



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:

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

Registrar: Mr Adama Dieng

Date: 20 October 2005

THE PROSECUTOR
v.
THARCISSE MUVUNYI

ICTR-2000-55A-T

**DECISION ON THARCISSE MUVUNYI'S MOTION FOR PROTECTION OF
DEFENCE WITNESSES**

Office of the Prosecutor

Mr Charles
Ms Adesola
Ms Renifa
Ms Memory
Mr Dennis Mabura

Counsel for the Defence

Adeogun-Phillips Mr William E. Taylor, III
Adeboyejo Mr Jean Flamme
Madenga Ms Cynthia J. Cline
Maposa Ms Véronique Pandanzyla

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 “Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses” filed on 30 September 2005 (the “Motion”);

HAVING RECEIVED the “Prosecutor’s Response to Tharcisse Muvunyi’s Defence Motion for Protective Measures” filed on 7 October 2005 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Article 21, and the Rules of Procedure and Evidence (the “Rules”), specifically Rules 68, 69 and 75;

NOW DECIDES the Motion pursuant to Rule 73 of the Rules on the basis of written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

The Defence

1. Pursuant to Rules 69 and 75 of the Rules, the Defence seeks protective measures for the witnesses it intends to call similar to those granted to Prosecution witnesses by the Trial Chamber in its decision of 25 April 2001^[1].
2. The Defence submits that its witnesses, potential witnesses and members of their families are subject to the danger of retaliation, intimidation, or other harm if they testify before this Tribunal and that protection is necessary not only for residents of Rwanda and other African States, but also for witnesses residing in other continents. The Defence adds that while witnesses residing far away from Rwanda and its neighbouring States may be relatively immune from direct intimidation and/or danger, many if not all, will have friends and relatives still residing in Rwanda. The Defence submits that the security situation in Rwanda today is comparable to that prevailing when the Prosecution made its application in 2001. In support of its submission on the security situation, the Defence attaches an affidavit from a Defence investigator.^[2] The Defence also recalls the testimony of Prosecution Witness NN relating to concerns for his security.
3. The Defence further alleges that the Prosecution sought and was granted broad witness protection measures in the instant case, including the use of closed video-link facilities to allow witnesses to testify. The Defence also asserts that the relief sought in this motion is reasonable in that it is exactly the relief sought by the Prosecution and granted by the Trial Chamber in 2001. The Defence therefore seeks:

An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Defence witnesses be sealed by the Registry and not included in any public record of the Tribunal.

An order that the names, addresses, whereabouts of, and other identifying information concerning all witnesses and potential Defence witnesses be communicated only to the Witness and Victims Support Section personnel by the Registry in accordance with the established procedures and only in order to implement protection measures for these witnesses.

An order requiring that any names, addresses, whereabouts, and any other identifying information concerning such victims and potential Defence witnesses contained in existing public records of the Tribunal be expunged from those documents.

An order prohibiting disclosure to the public or the media, of the names, addresses, whereabouts, or any other identifying data in the supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential Defence witnesses, and this order shall remain in effect after the termination of the trial.

An order prohibiting the Prosecution and its agents from sharing, discussing or revealing, directly or indirectly, any document or any information contained in any document, or any information which could reveal or lead to the identification of any individuals who are Defence witnesses or potential Defence witness, to any person or entity other than assigned members of the prosecution team or other persons working on the immediate prosecution team. Such persons shall be designated to the Registry by the Prosecution.

An order requiring the Prosecution to provide the Trial Chamber and the Defence a designation of all persons working on the immediate prosecution team who will, pursuant to paragraphs a) through d) above, have access to any information referred to in paragraphs a) through d) above, and requiring the Prosecution to advise the Chamber and the Defence in writing of any changes in the composition of this team and requiring the Prosecution to ensure that any member departing the Prosecution team has remitted all documents and other tangible information in any form including electronic form that could lead to the identification of victims and potential Defence witnesses.

An order prohibiting the photographing, audio and/or video recording, or making of sketches of any Defence witness at any time or place without leave of the Trial Chamber and the Parties.

An order prohibiting the disclosure to the Prosecution of the names, addresses, whereabouts of and other identifying data which would reveal the identities of victims or potential Defence witnesses, any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Defence to disclose any materials provided to the Prosecution sooner than twenty-one (21) days before the victim or witness is to testify at trial unless the Trial Chamber decides otherwise pursuant to Rule 69 (A) of the Rules. In no case will the defence be required to provide more information related to the identity of the witness than is required by the Trial Chamber's previous decisions in this case. This information includes only the following:

- i. Full names (Family name, first and nicknames and pseudonyms)

- ii. Date of birth
- iii. Religion
- iv. Ethnic group
- v. Occupation
- vi. Address in April 1994

An order that the Prosecution shall make a written request, on reasonable notice to the Defence, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential Defence witness or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such a protected witness or his or her guardian, the Defence shall undertake the necessary arrangements to facilitate such contact; and

An order requiring that the Defence designate a pseudonym for each Defence witness, which will be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the Parties to the trial, and the public until such time that the Trial Chamber decide otherwise.

