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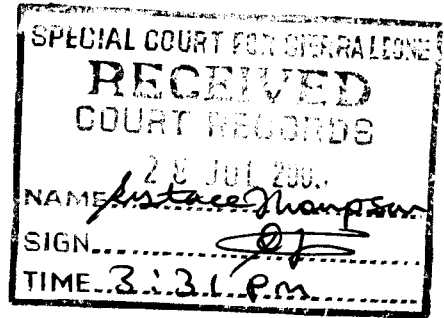
SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR  
FREETOWN – SIERRA LEONE

SCSL-2003-12-PT-025  
(789-855)

Before: Judge Bankole Thompson, Presiding Judge  
Judge Pierre Boutet  
Judge Mutanga Itoe

Registrar: Robin Vincent

Date filed: 28 July 2003



THE PROSECUTOR

Against

ALIEU KONDEWA

CASE NO. SCSL – 2003 – 12 – PD

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**PROSECUTION REPLY TO DEFENCE RESPONSE TO THE PROSECUTION  
MOTION FOR IMMEDIATE PROTECTIVE MEASURES**

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Office of the Prosecutor:  
James C. Johnson, Acting Chief of Prosecutions  
Sharan Parmar, Assistant Trial Counsel

Defence Counsel:  
James MacGuill, Lead Counsel  
James Evans, Co-Counsel

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN – SIERRA LEONE

**THE PROSECUTOR**

**Against**

**ALIEU KONDEWA**

CASE NO. SCSL – 2003 – 12 – PD

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**PROSECUTION REPLY TO DEFENCE RESPONSE TO THE  
PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES**

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**INTRODUCTION**

The arguments raised in the Response of Defence Counsel should be rejected as they are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals. The assertions fail to realize that it has been accepted by the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court that the rights of the Accused must be balanced with the need for protective measures for witnesses and victims.

## ARGUMENT

### I. Procedural Matters

1. On 17 July 2003, the Defence filed its response (the “**Defence Response**”) to the Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure dated 11 July 2003 (the “**Prosecution Motion**”). The Defence Response was not served upon the Prosecution until 25 July 2003.
2. The Defence asserts at para. 3 that Defence Counsel “had not had the benefit of taking instructions from the Accused” and therefore files the Defence Response “without prejudice to the Accused’s right to raise further grounds of objection to the Prosecution’s Motion either in advance of or at the hearing” of the Prosecution Motion. The Prosecution submits that the Defence is precluded from such measures having been duly provided with an opportunity within the time limits prescribed under the Rules to submit a fully argued response to the Prosecution Motion Office. This practice would unduly delay the final disposition of these matters as the Prosecution would be entitled to a Reply, inappropriately interject uncertainty into the proceedings, and is not required by fundamental fairness or international standards of justice.
3. In any event, while in agreement with the right of the Accused to meet with Defence counsel and prepare his Defence, the Prosecution submits that the preparation of a response to this motion does not require such extensive contact with the Accused. Furthermore, International Tribunals are characterized by the assignment of Defence counsel who are often absent from the seat of the Tribunal prior to trial.
4. The Defence also requests that the matter be heard orally. As a pre-trial motion, it is well within the discretion of the Designated Judge or the Trial Chamber to make a determination on the Prosecution Motion for witness protection matters without an oral hearing. The Prosecution submits that the Designated Judge issue a decision without an oral hearing as was done in the cases of *The Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, and *Samuel Hinga Norman*, SCSL-2003-08-PT.

5. For the record, the Prosecution corrects the reference in para. 25 (d) and (h) of the Prosecution Motion, which should make reference to para. 25 and not para. 23, and paragraph 25(a), which should make reference to para. 19 and not para. 16.

## II. Interim measures sought in order to meet Prosecutorial obligation

6. The Defence raises objections to the one of the proposed interim measures sought by the Prosecution (See para. 5 and 6 of the Defence Response). The Prosecution notes that the *transmission* of disclosure materials to the Registry would not trigger the time period within which Defence must file preliminary motions as the Defence would not have been in receipt of the said materials.
7. Alternatively, the Prosecution seeks a suspension of its disclosure obligations under Rule 66(A)(i) until a decision is rendered on the Prosecution Motion, which is in essence that proposed by the Defence at para. 8 and 9 of the Defence Motion.
8. Finally, in reply to Defence argument at para.5, as demonstrated by the practices of the Court and the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR), witness statements need not be considered for the preparation of preliminary motions. That is, the Rules of the ICTY and ICTR require the filing of preliminary motions *prior to* the actual disclosure by the Prosecution of witness statements<sup>1</sup>.

