

ICTR-97-31-I
17 Aug. 2005
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge William Sekule
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 17 August 2005

The PROSECUTOR

v.

Tharcisse RENZAHO
Case No. ICTR-97-31-I

2005 AUG 17 P 3:05

DECISION

**ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR
VICTIMS AND WITNESSES TO CRIMES ALLEGED IN THE INDICTMENT**

Office of the Prosecutor

Mr. Jonathan Moses
Ms Katya Melliush

Defence Counsel

Mr. F. Cantier

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

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, Presiding, Judge William Sekule, and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEISED of the Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 6 June 2005 (the “Motion”);

NOTING that the Defence has not filed a Response to this Motion;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 on the basis of the written submissions of the Prosecution alone.

SUBMISSIONS OF THE PROSECUTION

1. The Motion is brought pursuant to Article 21 of the Statute and Rules 54, 69, 73, and 75 of the Rules.
2. The Prosecution seeks protective measures for three categories of victims and potential Prosecution witnesses: those who live in Rwanda; those living outside Rwanda, but in Africa; and those who reside outside Africa. In all cases, the Prosecution seeks protective measures for those who have not waived their right to such protection.¹ The measures requested are as follows:
 - a. that the Chamber allow the Prosecution to designate a pseudonym for each victim or potential Prosecution witness covered by this order (“Protected Person”), and that the pseudonym be used whenever referring to such Protected Person in Tribunal proceedings, communications, and discussions, both between the parties and with the public;
 - b. that the names, addresses, whereabouts and other information which might identify or assist in identifying any Protected Person be sealed by the Registry and not be included in any records of the Tribunal other than confidential material provided to the Chamber in support of the Motion. The Prosecution further requests that identifying information be communicated to the Witnesses and Victims Support Unit (WVSS) only in accordance with established procedure and only in order to implement protective measures for such Protected Persons;
 - c. that where names, addresses, and other potential identifying information of victims and actual or potential Prosecution witnesses are contained in existing records of the Tribunal, such identifying information be expunged from those documents;

¹ *Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 6 June 2005, para. 12.

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- d. that disclosure of any identifying information concerning Protected Persons to the public or the media, prior to, during, and after the termination of this trial and any appeal be prohibited;
- e. that the Accused or any member of the Defence team be prohibited from attempting to make any independent determination of the identity of any Protected Person or encouraging or otherwise aiding any person to attempt to identify any such Protected Person;
- f. that the Defence be required to provide the Chamber and the Prosecution with the designation of all persons working on the immediate Defence team who will have access to any identifying information; further that the Defence be required to notify the Chamber and the Prosecution in writing of any person leaving the Defence team and to confirm in writing to the Chamber and to the Prosecution that such person has remitted all material containing identifying information;
- g. that the Accused and/or Defence Counsel be required to make a written request to the Chamber, with reasonable notice to the Prosecution, prior to contacting any Protected Person or any relative or associate of such person; further that the Prosecution at the Direction of the Chamber, be required to facilitate such contact, provided that such person (or the parents or guardian of such person if he/she is under the age of eighteen years) consents to an interview by the Defence;
- h. that photography and audio and/or video recording or sketching of any Protected Person at any time or place be prohibited unless the Chamber and the parties grant leave to do so;
- i. that all trial proceedings be closed to the public where any Protected Person is to give testimony that might reveal or assist in revealing his/her identity or whereabouts, or that might reveal or assist in revealing the identity or whereabouts of a member of his/her family or of any other Protected Person;
- j. that the Defence and the Accused be prohibited from directly or indirectly sharing, discussing or revealing any identifying information to any person or entity other than the Accused, assigned Defence Counsel, or other persons the Registry designates as working on the Defence team;
- k. that the Accused, both individually or through any person working for the Defence, be prohibited from personally possessing any material that contains any identifying information, including but not limited to, any copy of a witness statement even if the statement is in redacted form, unless the Accused is in the presence of Counsel at the time that he possesses such information; further, that the Chamber instruct United Nations Detention Centre authorities to ensure compliance with this prohibition;
- l. that disclosure to the Defence of any identifying information and any information in the supporting material on file with the Registry be prohibited; further, that the Prosecution be required to disclose any materials provided to

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the Defence in a redacted form, until such time as the Chamber is assured that the witnesses have been afforded adequate protection, but in any event, not earlier than 21 days before the witness is due to testify at trial;