The Prosecution

4. The Prosecution objects only to paragraphs e) and f) of the Defence Motion as these measures, if granted, would cause serious prejudice and legal harm for the Prosecution since they unnecessarily and unduly restrict the dissemination of information concerning the identity of Defence witnesses, within the Office of the Prosecutor (OTP). The Prosecution relies on the Appeals Chamber decision rendered on 6 October 2005 in *Bagasora et al.*^[3] and particularly in its paragraphs 40 through 47, where the Appeals Chamber dismissed restrictive protective measures similar to those requested by the Defence in its motion. The Prosecution argues that nowhere in the Statute or the Rules is it stated that the Prosecution's obligations may be limited to specific teams within the OTP.

5. The Prosecution submits that restricting the dissemination of information pertaining to the identity of Defence protected witnesses to the Prosecution team handling this particular case, and preventing its disclosure by that team to other persons within the OTP, raises issues that would significantly affect the fair and expeditious conduct of the proceedings, and is contrary to the interests of justice. The Prosecution alleges that this restriction is contrary to Rule 68. The Prosecution also alleges that the restriction sought by the Defence is not compatible with Rule 75 and especially its paragraph (F). The Prosecution then submits that the restriction is incompatible with the definition of the functions of the Prosecution, as provided by the Statute and the Rules, since it would prevent the Prosecution team from sharing information pertaining to the identity and evidence of Defence protected witnesses that would have a bearing on other investigations and prosecutions being conducted by the Prosecution. According to the Prosecution, this restriction would also interfere with the ability of the Prosecution team

to discharge its mandate in an effective way. Finally, the Prosecution submits that its staff should have the ability to share information for legitimate forensic purposes, always, of course, within the confines of the need to protect confidential or sensitive information pertaining to the identity of witnesses.

6. The Prosecution submits that the OTP is a separate and independent organ of the Tribunal, with the responsibility to investigate and prosecute and as such, the members of a Prosecution team handling a particular case are the Prosecutor's agents, and constitute an integral component of the Prosecutor, as an organ of the Tribunal. Also, the Prosecution team assigned to a particular case by the Prosecutor cannot be treated as a separate and distinct entity within his office that is unable to share information with him and with his other agents as cases before the Tribunal are closely inter-related. These measures, if granted, would impair the ability of the team to cross-examine witnesses effectively on all matters that the trial Chamber should legitimately consider in determining what weight, if any, to accord to the testimony of Defence witnesses.

7. The Prosecution acknowledges that the Defence has a legitimate concern to ensure the protection of the Defence witnesses and the need to ensure a fair trial for the Accused person. However, the Prosecution considers that protective measures need not be necessarily identical between the Defence and Prosecution witnesses in order to provide equal protection. The Prosecution lists the differences between the Prosecution and the Defence such as the burden of proof that the Prosecution bears; the duty to investigate; the fact that the Defence does not have an obligation to disclose its case with the exception of the Pre-Defence Brief; and the fact that the Prosecutor and its agents are ministers of justice assisting in the administration of Justice. The Prosecution adds that the Defence and the OTP are structured differently and that the dissemination of information concerning a protected Defence witness could go beyond the bounds of the particular Prosecution team handling the case of the specific accused, but within the parameters of a witness protection order, without violating the interests of justice, or unfairly compromising the ability of the accused to get a fair trial. The Prosecution also asserts that the OTP, as an organ of the Tribunal, is under the obligation to protect the identity of both Prosecution and Defence witnesses.

DELIBERATIONS

8. The Chamber recalls Article 21 of the Statute, which provides for the protection of victims and witnesses. Such protective measures may include the conduct of *in camera* proceedings and the protection of personal identity. The Chamber also recalls Rule 54 of the Rules, which gives it the 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 enables the Chamber to order measures appropriate for the privacy or security of witnesses.

9. The Chamber notes the Decision rendered in the *Bagosora* case where the Trial Chamber laid down the following criteria 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.^[4]

10. Since the Motion requests blanket protection for all potential Defence witnesses, the Chamber is not in a position to evaluate the relevance of the testimony of individual witnesses. However, the Chamber will 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 understands the fear that potential witnesses and their relatives may hold in relation to the effects of testifying before the Tribunal without protective measures^[5]. Based on the affidavit provided by the Defence as well as the documents referred to in the Motion, the Chamber is satisfied that some of the witnesses who come to testify before the Tribunal face serious danger to their lives or person. The Chamber notes that there have been frequent violent incidents perpetrated against potential witnesses in Rwanda and that the security situation in that State remains dangerous for potential witnesses. The Chamber also recalls that the Prosecution was granted similar measures to those sought by the Defence in its Motion upon request.