## III. Balance between rights of the Accused with need for protective measures

9. The Prosecution submits that the provisions of the Rules and this Court's Statute "seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection".<sup>2</sup> Furthermore, the philosophy of the International Tribunals and this Court is "pre-eminently mindful of the need to

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<sup>1</sup> Under ICTY and ICTR Rule 72, preliminary motions shall be brought 30 days within disclosure by the Prosecution of materials under 66(A)(i). Both ICTY and ICTR Rule 66(A)(i) requires disclosure of "all copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused", within 30 days of the initial appearance of the accused. Disclosure of witness statements under ICTY Rule 66(A)(ii) is mandated within the time-limit prescribed by the Trial Chamber (in practice greater than thirty days) and under ICTR Rule 66(A)(ii) no later than 60 days before the date set for trial.

<sup>2</sup> See para. 15 of "Decision on the Prosecutor's Motion For Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure", dated 23 May 2003 in *Prosecutor Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, and *Samuel Hinga Norman*, SCSL-2003-08-PT.

guarantee the utmost protection and respect for the rights of the victims and witnesses".<sup>3</sup>

10. While the Prosecution fully recognises the rights of the Accused as they are stipulated in Article 17 of this Court's statute,<sup>4</sup> the prevailing practice of the ad hoc Tribunals, as stipulated in Article 17.2 of the Court's statute and as held by the Court<sup>5</sup>, the right of the Accused to a fair and public trial may be subject to derogation in exceptional circumstances, which includes the interest of witness and victim protection.

#### **IV. Demonstration of exceptional circumstances and objective fear**

11. The Prosecution submits that the Defence objection at para. 12 of the Defence Response incorrectly interprets the onus outlined in Rule 69 upon a party seeking protective measures and should therefore be rejected. In particular, the Defence assertion that the Prosecution is obligated to demonstrate through specific evidence, on a case by case basis, the dangers attendant to the disclosure of identifying data to the Accused is incorrect.
12. The jurisprudence of the International Tribunals and this Court clearly demonstrates that the party seeking protective measures must show the existence of a real fear for the safety of a witness or the witness' family, an objective basis for the fear. Furthermore, the plain language of Rule 69 establishes a requirement that there be a showing of exceptional circumstances to warrant the protective measures that are being sought. The Prosecution submits that the affidavit evidence clearly demonstrates exceptional circumstances and a real and objective fear for the safety of its witnesses and victims.

#### Exceptional circumstances

13. The Prosecution submits that the circumstances set forth in Attachments A through D, in particular the Confidential Investigator's Declaration of Tamba Gbekie and the

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<sup>3</sup> *Ibid*, para. 9, 15. See also para 14, which refers to ICTY decision in *Blaskic*, IT-95-14, 5 November 1996.

<sup>4</sup> Of note, the language of Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute") is almost identical to Article 20 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

<sup>5</sup> *Supra* note 2, para. 15.

Declaration of Dr. Alan White, the Chief of Investigations, provide a sufficient basis to find that exceptional circumstances exist to support the relief requested, including protective measures for categories of witnesses, contrary to the Defence assertion at para. 12 of the Defence Response.

14. These circumstances include, as in Rwanda, the presence of perpetrators who actually carried out the crimes alleged in the indictment in the general population, the fact that potential witnesses live among these perpetrators, the fact that the Government of Sierra Leone is not actively prosecuting such perpetrators, and the fact that many potential witnesses live among these perpetrators in remote areas where there is no appreciable police presence or other security available. These circumstances are sufficient to reflect a security situation vis à vis all potential witnesses which supports applying the requested protective measures to the categories listed in the Prosecution motion.<sup>6</sup> In addition, the objective basis for the fears expressed is provided by the “horrendous nature and ruthless character of the alleged crimes”.<sup>7</sup>
15. The Prosecution submits that, where, as here, the security situation relative to witnesses in a country or region puts all witnesses in that country or region potentially at risk, based on real and objectively validated fears, exceptional circumstances exist to justify providing protective measures for categories of people, as has been done in the ICTR. In addition to the authorities cited in the Prosecution motion, see especially *Rwamakuba*, wherein the Trial Chamber found that the security situation could be of such a nature to put at risk the lives of victims and potential Prosecution witnesses, and granted the relief requested for categories of witnesses.

#### Real and objective fears

16. The Prosecution submits that the existence of real fear for the safety of potential witnesses is set forth in the Confidential Investigator’s Declaration of Tamba Gbokie, while the Declaration of Dr. Alan White provides information which establishes both a real fear for the safety of witnesses and their families and an objective basis for

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<sup>6</sup> See *Prosecutor v. Rwamakuba*, ICTR - 98 - 44- T, 22 September 2000; and the authorities cited in the Prosecution Motion.

