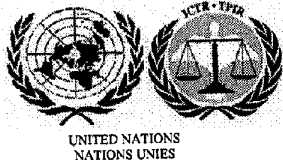


ICTR-99-50-T

05-03-2004

(12484 — 12473)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

Before: Judge Asoka de Zoysa Gunawardana, Presiding
Judge Khalida Rachid Khan
Judge Lee Gacuiga Muthoga

Registrar: Mr. Adama Dieng

Date: 4 March 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerôme BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

2004 MAR 5 P 2 00
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

**DECISION ON JUVENAL KAJELIJELI'S URGENT MOTION FOR
DISCLOSURE OF OPEN AND CLOSED SESSION TESTIMONY AND
EXHIBITS OF GAP**

Office of the Prosecutor:

Paul Ng'arua
Ibukunolu Babajide
Elvis Bazawule
George Mugwanya

Counsel for the Defence:

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme Bicamumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

Counsel for Juvenal Kajelijeli

Lennox S. Hinds
Sherrie Russel-Brown

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the “Trial Chamber”);

BEING SEIZED of “Juvénal Kajelijeli’s Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP” filed on 9 February 2004, (the “said Motion”);

NOTING the “Prosecutor’s Response to Juvénal Kajelijeli’s Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP” filed on 17 February 2004, (the “Response”);

NOTING the “Defence’s Reply to Prosecutor Response to Appellant Kajelijeli’s Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP” filed on 23 February 2004, (the “Reply”);

TAKING INTO CONSIDERATION the “Decision on Prosecutor’s Motion for Protective Measures for Witnesses” issued on 12 July 2000, (the “Protective Measures Decision”);

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Juvénal Kajelijeli, Case No. ICTR-98-44A-A, moves the Trial Chamber to order to the Registrar to avail the Defence with the open and closed session testimony and exhibits of Witness GAP.
2. The Defence mentions that the said witness has already testified in the case of *The Prosecutor v. Juvénal Kajelijeli* on 28 November, 3 December and 4 December 2001. The same Witness GAP also testified in the Case of *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, between 19 and 23 January 2004.
3. On 30 January 2004, the Defence for Juvénal Kajelijeli wrote to the Registry requesting a copy of the transcripts of the testimony of Witness GAP but has not yet received the requested transcripts or exhibits.
4. According to the Defence, disclosure of the open and closed session testimony and exhibits is necessary to assist Juvénal Kajelijeli “in preparing his appeal including but not limited to the filing of motions to allow new evidence pursuant to Rule 115 and 120”.

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5. The Defence agrees to be bound by the same protective orders that this Trial Chamber has already ordered with respect to the said witness.

Prosecution Submissions

6. In his response dated 17 February 2004, the Prosecutor submits that “he would, in principle, have no objection to the disclosure of certain closed session testimony and exhibits [...] relating to Witness GAP, so long as the protective measures afforded by Trial Chamber II obtain”.

7. However, the Prosecutor submits that, as the Trial Chamber’s Decision of 23 January 2004¹ excluded all of Witness GAP’s testimony from the trial record, “it would not serve any meaningful purpose to disclose the expunged testimony of Witness GAP”. Therefore, the Prosecutor argues that the Motion is now rendered moot and should be dismissed in its entirety.

Defence Reply

8. The Defence submits that the Prosecutor’s objection to producing Witness GAP’s testimony as it relates to the case of *The Prosecutor v. Juvénal Kajelijeli* is misplaced. According to the Defence, “the conflicts, contradictions and omissions that are revealed in the [...] statements of Witness GAP are of such nature that they undermine any factual basis that a reasonable trier of fact could find the witness credible”.

9. The Defence for Juvénal Kajelijeli moves the Trial Chamber to disclose the open and closed session testimony and exhibits of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu*.

DELIBERATIONS

10. The Prosecutor submits that, since the Decision of 23 January 2004 “in essence excluded all of Witness GAP’s testimony, it would not serve any meaningful purpose to disclose the transcript of the expunged testimony of Witness GAP”.

11. As a preliminary remark, the Trial Chamber considers that there is no impediment for this Trial Chamber to disclose to an accused person in a case before this Tribunal the transcripts of the testimony in open session of a witness in another case. Pursuant to Article 19 of the Statute, “the hearings shall be public unless the Trial Chamber decides to close the proceedings [...]”. Therefore, the open session testimony as well as the non-confidential exhibits of Witness GAP before this Trial Chamber shall be made available to the Defence for Juvénal Kajelijeli as soon as possible.

