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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan

Registrar: Mr. Adama Dieng

Date: 27 June 2005

2005 JUN 27 P 12: 55

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON JUSTIN MUGENZI'S CONFIDENTIAL MOTION FOR PROTECTION OF DEFENCE WITNESSES

Office of the Prosecutor:
Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Elvis Bazawule
Mr. Justus Bwonwonga
Mr. Shyamlal Rajapaksa

Counsel for the Defence:
Ms. Michelyne St. Laurent and Ms. Alexandra Marcil, for ***Casimir Bizimungu***
Mr. Ben Gumpert, for ***Justin Mugenzi***
Mr. Pierre Gaudreau and Mr. Michel Croteau, for ***Jérôme Bicamumpaka***
Mr. Tom Moran and Ms. Marie-Pierre Pouline, for ***Prosper Mugiraneza***

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

SITTING as Judge Khalida Rachid Khan, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Chamber");

SEISED of "Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses", filed on 5 April 2005 (the "Motion");

CONSIDERING

(1) The "Prosecutor's Response to Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses", filed on 9 June 2005 ("the Response");

(2) The "Prosecutor's Consolidated Corrigendum To Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 15 June 2005 (the "Corrigendum to the Prosecution's Response");

(3) "Justin Mugenzi's Response to Prosecutor's Corrigendum", filed on 20 June 2005 (the "Response to the Corrigendum";

HEREBY DECIDES the Motion, pursuant to Articles 19, 20, and 21 of the ICTR Statute (the "Statute") and Rules 69 and 75 of the Rules of Procedure and Evidence (the "Rules").

SUBMISSIONS

Defence Motion

1. The Defence for Justin Mugenzi seeks an order for the protection of its witnesses on the ground that they have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries, as well as outside of Africa.

2. The Defence requests protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecution no sooner than twenty-one days before the testimony of each witness. The Defence asserts that the granting of these measures is consistent with the Accused's rights and the interests of a fair trial, pursuant to Articles 19, 20, and 21 of the Statute and Rules 69 and 75 of the Rules.

3. The Defence draws attention to the common practice that information given to the Victims and Witness Protection and Support Unit is communicated to the Rwandan authorities. In this regard, the Defence submits that the present arrangements do not afford adequate protection to Defence witnesses. Accordingly, Counsel for Mugenzi, in Paragraph 15 (g) and (h) of the present Motion, seeks protective measures designed to protect information about witnesses within the Victims and Witness Protection and Support Unit.

Prosecution's Response

4. The Prosecution objects only to the Defence submissions contained in Paragraph 15 (g) and (h) of its Motion. The Prosecution submits that the cooperation of the Rwandan authorities is necessary to the operation of the Tribunal. Furthermore, the Prosecution notes that that the Victims and Witness Protection and Support Unit discloses information only to the extent that it is absolutely necessary to ensure the presence and protection of witnesses.

Corrigendum to the Prosecution's Response

5. In its Corrigendum, the Prosecution seeks to revise its earlier submission, in which it affirmed the Defence request to restrict confidential witness information to members of the immediate Prosecution team.

6. Characterizing the Office of the Prosecutor as a single and indivisible unit, "within which information may flow without restriction", the Prosecution requests the Chamber to deny two protective measures, set forth in Paragraph 15 (g) and (h) in the Motion. The first of the two measures prohibits the Prosecution from sharing, directly or indirectly, any information which could lead to the identification of a potential Defence witness with any person other than the members of the immediate Prosecution team. The second measure requires the Prosecution to designate all members of the immediate Prosecution team, to provide notification of any change in the composition of that team, and to ensure remission of all relevant information from any member departing from the team.

DELIBERATIONS

7. The Chamber recognizes the substantial delay in the filing of the Prosecution's Response. However, in the interest of justice, the Chamber will consider the Prosecution's submissions.

(i) Protection Measures

8. By virtue of Article 21 of the Statute, the Tribunal provides in its Rules for protection of victims and witnesses. Under Rules 69 and 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of victims. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information

that may otherwise appear in the Tribunal's public records, assigning a pseudonym to a witness, and permitting witness testimony in closed session. Pursuant to Rule 69 of the Rules:

> (A) 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.
>
> ...
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

9. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for their personal safety or the safety of their families, and that there must be an objective justification for this fear. In granting protective measures, the Chamber, on a case-by-case basis, must also take into consideration the fairness of the trial and the equality of the parties.[1]

10. The Chamber considers that the Defence has not provided independent justifying elements that clearly demonstrate that the fears of its potential witnesses are well-founded. However, the Chamber is mindful of its previous decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the Tribunal's proceedings would threaten their safety and security.[2]