<sup>7</sup> See *Prosecutor v. Tadic*, IT- 94- 1-T, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995, para. 62.

these fears. Attachments A, B and D in particular demonstrate that these fears are genuine and well founded. Thus, as was held by the Judge Thompson:

the combined effect of these affirmations is to demonstrate ... the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It is significant to note that there is no affidavit in opposition.<sup>8</sup>

17. There is much commonality between the situation in Sierra Leone and that in Rwanda: the victims, witnesses and the perpetrators live together in close knit communities; the situation in the region surrounding Sierra Leone is still volatile as reflected by recent events in Ivory Coast and Liberia, which involve members of the same factions which fought in the Sierra Leone conflict. This commonality supports the application of similar protective measures, which are applicable to all witnesses and victims, such as those requested by the Prosecution. Furthermore, these regional threats and instability warrant protective measure for witnesses who are outside the territory of Sierra Leone, which is especially demonstrated within the Declaration of Dr. Alan White.

#### **V. Scope of Rule 69**

18. The Defence' claim that the protective measures sought compromises the Accused' right to adequate time and facilities to prepare his defence fails to consider that the substance of the witnesses' testimony will have been previously disclosed to the Defence and that only the data that could lead to the identity of the witness will be withheld for a certain period prior to testimony (See para. 7, Defence Response). Since the Defence will be in possession of the substance of anticipated testimonies, the Prosecution submits that 21 days before testimony is sufficient time to allow the Defence to conduct any inquiries relating to remaining issues, such as the credibility

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<sup>8</sup> See para. 11 See para. 15 of "Decision on the Prosecutor's Motion For Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure", dated 23 May 2003 in *Prosecutor Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT.

of the identified witness.<sup>9</sup> Furthermore, this measure has been the general and recent practice of the ICTR.<sup>10</sup>

19. The orders outlined in the Prosecution Motion at para. 25 (g), (h), (i) and (j) are not suggested to control the identity or operations of the Defence team members, least of all by the Prosecution’s Office. The Prosecution reiterates that these provisions provide the Court with the most direct means to exercise oversight regarding the implementation of protective measures, including, if necessary, the means by which to pursue alleged violations of the protective orders (See para. 23 Prosecution Motion). The Prosecution submits that such measures are essential in that they serve to prevent protected identifying witness information from passing into the public realm should Defence team members leave the case or at the conclusion of the trials, as has occurred at the ICTR, following which dangers may still present themselves to the safety of witnesses and victims.

20. The Prosecution submits that it has made a reasonable case for measures of confidentiality through withholding identifying data during the pre-trial phase. In matters of such delicacy and sensitivity, as the Court stated in recent decisions, “it would be unrealistic to expect ... the Prosecution ... to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation”.<sup>11</sup> Furthermore, individual measures may be sought in the future where warranted for individual witnesses. Accordingly, the arguments raised by the Defence should be rejected.

<sup>9</sup> See *Prosecutor v. Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003, para. 17; *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001, para. 26; *Prosecutor v. Rwamakuba*, *supra*, para. 15 f.

<sup>10</sup> See *Prosecutor v. Nsabimana and Nteziryayo*, ICTR 97-29-I, 21 May 1999; *Prosecutor v. Edouard Karemera*, ICTR 98-44-I, 6 July 2000; *Prosecutor v. Mathieu Ngirumpatse*, ICTR 98-44-I, 6 July 2000; *Prosecutor v. Juvenal Kajelijeli*, cited in Prosecution Motion; *Prosecutor v. Prosper Mugiraneza*, ICTR 99-50-T, 12 July 2000; *Prosecutor v. Justin Mugenzi*, ICTR 99-50-I, 12 July 2000; *Prosecutor v. Joseph Nzirorera*, cited in Prosecution motion; *Prosecutor v. Jerome Clement Bicamumpaka*, ICTR 99-50-I, 12 July 2000; *Prosecutor v. Eliezer Niyitegeka*, ICTR 96-14-I, 12 July 2000; *Prosecutor v. Casimir Bizimungu*, ICTR 99-50-T, 22 September 2000; *Prosecutor v. Rwamakuba*, *supra*; *Prosecutor v. Samuel Musabyimana*, ICTR 2001-62-I, 19 February 2002; *Prosecutor v. Hormisdas Nsengimana*, cited in Prosecution Motion.