¹ *The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T*, “Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, (the “Decision of 23 January 2004”).

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12. It is observed that, when a protected witness has given evidence in closed session, the party seeking to obtain a copy of such proceeding should move the Trial Chamber, which granted the protective measures, to vary its order and disclose the closed session testimony.

13. The Defence for Juvénal Kajelijeli submits that the disclosure of Witness GAP's complete testimony in the case of *The Prosecutor v. Casimir Bizimungu et al.* and the statements of the said witness are necessary to file a motion before the Appeals Chamber based on Rule 115 of the Rules.

14. The Trial Chamber is of the view that, a comparison between the testimony Witness GAP made in the case of *The Prosecutor v. Juvénal Kajelijeli* and the one he made in the case of *The Prosecutor v. Casimir Bizimungu et al.*, may be relevant for the Defence of Juvénal Kajelijeli to support his appeal. In this particular case, the fact that the Trial Chamber decided to disregard the testimony of Witness GAP regarding events involving Casimir Bizimungu in Ruhengeri *préfecture* will not affect the Defence of Juvénal Kajelijeli, who is an accused in another case. The Trial Chamber is of the view that Juvénal Kajelijeli's right to utilise the testimony of Witness GAP in support of his appeal will not be affected by the Decision of 23 January 2004 in the case of *The Prosecutor v. Casimir Bizimungu et al.*, which excluded the said testimony due to an imprecision in the Indictment.

15. The Trial Chamber is of the view that the Prosecutor's contention, namely that the testimony of GAP has been expunged from the record and therefore would be meaningless for the Defence of Juvénal Kajelijeli, is not tenable in law, as the evidential value of such testimony is not affected by the exclusion in the case of *The Prosecutor v. Casimir Bizimungu et al.* for the reasons stated in paragraph 14 above.

16. In accordance with past practice, the Trial Chamber finds that it has authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry. For the reasons stated in paragraphs 13 and 14 above, the Trial Chamber is of the opinion that, the Defence for Juvénal Kajelijeli has proved *prima facie* that the testimony and exhibits are relevant for the proceedings before the Appeals Chamber.

17. The Trial Chamber follows past decisions in finding that its Protective Measures Decision should be modified, only to the extent of permitting the moving party access to the protected material, on condition that its terms shall apply *mutatis mutandis* to that party, viz the Defence for Juvénal Kajelijeli in this particular case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECIDES that the transcripts of the open and closed session trial testimony of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, and exhibits filed therewith shall be immediately disclosed to the Defence of Juvénal Kajelijeli;

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ORDERS that the Defence of Juvénal Kajelijeli, on receipt of the said closed session testimony of Witness GAP and exhibits filed under seal therewith, shall be bound *mutatis mutandis* by the Protective Measures Decision of 12 July 2000 (attached as Appendix A);

DIRECTS the Registry to promptly carry out the terms of this decision, and to continue to enforce the terms of the Protective Measures Decision of 12 July 2000.

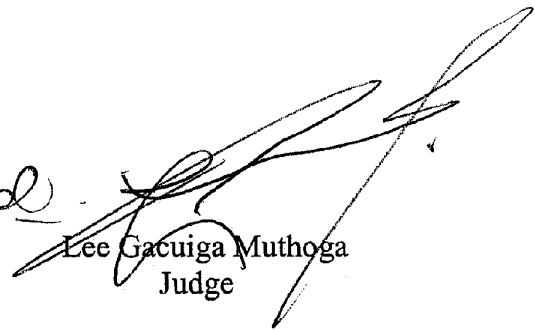
Arusha, 4 March 2004



Asoka de Zoysa Gunawardana
Presiding Judge



Khalida Rachid Khan
Judge



Lee Gacuiiga Muthoga
Judge



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12331**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")**

SITTING as Trial Chamber II, composed of Presiding Juge Laity Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in *Prosecutor v. Justin Mugenzi* (the "Motion"), submitted on 9 March 2000;

CONSIDERING "the Defence's Response to the Prosecution Motion For Witness Protection Filed on 25 April 2000;"

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the "Rules");