- m. that the Chamber implement any other order or orders it may deem appropriate in the interests of justice.
3. In support of the Motion, the Prosecution has filed a Solemn Declaration by Maxwell Nkole, Commander in the Investigations Division of the Office of the Prosecutor in Kigali, Rwanda, dated 26 May 2005; a Memorandum from the WVSS dated 4 September 2004; and sixteen other news reports and other documents relating to the security situation in Rwanda.
4. In his Declaration, Mr. Nkole characterizes the general security situation in Rwanda as “highly precarious and unpredictable”,² and gives an account of the dangers that genocide victims and potential witnesses face in that country. He attests to several incidents of attacks on, and killing of potential Gacaca witnesses, and states that at least one case, the murder in October 2004 of a witness who had recently testified before the Tribunal, might have been linked to the witness’ testimony.
5. In support of its prayer for disclosure to the Defence of only redacted material and for rolling disclosure of unredacted material no earlier than 21 days before the date of the witness’s testimony, the Prosecution cites several ICTR decisions that have adopted this specific “rolling disclosure” policy, and argues that this policy “has crystallized as the Tribunal’s practice.”³ The Prosecution further relies upon the memorandum from WVSS which indicates among other things that “[f]ull disclosure of unredacted witness statements and witness identifying information several months in advance is not in the interests of witness protection.” WVSS cautions that “the best protection available to any witness is anonymity,” and that “even a small incident or a perceived threat may discourage a witness from coming to testify.”⁴

DELIBERATIONS

6. The Chamber recalls that Article 21 empowers the Tribunal to make rules for the protection of victims and witnesses and provides that protective measures may include the conduct of *in camera* proceedings and the protection of personal identity. Rule 54 gives the Chamber a general power to make orders necessary for the conduct of a trial; Rule 69 provides that either party may apply to the Chamber to order non-disclosure of the identity of witnesses who may be in danger or at risk; Rule 75 stipulates the power of the Chamber to order measures appropriate for the privacy or security of witnesses, and states that such measures must be consistent with the rights of the Accused. Rule 73 enables

² Solemn Declaration of Maxwell Nkole, 26 May 2005, para. 10, annexed to *Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 6 June 2005, annex A.

³ *Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 6 June 2005, para. 31.

⁴ Interoffice Memorandum from the Witnesses and Victims Support Section – Prosecution (WVSS-P) to the Chief of Prosecutions, 4 September 2002, paras. 9, 3, and 8, respectively, annexed to *Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 6 June 2005, annex R.

either party to bring motions before the Chamber after the initial appearance of the Accused.

7. The Chamber notes that in the *Bagosora* case the following criteria were laid down for granting protective measures to witnesses under Rule 75:

Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.⁵

8. The Chamber further recalls the *Bagosora* decision on the issue of disclosure of the identities of protected witnesses which states that "measuring the dangers to prospective witnesses is a difficult task, and the consequences of miscalculation are profound, both for the rights of the Accused and the availability of witnesses....The Chamber is anxious to ensure the highest level of protection for witnesses, and is mindful of the need to inspire confidence that those who come before the Tribunal will not be subject to intimidation."⁶
9. Since the Motion requests blanket protection for all victims and potential witnesses to crimes alleged in the Indictment, the Chamber is not in a position to evaluate the relevance of the testimony of individual witnesses. The Chamber will, however, evaluate the fear for the safety of witnesses in light of the general security situation both within and outside Rwanda and decide which measures are necessary to secure the desired level of protection. The Chamber will first analyse whether specific witness protection measures are needed, that is, whether the Prosecution has demonstrated a real fear for the safety of witnesses and an objective basis for that fear for witnesses in and outside Rwanda. If this is shown, the Chamber will then analyse the specific measures sought to determine if they are strictly necessary.

Real Fear Underscored by an Objective Basis

10. As mentioned in the above-cited *Bagosora* decision, to fulfil the second criterion for protective measures, the witness's subjective fear is insufficient and must be underscored by objective considerations. In the *Milosević* decision, the ICTY further ruled:

[F]ears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk.⁷

11. The Chamber has carefully considered the Prosecution submissions and reviewed the supporting documents. The Chamber is satisfied that there have been frequent violent incidents perpetrated against genocide victims and potential witnesses in Rwanda and that the security situation in that country still remains dangerous for potential genocide witnesses. The migration of large numbers of potential Gacaca accused persons to countries neighbouring Rwanda, and the fact that supporters and family members of

⁵ *Prosecutor v. Bagosora*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28.

⁶ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003.

⁷ *Prosecutor v. Milosević*, Case No. IT-02-54, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7.

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persons currently indicted or accused before the Tribunal might be living in these countries, adds to the risks that potential victims and witnesses may face if their identities are revealed. The Chamber is therefore satisfied that the fear of potential witnesses and victims in and outside Rwanda is objectively founded.

