



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
02-02-05
(20238-20233)

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Mwamp

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 2 February 2005

THE PROSECUTOR

v.

**CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA**

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 FEB-2 A 10:38

**DECISION ON PROSPER MUGIRANEZA'S MOTION FOR PROTECTION OF
DEFENCE WITNESSES**

Office of the Prosecutor:

Mr Paul Ng'arua
Mr Ibukunolu Babajide
Mr Justus Bwonwonga
Mr Elvis Bazawule
Mr George William Mugwanya
Mr Shyamlal Rajapaksa

Counsel for the Defence:

Ms Michelyne C. St. Laurent and Ms Alexandra Marcil for **Casimir Bizimungu**
Mr Ben Gumpert for **Justin Mugenzi**
Mr Pierre Gaudreau and Mr Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr Tom Moran and Mr Christian Gauthier for **Prosper Mugiraneza**

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Chamber”);

BEING SEIZED of

- (i) “Prosper Mugiraneza’s Motion for Protection of Defence Witnesses”, filed on 14 December 2004 (the “Motion”);
- (ii) the “Confidential Exhibits to Prosper Mugiraneza’s Motion for Protection of Defence Witnesses”, filed on 14 December 2004 (the “Exhibits”);

NOTING the “Prosecutor’s Response to Prosper Mugiraneza’s Motion for Protection of Defence Witnesses”, filed on 20 December 2004 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Evidence (the “Rules”), particularly Rules 69 and 75 of the Rules;

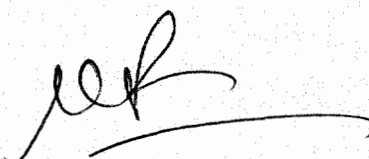
NOW DECIDES the Motion solely on the basis of the written briefs of the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence Motion

1. The Defence for Prosper Mugiraneza seeks an order for measures for the protection of Defence witnesses on the ground that they fear retaliation or other harm as a consequence of the evidence they might give before this Tribunal.
2. In the interests of brevity and in support of its request for protective measures, the Defence for Mugiraneza seeks to adopt the Prosecution Motion for Protection of Witnesses filed on 9 March 2000 as well as the briefs and exhibits filed in support of the Prosecution Motion. The Defence for Mugiraneza adopts the Affidavit of Remi Abdulraham¹ which was filed in support of the Prosecution Motion and also files a copy of the affidavit of the investigator working in Mugiraneza’s Defence team (confidential Exhibit D), both of which pertain to the need for witness protection.
3. The Defence submits that although the documents filed by the Prosecution which it adopts in the present Motion are now more than four years old, the Chamber should presume that the circumstances described in these documents have not changed materially since the Prosecution has not brought any such change to its notice.
4. The Defence further points out that the Chamber has heard evidence showing that witnesses before this Tribunal may face adverse consequences which the Chamber must take seriously. The Defence also contends that witnesses were pressured to make public statements and faced adverse actions when they did not do so. The Defence also cites certain transcripts from this Trial in support of this contention.

¹ This is part of the record as RP-784-86.



5. According to the Defence, such protective measures are required not only for witnesses and potential witnesses residing in Rwanda and Africa but also for witnesses resident in other places such as Europe or any other continent. The Defence submits that although such witnesses who are not resident in Africa may themselves be immune from direct intimidation or danger, they have friends and relatives in more dangerous locations.
6. The Defence points out that the relief sought is reasonable and that the Prosecutor had been granted identical relief in a similar situation.


The Prosecution Response

7. The Prosecution submits that it does not oppose the Motion in principle, subject to a number of observations.
8. The Prosecution states that the Defence has sought to shift the burden of proof by alleging that the Prosecution must indicate whether circumstances have changed since 2000. The Prosecution contends that it discharged the burden of proving the prevailing circumstances when it filed its Motion for protective measures in 2000. Accordingly, the Prosecution argues that the burden of proving whether the same circumstances continue to exist at present is upon the Defence.
9. The Prosecution responds to paragraph 9(g) of the Motion by submitting that it is self-evident that the Chamber's permission will suffice to allow the photographing, audio and/or video recording, or sketches of any Defence witnesses.