(ii) Disclosure of Confidential Witness Information by the Victims and Witness Support Unit

11. In Paragraph 15 (g) and (h) of its Motion, the Defence seeks orders designed to protect sensitive information relating to witnesses' identities from being disseminated outside the Victims and Witness Protection and Support Unit. Specifically, in Paragraph 15 (g), the Defence seeks an order prohibiting the Victims and Witness Protection and Support Unit from communicating any information with anyone outside its immediate team that could lead to the identification of a potential Defence witness. In Paragraph 15 (h), the Defence seeks an order requiring the Unit to specify all persons within its immediate team and any change to the composition of the team.

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[1] *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8. *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

[2] *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

12. In the view of the Chamber, the requests of the Defence in Paragraphs 15 (g) and (h) of its Motion are unworkable and unnecessary, and, therefore, denied. Disclosure of confidential information by the Victims and Witness Protection and Support Unit occurs only insofar as it is absolutely necessary to communicate with governmental and official authorities to ensure the protection of witnesses and their presence in Arusha. Confidential information is handled by the Victims and Witness Protection and Support Unit in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties. In such circumstances, the party receiving the information is bound by the same obligation to protect the identity of the witness or victim as are the representatives of the Victims and Witness Protection and Support Unit.

13. With respect to the other protective measures sought by the Defence, the Chamber observes that such measures have normally been granted in previous cases and that they are substantially identical to those ordered in respect of Prosecution witnesses in the present case.[3] In the Chamber's view, the interests of trial fairness favour the adoption of identical measures, applicable to all protected witnesses, absent exceptional circumstances. These measures are enumerated below in language customarily adopted in witness protection orders.[4]

(iii) Corrigendum to the Prosecution's Response

14. The Chamber expresses its concern regarding the late submission of a Corrigendum, filed by the Prosecution on 15 June 2005, several weeks after the Motion and the corresponding Response. However, in the interests of justice, the Chamber considers the Prosecution's submissions in the Corrigendum.

15. The Chamber does not agree with the Prosecution's assertion that its duty to investigate and prosecute, its statutory disclosure obligations, and the practicalities of organization require dissemination of confidential witness information to any staff member within the Office of the Prosecutor. As the Tribunal has observed in a decision on a similar motion in *Bagasora et al*, "Neither the general duty to investigate crimes nor professional collegiality can supersede the specific obligations of a witness protection order, which is itself authorized under Article 21 of the Statute."[5] The Chamber adopts this reasoning, and considers that the two measures in

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[3] *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Bagasora 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, para. 2; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

[4] *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagasora et al.*, Decision on Bagasora Motion for Protection of Witnesses (TC), 1 September 2003.

[5] *Bagasora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 6.

question, in conjunction with others, are designed to offer substantial protection to potential witnesses who may, in the absence of such measures, be subject to great danger or intimidation and, consequently, may be unwilling to testify before the Tribunal.

16. The Chamber is satisfied that the two measures in question, which limit disclosure of protected witness information to the immediate Prosecution team, strike an appropriate balance between affording security to witnesses and enabling the exercise of the Prosecution's duties.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Motion for Protection Measures in the following terms:

(a) The names, addresses, whereabouts of, or/and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal;

(b) The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals;

(c) To the extent that any names, addresses, whereabouts of, and other identifying information concerning such potential Defence witnesses currently exist in records of the Tribunal, such information should be expunged from those documents;

(d) The names, addresses, whereabouts of, and other identifying data of potential Defence witnesses found in the supporting material or in any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition;

(e) The Prosecution shall not share, discuss, or reveal, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any Defence witnesses to any person or entity other than persons working on the immediate Prosecution team;

(f) The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witness;

(g) No photographing, audio or visual recording, or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties;

(h) The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place, and, in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules;

(i) The Defence is required to submit the following identifying data pursuant to Paragraph (h), if such information is contained in the original witness information sheets:

(i) Full names (including family, first, nicknames, and pseudonym);

(ii) Date and place of birth;

(iii) Names of parents;

(iv) Ethnic group;

(v) Religion;

(vi) Address in April 1994;

(vii) Occupation in April 1994.

(j) The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Chamber, or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber, or a Judge thereof, with the consent of such a protected person or the parents or guardians of that person, if that person is under the age of 18;

(k) The Defence shall designate a pseudonym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications, and discussions between the Parties to the Trial, and the public, until such time as the Chamber decides otherwise.

Arusha, 27 June 2005

Khalida Rachid Khan

Judge

[Seal of the Tribunal]