



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3100
Muhu

OR: ENG

TRIAL CHAMBER II

ICJR - 00-55A-T
07-02-2006
(3100-3094)

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

Registrar: Mr Adama Dieng

Date: 7 February 2006

THE PROSECUTOR

vs.

THARCISSE MUVUNYI

ICTR-2000-55A-T

**DECISION ON MUVUNYI'S AMENDED MOTION TO HAVE DEFENCE
WITNESSES M005, M015, M036, M046 AND M073 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
Ms Adesola Adeboyejo, Trial Attorney
Ms Renifa Madenga, Trial Attorney
Mr Dennis Mabura, Case Manager

Counsel for the Accused Person

Mr William E. Taylor, Lead Counsel
Ms Cynthia Cline, Legal Assistant
Ms Véronique Pandanzyla, Legal Assistant

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 "Accused Tharcisse Muvunyi's Amended Motion to Have Defence Witnesses M005, M015, M036, M046, M067 (*sic*), and M073 Testify by Closed-Video Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence" filed on 18 January 2006 (the "Amended Motion");¹

HAVING RECEIVED the "Prosecutor's Response to Accused Tharcisse Muvunyi's Amended Motion to Have Defence Witnesses M005, M015, M036, M046, M067 (*sic*), and M073 Testify by Closed-Video Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence" filed on 20 January 2006 (the "Response");

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 Defence

1. The Defence for the Accused Tharcisse Muvunyi seeks to have Witnesses M005, M015, M036, M046 and M073² testify via closed-video link pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence. For the purposes of this Amended Motion, the Defence asserts that it adopts the submissions made by the Prosecution in its motion to have Witnesses QCM and NN testify via closed-video link.³
2. The Defence requests that the proceedings be closed to the public when the testimony could reveal the witnesses' identities and when any protective measures are considered. The Defence also requests that identifying records of the witnesses should not be disclosed to the public and that members of the Prosecution team should be prohibited from disclosing any records pertaining to these witnesses to any individual outside the Prosecution team in this case, including other Prosecutors at this Tribunal.
3. The Defence submits that all of the witnesses listed in this Amended Motion have been informed of the security measures already put in place by the Tribunal, but that "the witnesses have refused to travel to Arusha and insist on testifying by video link." The Defence further submits that all the witnesses have appropriate travel documents enabling them to travel to the venue from which they intend to testify via video link.

Witness M005

4. According to the Defence, Witness M005 currently resides in Rwanda and wishes to testify from Kigali or from The Hague. The Defence submits that Witness M005 "has already faced intimidation for testifying in Belgium regarding four Rwandan accused

¹ The original motion, filed on 5 January 2006, has been withdrawn.

² Although Witness M067 was included in the original motion and is also mentioned in the caption of this Amended Motion, the Defence submits that this witness has now "agreed to come to Arusha to testify" and accordingly withdraws its request regarding M067.

³ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Prosecution Motion to have Witnesses QCM and NN Testify By Closed-Video Link", 14 April 2005.



defendants.” The Defence attaches to the Amended Motion a sworn affidavit from a Defence investigator indicating that the witness “faced threats from people who had heard his testimony and who were not happy about its content” and that the witness is in a “precarious” situation considering the perceived risk of reprisals.

Witness M015

5. The Defence submits that Witness M015 resides in Switzerland and prefers to testify from Geneva, “but would consider testifying from The Hague.” The Defence alleges that this witness “faced death threats and escaped to Europe for his own safety.” Attached to the Amended Motion is a sworn affidavit by a Defence investigator asserting that the witness felt insecure in Rwanda and fled to Uganda; that while in Uganda, the witness “escaped death attempts” orchestrated by people working on behalf of the current Rwandan regime; and that the witness is in a “precarious” situation as a result of the risk of reprisals.

Witness M036

6. The Defence submits that Witness M036 is currently residing in Canada and would prefer to testify from New York or from The Hague. According to the Defence, “Witness M036 is concerned for his employment and threats to his employment if he testifies in Arusha.” In an attached sworn affidavit by a Defence investigator, it is asserted that the witness has expressed the fear that “any movement from his residence to an African country” and the reason for such movement will be known; that this could result in threats which would harm the witness’s employment; and that the witness is in a “precarious” situation as there exists a risk of reprisals.

Witness M046

7. The Defence submits that Witness M046 resides in Switzerland and prefers to testify from Geneva, “but would consider testifying from The Hague.” The Defence asserts that this witness “escaped threats on his life by going to Europe.” Attached to the Amended Motion is a sworn affidavit by a Defence investigator asserting that the witness felt insecure in his country and fled to Uganda; that while in Uganda, the witness “escaped death attempts” orchestrated by people working for the current Rwandan regime; and that the witness is in a “precarious” situation as a result of the risk of reprisals.