Strictly Necessary Protective Measures

12. The Chamber recalls the measures requested by the Prosecution as outlined in paragraph 2 above.
13. As regards the measures requested in paragraphs 2(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) above, the Chamber notes that they are either generally accepted by the ICTR in order to safeguard the privacy and security of victims and witnesses or specifically envisioned in the *ICTR Rules of Procedure and Evidence*, and are consistent with the rights of the Accused.⁸ The Chamber thus grants these measures as strictly necessary in light of the dangers to victims and witnesses currently living in and outside Rwanda.
14. The measure requested in paragraph 2(k) above seeks to prohibit the Accused from personally possessing any material that contains any identifying information, except when he is in the presence of Counsel. It further requests the Chamber to instruct the United Nations Detention Centre authorities to ensure compliance with this prohibition. The Chamber considers this measure not strictly necessary and believes that it intrudes upon the rights of the Accused. As held in the *Mpambara* case, such a measure is redundant and therefore not strictly necessary because it is covered by the protective measure granted under paragraph 2(j) above, which requires the Accused and his Defence team not to share identifying information with third parties.⁹ Moreover, the Chamber notes that in granting protective measures to witnesses, it must do so in a manner that is consistent with the rights of the Accused according to Rule 75. Since this measure may interfere with the Accused's ability to aid Defence Counsel in preparing his defence, it is not consistent with this requirement.
15. With respect to the rolling disclosure sought under paragraph 2(l) above, the Chamber notes that in considering this measure, the Chamber must determine if it is strictly necessary and, if so, that it is consistent with the right of the Accused to adequate time for the preparation of his defence as stipulated in Rule 69(C).¹⁰ The Chamber considers that in determining an appropriate rolling disclosure time-line, it must take into account the general security situation in Rwanda as described in the Motion and supporting

⁸ See e.g. *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 22 September 2000, paras. 8-13; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses (TC), 3 April 2001, paras. 17-19; *Prosecutor v. Bagasora et al.*, Case No. ICTR-98-41-I, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001, paras. 38-40; *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, Order for Protective Measures for Witnesses (TC), 12 July 2001, para. 9; Rule 79 (A) (ii), which provides for the exclusion of the press or public for all or part of the proceedings for reasons of "[s]afety, security or non-disclosure of the identity of a victim or witness".

⁹ *Prosecutor v. Mpambara*, Case No. ICTR-01-65-I, Decision on the Prosecutor's Motion for Protective Measures for Prosecution Witnesses (TC), 29 May 2002, para. 24.

¹⁰ Rule 69 (C) reads as follows: "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."

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documentation, as well as the specific risks faced by victims and potential witnesses. Based on these considerations, it is the Chamber's view that permitting the Prosecution to refrain from disclosing identifying information up to 21 days before the date a witness is scheduled to testify and no later is strictly necessary and will give sufficient time to the Defence to prepare its case.

16. While the Chamber notes that the fixing of rolling disclosure deadlines should be based on a consideration of the security situation and the objective fears expressed for witnesses in each individual case, its conclusion is fortified by numerous Tribunal decisions that suggest the disclosure of identifying information 21 days before witness testimony strikes an acceptable balance between witness protection concerns and the rights of the Accused.¹¹ The Chamber therefore modifies the prayer contained in paragraph 2(l), requiring the Prosecutor to disclose any materials provided to the Defence in unredacted form no later than 21 days prior to the witness's testimony.

FOR THE ABOVE REASONS,

THE TRIBUNAL

GRANTS the measures requested in paragraphs 2 (a), (b), (c), (d), (e), (f), (g), (h) (i) and (j) above as generally accepted by the ICTR and strictly necessary to protect witnesses and victims in and outside Rwanda;

MODIFIES the measure requested in paragraph 2(l), thereby requiring the Prosecution to disclose witness statements and other identifying materials to the Defence in unredacted form no later than 21 days prior to the witness' testimony;

DENIES the measure requested in paragraph 2(k) above because it is not consistent with the rights of the Accused;

DENIES the Motion in all other respects.

Arusha, 17 August 2005



Arlette Ramarison
Presiding Judge
[Seal of the Tribunal]



William Sekule
Judge



Solomy Balungi Bossa
Judge

¹¹ See e.g. *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses (TC), 3 April 2001, para. 20; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-I, Decision on the Prosecutor's Motion for Protective Measures for Prosecution Witnesses (TC), 29 May 2002, para. 18.