



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-04-81-T
25-02-2009
(5867-5864)

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S. Muna

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 25 February 2009

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-T

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DECISION ON DEFENCE MOTION FOR PROTECTIVE MEASURES

The Prosecution
Ifeoma Ojemeni Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussiaa-Berdou

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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 Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Defence motion for witness protection measures, filed on 16 February 2009;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence case is scheduled to commence on 4 May 2009. This motion for special measures protecting the identity of witnesses to be called on behalf of the Defence is brought under Article 21 of the Statute of the Tribunal and Rules 53, 54, 69, 73 and 75 of the Rules of Procedure and Evidence. Protection is requested for victims and potential witnesses who reside within and outside Rwanda.¹ The Prosecution has not filed any response.

DELIBERATIONS

2. 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.

3. 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.²

4. The Defence has stated that it has experienced difficulty with some of its potential witnesses. Some were no longer willing to cooperate with it, while others have reluctantly agreed to testify provided that they would not be required to travel to the seat of the Tribunal.

¹ Setako Defence Motion for Witness Protection Measures (Rules 54, 69, 73 and 75 of the R.P.E.), filed on 16 February 2009, paras. 9 and 17.

² *Prosecutor v. Setako*, Decision on Prosecution Motion for Protective Measures (TC), 18 September 2007, para. 4; *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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It further submits that there is currently a heightened sense of insecurity among its potential witnesses, particularly due to conflict close to the border areas in the north of Rwanda.³

5. Based on the Defence submissions and the Chamber's prior decisions regarding protection for Prosecution witnesses, it accepts the existence of these fears amongst Defence witnesses, and their objective justification.⁴ Accordingly, the Chamber finds that the conditions for ordering witness protection measures are satisfied.

6. The measures sought by the Defence for Setako are substantially identical to those previously ordered in respect of Prosecution witnesses in the present case. The interests of trial fairness and administrative simplicity strongly favour the adoption of identical measures, which are enumerated below in language customarily adopted in such orders.

7. The Defence requests that the witness's identity be disclosed to the Prosecution 21 days before the date that the witness is expected to testify. In relation to Prosecution witnesses, the Chamber decided that their identity should be disclosed to the Defence 30 days prior to the commencement of the Prosecution case.⁵ The Defence has not provided any explanation why a shorter period is required for its witnesses. Following the procedure employed by the Prosecution in regard to its own witnesses, the Chamber makes a general order that the Defence shall disclose unredacted witness information to the Prosecution 30 days before the start of its case.

8. The request that the Prosecution provide the Defence with a list of all persons within the Office of the Prosecutor who shall have access to the protected information is denied. The Prosecutor is, of course, bound to ensure that confidential information is not disclosed by his Office to other persons; but the mechanism to prevent such disclosure, and the range of persons within his Office who have such access, rests within his sole discretion.⁶

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that:

1. The Defence 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.
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.

³ Motion, paras. 10, 11 and 15.

⁴ See the decisions referred to in footnote 2.

⁵ *Setako*, Decision on Motion for Protective Measures for Prosecution Witnesses, 18 September 2007, p. 4.


⁶ *Bagosora et al.*, Decision Amending Defence Witness Protective Orders (TC), 2 December 2005, para. 5 (applying *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005).

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4. The names and identities of the protected witnesses shall be forwarded by the Defence to the Registry in confidence, to be communicated to the Witnesses and Victims Support Section 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 Prosecution 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 Prosecution team in this case and any representative acting on its behalf shall notify the Defence in writing if it wishes to contact any protected witness and, if the witness consents, the Defence shall facilitate such contact.
8. The Prosecution team, or any person working for it, 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.
9. The Defence shall temporarily withhold disclosure to the Prosecution of the identifying information of the protected witnesses and temporarily redact that information from material disclosed to the Prosecution. However, such information shall be disclosed by the Defence to the Prosecution 30 days prior to commencement of the Defence case, in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69 (C) of the Rules.

Arusha, 25 February 2009.


Erik Møse
Presiding Judge


Sergei Alekseevich Egorov
Judge


Florence Rita Arrey
Judge

[Seal of the Tribunal]