Witness M073

8. The Defence asserts that Witness M073 lives in France and would testify from The Hague. According to the Defence, this witness is concerned not only for his own safety, but also “for the safety of a family member who lives in Rwanda and is a member of the Rwandan government.” In a sworn affidavit by a Legal Assistant for the Defence team, it is asserted that this witness’s family “still lives in Rwanda”; that one member of his family holds “a very high position in the present government”; and that the witness’s situation is “precarious” due to the risk of reprisals.
9. The Defence submits that while protective measures are currently in place at the Tribunal, these measures do not provide adequate protection for the above witnesses and that recent events in Belgium show that the fears of the witnesses are well-founded. The Defence also attaches to the Amended Motion a press release dated 23 December 2005 posted on the Tribunal’s web site, confirming the death of indictee and potential Prosecution witness Juvénal Uwilingiyimana.



The Prosecution

10. The Prosecution submits that the criteria to be applied by a Trial Chamber for the granting of a motion for video-link testimony pursuant to Rule 71 (D) include exceptional circumstances and the interests of justice. The Prosecution further submits that the interests of justice will be determined by considering: i) the importance of the testimony; ii) the inability or unwillingness of the witness to attend; and iii) whether a good reason can be adduced for that inability or unwillingness.⁴ In that regard, the Prosecution argues that the Defence has not shown any good reason why the witnesses are unable or unwilling to come to the Tribunal to testify.

Witness M005

11. The Prosecution submits that since Witness M005 was able to testify publicly in Belgium, "it is now a contradiction in terms" for the Defence to assert that it would jeopardise the witness's safety and security for him to give testimony as a protected witness at the Tribunal, despite all the safeguards in place. The Prosecution also notes that the witness has not produced a sworn affidavit elaborating on the nature of the threats he received following his public testimony in Belgium.

Witness M015

12. The Prosecution asserts that there is no sworn affidavit produced by Witness M015; that the Defence has not explained how the witness was able to determine that the threats he was facing were coming from the Rwandan government; and that there is no evidence to show that despite the protective measures in place, the witness is still unwilling to come and testify in person before this Tribunal.

Witness M036⁵

13. The Prosecution observes that if Witness M036 is genuinely worried that giving testimony at the Tribunal could have a negative impact on his employment, then it is difficult to understand why the witness would be willing to testify from a North American or European location. According to the Prosecution, it is equally difficult to see why the witness thinks any African country poses a real danger to his employment, "unless he is now allergic to his own continent."

14. The Prosecution submits that there is no good reason why any of these witnesses are unwilling to come to Arusha to testify in person; that the video link system is not cost-effective; that it is time-consuming; that there are no sworn affidavits from the witnesses buttressing the Defence investigator's claims; that there is no evidence indicating that the witnesses believe the Tribunal is unable to provide them with adequate protection; and that the Defence has failed to establish that the testimony of each of these witnesses is important.

15. With respect to the Defence request that the Prosecution be prohibited from disclosing identifying information concerning these witnesses to any individual outside of the immediate Prosecution team, the Prosecution cites earlier decisions by this Chamber and by the Appeals Chamber pointing to the disclosure obligation under Rule 68 of the Rules

⁴ Citing the cases of *Sikirica et al* and *Kordic & Cerkez* from the ICTY, as well as *Bagosora et al* from the ICTR.

⁵ The Prosecution has made no individual submissions in this vein regarding the other two witnesses named in the Amended Motion, M046 and M073, but dwells instead on M067 for whom the request was withdrawn following the original motion.

and asserts that the Office of the Prosecutor is a whole, undivided unit.⁶ The Prosecution also argues that since investigations into the circumstances surrounding the death of the indictee in Belgium in December 2005 are still ongoing, any attempt to link that event to a proposed non-disclosure order would be "highly speculative."⁷

16. The Prosecution requests that the Amended Motion by the Defence be dismissed in its entirety; that the Defence be ordered to comply with its disclosure obligations by giving further and better particulars regarding its witnesses; that the witnesses for whom the Defence is in default of its disclosure obligations be barred from testifying before the Tribunal; or, in the alternative, that the Prosecution "be allowed adequate time, at the receipt of better and further particulars relating to the witnesses, to do the necessary investigations for the proper conduct of the case."

HAVING DELIBERATED

17. The Chamber recalls Rule 54 of the Rules, pursuant to which it is empowered to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial; Rule 90 (A) establishing the principle that witnesses should be heard directly unless directed otherwise by the Chamber; and Rule 71 (D) providing for a witness's deposition to be given by means of a video-conference.

18. The Chamber is mindful of the jurisprudence of the Tribunal establishing that a witness's testimony may be heard via video-conference in lieu of a physical appearance if it is in the interests of justice.⁸ In determining what constitutes the interests of justice for the purposes of a motion for testimony by video-conference, the following factors are taken into consideration: i) the importance of the testimony; ii) the inability or unwillingness of the witness to attend; and iii) whether a good reason can be adduced for that inability or unwillingness.⁹

19. The Chamber also recalls its Decisions of 23 May 2005 and 20 June 2005 dealing with the Prosecution's request to introduce the testimonies of Witnesses QCM and NN via closed-video link.¹⁰ In the second Decision, the Chamber considered the circumstances of

⁶ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Interlocutory Appeal of Decision on Witness Protection Orders", 6 October 2005, para. 43.

