formerly required disclosure before trial, was amended to permit rolling disclosure at the Chamber's discretion. The numerous decisions prior to that date requiring disclosure before trial are omitted.