11. Pursuant to Rule 75 (B) of the Rules, the Trial Chamber is empowered to order the measures as requested by the Defence. As regards measures a), b), c), d), g), h), i), and j), the Chamber notes that they are either generally accepted by the Tribunal in order to safeguard the privacy and security of victims and witnesses or specifically envisioned in the Rules. Moreover, the Chamber is of the view that there is sufficient showing of real fear for the safety of potential witnesses were their identity to be disclosed. Consequently the Chamber grants measures a), b), c), d), g), i), and j). Concerning measure h), the Chamber recalls its oral order of 20 July 2005 where it indicated that the Defence shall provide the Prosecution no later than 21 days prior to the day the witness is scheduled to testify the unredacted statements and all the identifying information concerning its witnesses, so as to allow the Prosecution adequate time to prepare its case, pursuant to Rule 69 (C) of the Rules^[6].

12. Concerning measures e) and f), the Chamber considers that, to the extent possible, Defence witnesses should be granted the same protective measures as those provided for Prosecution witnesses. Granting similar measures is in the interest of the fairness of the trial.^[7] However, the role and obligations of the Prosecution and that of the Defence differ in a number of ways. The Chamber recalls Rule 75 (F) of the Rules which provides that once protective measures have been ordered with regards to a victim or a witness in any proceedings before the Tribunal, such measures shall not prevent the Prosecution from discharging any disclosure obligation under the Rules in other proceedings, provided that the Prosecution notifies the Defence team to whom the disclosure is being made of the nature of the protective measure ordered in the first proceedings. Furthermore, according to Rule 68 (A), the Prosecutor shall, as soon as practicable, disclose any exculpatory material to the Defence. Consequently the Chamber is of the view that the measures requested by the Defence in paragraphs e) and f), if granted, could affect the Prosecutor's obligations under Rule 68 and could run counter to Rule 75 (F).

This conclusion is further substantiated by the Appeals Chamber's Decision rendered on 6 October 2005 in *Bagasora et al.*^[8] in which the Appeals Chamber ruled that article 68 (A) should be interpreted in such a way as to impose a disclosure obligation on the Prosecutor as representing the entire OTP as such.^[9] It further found that the Prosecutor's obligation to disclose was not limited to specific teams within the OTP, but extended to his or her entire office "as a whole, undivided unit", which is to be regarded as an extension of himself or herself.^[10] Consequently it is the Chamber's view that granting measures e) and f) will not serve the interests of justice.

13. Finally, the Chamber notes that, in conformity with the Tribunal's jurisprudence^[11], 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 Witnesses and Victims Support Section of the Registry (WVSS). The Defence is therefore ordered to provide the particulars of its proposed witnesses to the WVSS as soon as possible.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER

GRANTS measures a), b), c), d), g), i), and j) of the Motion;

GRANTS measure h) and orders that the Defence shall disclose to the Prosecution, no later than 21 days prior to the day the witness is scheduled to testify the unredacted statements and all the identifying information concerning its witnesses, so as to allow the Prosecution adequate time to prepare its case, pursuant to Rule 69 (C) of the Rules;

DENIES measures e) and f).

Arusha, 20 October 2005

Asoka de Silva
Presiding Judge

Flavia Lattanzi
Judge
[Seal of the Tribunal]

Florence Rita Arrey
Judge

^[1] *Prosecutor v. Muvunyi et al.*, Case No. 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.

^[2] "Affidavit in Support of the Defence's Motion for Order for Protective Measures for Defence Witnesses" attached to "Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", filed on 30 September 2005.

^[3] *Prosecutor v. Bagasora et al.*, ICTR-98-41-A, "Decision on Interlocutory Appeals of Decision on Witness Protection Orders", 6 October 2005.

^[4] *Prosecutor v. Bagasora*, Case No. ICTR-96-7-I, "Decision on the Extremely Urgent Request Made by the Defence for the Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999", para. 28.

[5] *Prosecutor v. Bagosora*, 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.

[6] See Transcripts, 20 July 2005, p. 53.

[7] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Ntabakuze Motion for Protection of Witnesses”, 15 March 2004, para. 4.

[8] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Interlocutory Appeals of Decision on Witness Protection Orders”, 6 October 2005.

[9] *Ibid.*, para. 43.

[10] *Idem.*

[11] *Prosecutor v. Muvunyi at al.*, “Decision on the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment”, 25 April 2001, para. 28; *Prosecutor v. Muhimana*, “Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004”, para. 17; *Prosecutor v. Aloys Simba*, ICTR-01-76-I, “Decision on Defence Request for protection of Witnesses”, 25 August 2004, para. 5.