⁷ The Chamber notes that a significant part of the Prosecution's Response deals with issues not directly related to the video-link request, such as the failure of the Defence to fulfil its disclosure obligations or the state of disclosure of the personal details of witnesses like M025, M037, M076 and M077. For the purposes of the present Decision, therefore, the Chamber has chosen to set these issues aside without prejudice.

⁸ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-Conference" (TC), 22 February 2005, paras. 4-5.

⁹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Testimony by Video-Conference" (TC), 20 December 2004; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Prosecution Request for Testimony of Witness BT Via Video-Link" (TC), 8 October 2004; *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" (TC), 3 October 2003; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on the Prosecution Motion for Special Protective Measures for Witness 'A' Pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence" (TC), 5 June 2002; *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" (TC), 14 September 2001.

¹⁰ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "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

the witnesses as well as the Prosecution's efforts to remedy the shortcomings of its initial motion and determined that it was in the interests of justice to permit the witnesses to testify via video-conference.

20. Here, the Chamber has examined the Defence submissions and the accompanying documents in support of the Amended Motion, and notes that some important information appears to be missing. For instance, the complete identifying information is unavailable for most of the witnesses and there are no clear statements signed by the witnesses themselves explaining the basis of their security concerns. The Chamber also notes the brevity of the summaries of the expected testimony of most of the proposed witnesses and observes that the Defence has not fully complied with the directives contained in the Decisions of 20 October 2005¹¹ and 9 November 2005.¹²
21. On the Defence request that other prosecutors at this Tribunal who are not members of the Prosecution team in this case should be prohibited from obtaining any records pertaining to these witnesses, the Chamber wishes to draw the attention of the Defence to an earlier Decision in which the Chamber denied a similar argument.¹³
22. Having made the foregoing observations, it is the Chamber's view that in deciding whether or not to grant additional protective measures such as testimony by video-link, it must consider the particular circumstances of the case, the need to hear all evidence that is relevant to a Party's case and that could assist the Chamber in determining the truth, and the overall interests of justice. The Chamber concludes that the minimum conditions for the granting of a motion for video-link testimony having been met, it will be in the interests of justice to allow the Defence Motion. The Chamber is satisfied that any potential prejudice to the Prosecution can be remedied by the opportunity the Prosecution will have to confront the witnesses in cross-examination.¹⁴

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Amended Motion in part and

ORDERS that:

Rules of Procedure and Evidence", 23 May 2005; and "Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed-Video Link Facilities", 20 June 2005.

¹¹ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005;

¹² *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on the Prosecutor's Motion for Disclosure of Identifying Information Concerning Defence Witnesses Pursuant to Rules 69 (C) and 73 *ter*", 9 November 2005.

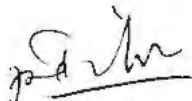
¹³ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005. See also *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T (AC), "Decision on Interlocutory Appeal of Decision on Witness Protection Orders", 6 October 2005, paras. 43-46.


¹⁴ *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, TCH "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.

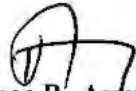


- i. The testimony of Defence Witnesses M005, M015, M036, M046 and M073 shall be permitted to be introduced via a secure audio-video transmission link with locations in Kigali and The Hague, as appropriate;
- ii. The Registry shall make all necessary arrangements in respect of the testimony via secure audio-video transmission link of Witnesses M005, M015, M036, M046 and M073;
- iii. The Prosecution shall be prohibited from disclosing the identity, specific whereabouts, or any records pertaining to Witnesses M005, M015, M036, M046 and M073 to anyone outside the Office of the Prosecutor;
- iv. Court proceedings where the testimony of Witnesses M005, M015, M036, M046 and M073 could reveal their identity shall be closed to the public;
- v. Court proceedings where protective measures are considered shall also be closed to the public.
- vi. The Registry shall take immediate steps to ensure the successful implementation of this Order;
- vii. The Parties shall co-operate with the Registry in the implementation of this Order;
- viii. All examinations of witnesses testifying by video-link shall take place from the courtroom in Arusha;
- ix. The Defence shall have one representative in The Hague and one in Kigali to prepare the witnesses for their testimony;
- x. The Parties shall make available to the Registry not later than 1 March 2006, all exhibits they intend to use during their respective examinations of the witnesses.
- xi. The specific times of the hearing as well as the venue shall be communicated to all Parties as soon as a determination is made to that effect.

Arusha, 7 February 2006


Asoka de Silva
Presiding Judge


Flavia Lattanzi
Judge


Florence R. Arrey
Judge

[Seal of the Tribunal]