<sup>11</sup> See *e.g. Prosecutor v. Sesay*, SCSL-2003-05-PT, 23 May 2003, para. 14; *Prosecutor v. Brima*, SCSL-2003-06-PT, 23 May 2003, para. 14; *Prosecutor v. Kallon*, SCSL-2003-07-PT, 23 May 2003, para. 15; *Prosecutor v. Norman*, SCSL-2003-08-PT, 23 May 2003, para. 14.



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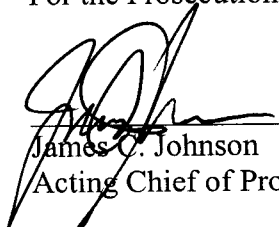
**CONCLUSION**

The protective measures requested in the Prosecution Motion are soundly based upon the prevailing jurisprudence and general practice of the International Tribunals concerning witness protection, which strike an appropriate balance between the interest of witness and victim protection and the eminent interest of effectively protecting the right of the Accused to a fair and expeditious trial. On this basis, the Court should grant the relief requested in the Prosecution Motion for protective measures.

The Prosecution reasserts its request for provisional transmittal to the Registry of disclosure materials within the period of disclosure, or alternatively a suspension of the Prosecution's disclosure obligation under Rule 66(A)(i), if the Designated Judge or Trial Chamber has not decided this motion by 31 July 2003 and issued the relevant orders.

Freetown, 28 July 2003

For the Prosecution,



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James C. Johnson  
Acting Chief of Prosecutions

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Nsabimana and Nteziryayo*, ICTR 97-29-I, 21 May 1999
2. *Prosecutor v. Edouard Karemera*, ICTR 98-44-I, 6 July 2000
3. *Prosecutor v. Mathieu Ngirumpatse*, ICTR 98-44-I, 6 July 2000
4. *Prosecutor v. Prosper Mugiraneza*, ICTR 99-50-T, 12 July 2000
5. *Prosecutor v. Justin Mugenzi*, ICTR 99-50-I, 12 July 2000
6. *Prosecutor v. Jerome Clement Bicamumpaka*, ICTR 99-50-I, 12 July 2000
7. *Prosecutor v. Eliezer Niyitegeka*, ICTR 96-14-I, 12 July 2000
8. *Prosecutor v. Casimir Bizimungu*, ICTR 99-50-T, 22 September 2000
9. *Prosecutor v. Samuel Musabyimana*, ICTR 2001-62-I, 19 February 2002

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Nsabimana and Nteziryayo*, ICTR 97-29-I, 21 May 1999



1999 JUN 17 A 10: 21

International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG

Before: Judge William H. Sekule, Presiding  
Judge Yakov Ostrovsky  
Judge Tafazzal H. Khan

Registry: Dr. Agwu Ukiwe Okali

Decision of: 21 May 1999

THE PROSECUTOR  
v.  
SYLVAIN NSABIMANA and  
ALPHONSE NTEZIRYAYO

Case No. ICTR-97-29-I

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**DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE  
MEASURES FOR VICTIMS AND WITNESSES**

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The Office of the Prosecutor:

Japhet Daniel Mono  
Don Webster  
Ibukunolu Alao Babajide  
Robert Petit

The Counsel for Alphonse Nteziryayo:

Titinga Frédéric Pacere

The Counsel for Sylvain Nsabimana:

Josette Kadji  
Charles Patie Tchacounte

Case No. ICTR-97-29-I

**THE TRIBUNAL,**

SITTING AS Trial Chamber II, composed of Presiding Judge William H. Sekule, Judge Yakov Ostrovsky and Judge Tafazzal H. Khan;

CONSIDERING the indictment of 15 October against Sylvain Nsabimana and Alphonse Nteziryayo pursuant to Article 17 of the Statute of the Tribunal (Statute) and Rule 47 of the Rules of Procedure and Evidence (Rules), on the basis that there was sufficient evidence to provide reasonable grounds for believing that they have committed genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Lennart Aspegren on 16 October 1997;

CONSIDERING the motion filed on 12 April 1999 by the Prosecutor, seeking an order for protective measures for victims of and witnesses to the crimes alleged in the indictment;

HAVING HEARD the parties at the hearing held on 18 May 1999;

CONSIDERING the provisions regarding the protection of victims and witnesses in Articles 19 and 21 of the Statute of the Tribunal and in Rules 69 and 75 of the Rules;

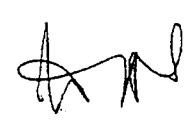
**AFTER HAVING DELIBERATED,**

WHEREAS the Prosecutor, for the protection of victims and witnesses, has filed a motion before the Tribunal to order the non-disclosure of their identities as well as for other related relief;