HAVING DELIBERATED

10. By virtue of Article 21 of the Statute and Rule 75 of the Rules, the Tribunal is under an obligation to order appropriate measures to protect victims and witnesses provided these measures do not compromise the rights of the accused.
11. The existing jurisprudence clearly mandates that the witnesses for whom protective measures are sought must have a real fear for their own safety or that of their family. This fear must have an objective basis and measures are therefore generally granted on a case-by-case basis.²
12. The Chamber notes that Confidential Exhibit D establishes that possibilities of retaliation or intimidation exist against Defence witnesses who have been contacted to testify before this Tribunal if protective measures are not put in place. The Chamber further notes that this Affidavit is dated 18 October 2004.
13. Nevertheless, the Chamber deems it necessary to comment upon the overall approach of the Defence for Mugiraneza to obtain an order for protective measures for Defence witnesses. The Chamber recalls that the burden of proving that circumstances exist which demand the protection of witnesses lies on the

² *Prosecutor v. Aloys Simba*, ICTR-01-76-I, "Decision on Defence Request for Protection of Witnesses (TC)", 25 August 2004, para. 5. ("*Simba*").



party seeking such protection. It is the Chamber's view that the Defence cannot merely adopt documents filed previously by the Prosecution in support of its own Motion and then shift the onus onto the Prosecution to show that the circumstances therein have changed. It is for the Defence to clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures. Decisions given by other Trial Chambers clearly indicate that the Defence must provide independent justifying elements attesting to the fears of its witnesses instead of merely relying on the specific circumstances of Prosecution witnesses.³

14. Having noted that Confidential Annex C establishes the existence of exceptional circumstances under Rule 69(A) of the Rules, the Chamber further notes that the Prosecution does not oppose the Motion in principle. The Chamber also notes that such measures have been granted by other Trial Chambers as a matter of abundant caution aimed at providing a secure environment for witnesses.⁴
15. With respect to the Defence request in paragraph 9(h) of its Motion not to be required to supply more information than the Prosecution is required to supply under the Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses dated 15 October 2003, the Chamber recalls the wording of its Order which differs from the Motion:

"Orders that the Witness information sheet or sheets, as the case may be, that are served to the Defence, along with the witness's statement, should contain the following identifying information, if such information is contained in the original witness information sheets:

- (i) Full Names (including family, first and nicknames and pseudonym)
- (ii) Date and place of birth
- (iii) Names of Parents
- (iv) Ethnic group
- (v) Religion
- (vi) Address in April in 1994
- (vii) Occupation in April 1994"

The Chamber decides that it is appropriate to use a similar formulation for purposes of deciding the current Motion.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

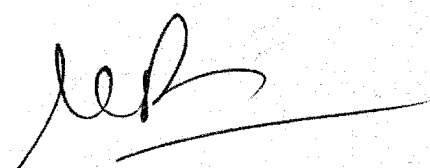
GRANTS the Motion in the following terms:

The Chamber orders that:

- (a) The names, addresses, whereabouts of or and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal.

³ *Simba*, para. 6.

⁴ *Prosecutor v. Bagosora*, "Decision on Bagosora Motion for Protection of Witnesses (TC)", 1 September 2003, para. 3.



(b) The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals.

(c) To the extent that any names, addresses, whereabouts of, and any other identifying information concerning such potential Defence witnesses currently existing in records of the Tribunal, such information should be expunged from those documents.

(d) The names, addresses, whereabouts of and other identifying data of potential Defence witnesses found in the supporting material or any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition.

(e) The Prosecution shall not share, discuss or reveal, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any Defence witnesses to any person or entity other than persons working on the immediate Prosecution team.

(f) The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witnesses.

(g) No photographing, audio or video recording or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties.

(h) The disclosure to the Prosecution of the names, addresses, whereabouts of and other identifying data which reveals or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place and in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.

(i) The Defence is required to submit the following identifying data pursuant to Paragraph (h) if such information is contained in the original witness information sheets:

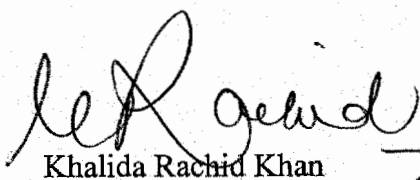


- (i) Full Names (including family, first and nicknames and pseudonym);
- (ii) Date and place of birth;
- (iii) Names of Parents;
- (iv) Ethnic group;
- (v) Religion;
- (vi) Address in April in 1994;
- (vii) Occupation in April 1994.

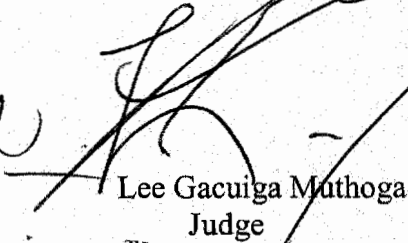
(j) The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Chamber or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber or a Judge thereof with the consent of such a protected person or the parents or guardians of that person if that person is under the age of 18.

(k) The Defence shall designate a pseudonym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications and discussions between the Parties to the Trial, and the public until such time as the Chamber decides otherwise.

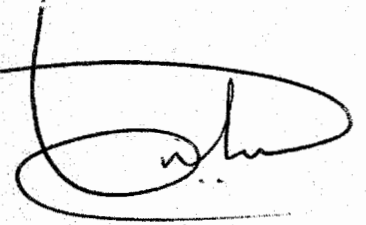
Arusha, 2 February 2005



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge



(Seal of the Tribunal)