



ICTR-04-81-1  
18-09-2007  
(1249-1244)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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S. Mase

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 18 September 2007

**THE PROSECUTOR**

**v.**

**Ephrem SETAKO**

*Case No. ICTR-04-81-1*

2007 SEP 18 P 12:00  
JUDICIAL SECRETARIAT  
ICTR  
FILED

**DECISION ON PROSECUTION MOTION FOR PROTECTIVE MEASURES**

**The Prosecution**

Ifeoma Ojemeni-Okali  
Simba Mawere  
Christiana Fomenky

**The Defence**

Stefan Kirsch

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

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**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the Prosecution "Motion for Related Orders to the Motion for Leave to Amend the Indictment" etc., filed on 10 September 2007;

**CONSIDERING** the Defence response, filed on 17 September 2007;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. This motion for special measures protecting the identity of witnesses to be called on behalf of the Prosecution is brought under Article 21 of the Statute of the Tribunal and Rules 53, 54, 69 and 75 of the Rules of Procedure and Evidence. The Prosecution asks for protection for victims and potential witnesses who reside in Rwanda.<sup>1</sup>
2. The Defence objects, in particular submitting that the Prosecution has not been sufficiently clear as to which witnesses its motion applies, nor sufficiently detailed regarding the basis for the request for protective measures.<sup>2</sup>

**DELIBERATIONS**

3. Pursuant to Article 19 of the Statute, the Tribunal must conduct the proceedings with due regard for the protection of victims and witnesses. Article 21 obliges the Tribunal to provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim's identity. 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, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Defence in adequate time for preparation.
4. Measures for the protection of witnesses are granted on a case-by-case basis. The jurisprudence of this Tribunal requires that the witnesses for whom protective measures are sought must have a real fear for their or their families' safety, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. Trial fairness, also an important consideration, favours similar or identical protection measures for Defence and Prosecution witnesses.<sup>3</sup>

<sup>1</sup> Motion, para. 2.

<sup>2</sup> Response, paras. 8-11, 14-15.

<sup>3</sup> *Prosecutor v. Renzaho*, Decision on Defence Request for Protective Measures (TC), 12 March 2007, para. 4; *Prosecutor v. Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006, para. 2; *Prosecutor v. Kanyarukiga*, Decision on Prosecution Motion for Protective Measures (TC), 3 June 2005, para. 2; *Prosecutor v. Ntabakuze*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004, para. 2.

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5. The Prosecution has stated that it has experienced difficulty with some of its potential witnesses. Some were no longer willing to cooperate with it, some have relocated to unknown destinations, while others have attempted to recant their evidence against an alleged co-perpetrator of the Accused due to threats against them and members of their families.<sup>4</sup> Attached to the motion was an affidavit by a Commander of Investigations in the Prosecutor's Office, according to which witnesses who participate in ICTR investigations face serious risks arising from their participation in Tribunal proceedings.<sup>5</sup> Based on the Prosecution's submissions and the Chamber's prior decisions, it is apparent that the witnesses do justifiably fear that disclosure of the participation in the proceedings of this Tribunal could threaten their safety and security.<sup>6</sup> Accordingly, the Chamber finds that the conditions for ordering witness protection measures are satisfied.

6. The Prosecution requests that it be permitted to disclose to the Defence the identifying information of each witness on a rolling basis, twenty-one days before each witness is scheduled to testify.<sup>7</sup> Numerous decisions have required that the identity of all witnesses be disclosed before the start of trial, especially 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.<sup>8</sup> In light of Rule 69 (C), witness identities and unredacted witness statements would appropriately be disclosed to the Defence thirty days prior to the commencement of the Prosecution case.<sup>9</sup>

# **FOR THE ABOVE REASONS, THE CHAMBER**

## **HEREBY ORDERS that:**

1. The Prosecution shall designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, and that pseudonym shall be used in Tribunal proceedings, communications and discussions, both between the parties and with the public.
2. The names, addresses, whereabouts, and other identifying information concerning the protected witnesses shall be sealed by the Registry and not included in any public or non-confidential Tribunal records, or otherwise disclosed to the public.

<sup>4</sup> Motion, para. 8.

<sup>5</sup> Affidavit attached to Motion, paras. 4-7.

<sup>6</sup> See the decisions referred to in footnote 3.

<sup>7</sup> Motion, para. 10 (h).

<sup>8</sup> *Prosecutor v. Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, paras. 6-7; *Prosecutor v. Gatare*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, para. 6; *Prosecutor v. Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7. See also *Prosecutor v. 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. *Ndindabizi*, 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 many decisions prior to that date requiring disclosure before trial are omitted.

<sup>9</sup> *Prosecutor v. Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006, para. 5; *Prosecutor v. Kanyarukiga*, Decision on Prosecution Motion for Protective Measures (TC), 3 June 2005, para. 5.

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3. Names, addresses, locations and other identifying information of the protected witnesses which may appear in the Tribunal's public records shall be expunged and placed under seal.
4. The names and identities of the protected witnesses shall be forwarded by the Prosecution to the Registry in confidence, to be communicated to the Witnesses and Victims Support Unit only to implement protective measures for such witnesses.
5. No person shall make audio or video recordings or broadcastings, or take photographs or make sketches of protected witnesses, without leave of the Chamber and the parties.
6. The Defence shall keep confidential to itself all information identifying any protected witness, and shall not, directly or indirectly, share, discuss or reveal any such information.
7. 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.
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 Defence, or any person working for the Defence, shall not attempt to make an independent determination of the identity of any protected witness or encourage or otherwise aid any person in so doing.
10. The Prosecution shall temporarily withhold disclosure to the Defence of the identifying information of the protected witnesses and temporarily redact that information from material disclosed to the Defence. However, such information 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, 18 September 2007.



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