ARGUMENTS OF THE PROSECUTION

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.
2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue, on the basis of the requests made in point 3 of the Motion, the following orders:
 - 3.a) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;
 - 3.b) Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;
 - 3.c) Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;
 - 3.d) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and 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 these individuals, and this order shall remain in effect after the termination of the trial;

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Prohibiting the Defence and the accused from sharing, revealing or discussing, 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 individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;

Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;

Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise. Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

THE RESPONSE BY THE DEFENCE42329
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5. Defence for Mugenzi submits, *inter alia*, that the provision of the Motion stating that the witnesses residing in Africa who have not waived their protection need protection is an erroneous presumption. He contends that the Motion does not rely on the rights of the Accused the rights of the accused set forth in Rule 75 (A) of the Rules.
6. Defence for Mugenzi seeks dismissals of the requests formulated in paragraph 3 (f) and contends that the order would infringe upon the Accused right to a fair trial under Article 20 of the Statute unless the Prosecution accepts the following:
 - (i) The Defence witnesses should have the same protections that the Prosecution witnesses have.
 - (ii) The Prosecutor should also designate the names of its team members knowing that risks to Defence witnesses residing in Rwanda are greater than the risks posed to Prosecutor's witnesses who at least, benefit from having support from the Government of Rwanda.
7. Defence for Mugenzi submits that if the Prosecutor agrees to the above concessions, he will withdraw his objection regarding paragraph 3 (f).
8. Furthermore, Defence for Mugenzi objects to paragraph 3 (h) for three reasons:
 - (i) First, Defence for Mugenzi submits that the disclosure of identity seven days before a witness testifies is not a reasonable time limit to investigate the witnesses considering that the Defence is restricted in making inquiries in Rwanda.
 - (ii) Second, Defence for Mugenzi contends, *inter alia*, that the non-disclosure measures of paragraph 3 (h), if ordered, would prejudice the right of the accused to an adequate defence by hampering investigations and by preventing the Defence from having full knowledge of the Prosecutor's case. Defence for Mugenzi argues that, during trial, the Defence team will be paralyzed in Arusha, while the Prosecutor's numerous investigators will have free hands to conduct all inquiries. In addition, it is argued that this unequal position violates the Rule 69 (C) of the Rules whereby the identity of the witness shall be disclosed in sufficient time prior to trial.
 - (iii) Third, Defence for Mugenzi argues that the Prosecutor failed to demonstrate that withholding the identity of the witnesses is fair, reasonable and in the interests of justice. He contends that under Rule 69 (A) of the Rules, withholding the identity of the cases is justified only in exceptional circumstances. The Defence requests that, in absence of such showing, the present motion be dismissed.

HAVING DELIBERATED,

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12475*On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):*

9. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C) of the Rule regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.
10. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses on 20 November 1998) quoting the findings of The Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in the *Prosecutor v. Tadic*, IT-94-I-T (Decision on the Prosecutor's Motion Requesting Protective Measures for Witnesses on 10 August 1995). In these decisions, both Trial Chambers held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decisions, both Trial Chambers determined that a non-disclosure order may be based on fears expressed by persons other than the witness.
11. After having examined the information contained in the various documents and reports that the Prosecutor has annexed to in his brief to support the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation prevalent in Rwanda and neighboring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Considering that the Defence for Mugenzi did not object to the said measures requesting the non-disclosure of the identity of witnesses, as specified in paragraphs 3(a), 3(b), 3(c), 3 (d) and 3(e) of the Motion, the Chamber finds that these measures required by the Prosecution are justified.

On point 3(f) of the Motion

12. The Chamber will grant the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.
13. The Chamber endorses the holding in *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information."

On points 3(g) and 3(i) of the Motion

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14. Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the accused and decides to grant them as they stand.

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

15. Taking note of the Defence's argument that the right of the Accused to have adequate time for preparation of defence could be impaired if such measure was granted. The Chamber considers that the seven (7) days period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.
16. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (*Prosecutor v. Semanza*, ICTR-97-21-I, (10 December 1998); *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000); *Prosecutor v. Nsabimana and Nteziryayo*, ICTR, (21 May 1999);).
17. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in *Prosecutor v. Muhimana*, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials;"


MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

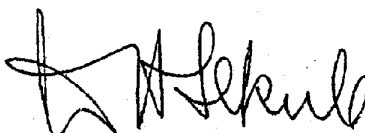
MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

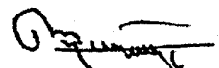
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Arusha, 12 July 2000


Lary Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