WHEREAS in support of this motion, the Prosecutor has submitted that, according to various concordant reports from UN institutions and numerous media reports, since December 1996, there has been a considerable increase in the number of violent acts directed against victims of and witnesses to the serious violations of international humanitarian law committed in Rwanda in 1994, acts which, in numerous cases, have led to the death of victims and witnesses;

WHEREAS, while invoking the provisions of Rule 69(A) and relying on the deterioration of the security situation throughout Rwanda, the Prosecutor applies to the Tribunal for the issue of the following orders:

- (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, other than the **CONFIDENTIAL** material provided to the Trial Chamber in support of this motion;



- (b) That the names, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses, be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals;
- (c) Requiring, to the extent that any names, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, other than the **CONFIDENTIAL** material provided to the Trial Chamber in support of this motion, that such identifying information be expunged from those documents;
- (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 such victims and potential prosecution witnesses, and this order shall remain in effect after the termination of this trial;
- (e) Prohibiting the Defence and the Accused from sharing, discussing or revealing, 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 victims or potential prosecution witnesses, to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team. Such persons so designated by the assigned Counsel or the Accused;
- (f) Requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 3(e) of the Prosecutor's motion, have access to any information referred to in Paragraphs 3(a) through 3(d) of the above mentioned motion and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of victims and potential prosecution witnesses;
- (g) Prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witness at any time or place without leave of the Trial Chamber and parties;
- (h) 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 other information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and



allowing 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, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven (7) days before the victim or witness is to testify at trial;

- (i) That the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential prosecution witnesses or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;
- (j) Requiring that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public;
- (k) Prohibiting any member of the Defence team referred to in Paragraph 3(f) of the Prosecutor's motion, from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;
- (l) Prohibiting the Accused individually from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;
- (m) Prohibiting the Accused individually from personally possessing any material which includes, (but not limited to) any copy of a statement of a witness even if the statement is in redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and instructing the Detention Centre authorities to ensure compliance with the prohibition set out in this Paragraph.

WHEREAS, the Defence Counsel for Nsabimana, during the hearing on 18 May 1999, opposed the motion generally on the ground that it failed to provide specific details;

WHEREAS, the Defence Counsel for Nteziryayo, during the hearing on 18 May 1999, opposed the motion on the ground that it was premature regarding the Accused, as no indictment against Nteziryayo has been confirmed;

CONSIDERING that the indictment against both Accused (Nsabimana and Nteziryayo) was confirmed on 16 October 1997 by a decision of Judge Lennart Aspegren;

CONSIDERING the volatile situation at present in Rwanda and the neighbouring countries, as described in many concordant reports issued by various sources;

CONSIDERING the existing exceptional circumstances which justify the special protection

Case No. ICTR-97-29-I

of witnesses;

CONSIDERING the general provisions of Rules 69 and 75;

CONSIDERING that granting the Prosecution's requests (e) and (k) does not lower any ethical duty owed by both parties;

CONSIDERING the rights of the Accused as formulated in Article 20 of the Statute and in particular Article 20(4)(b) and 20(4)(e);

CONSIDERING that the seven (7) days delay required in request (h) is too short to allow the Defence adequate preparation time for cross examination, in accordance with Article 20(4)(e) of the Statute;

CONSIDERING that request (m) is overly broad and may impinge Article 20(4)(b) of the Statute;

**FOR THESE REASONS,**

**THE TRIBUNAL**

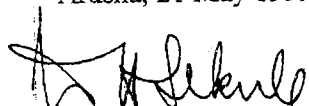
**GRANTS** the measures requested in paragraphs (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l) of the Prosecution motion;

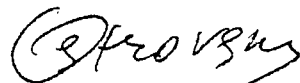
**MODIFIES AND GRANTS** paragraph (h) of the Prosecution motion, as follows:

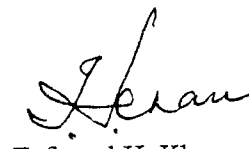
“(h) Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; *or twenty-one (21) days before the victim or witness is to testify at trial, which ever comes first.*”

**DENIES** the measures sought in paragraph (m) of the Prosecution motion.

Arusha, 21 May 1999

  
William H. Sekule  
Presiding Judge

  
Yakov Ostrovsky  
Judge

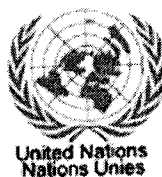
  
Tafazzal H. Khan  
Judge

(Seal of the Tribunal)



PROSECUTION INDEX OF AUTHORITIES

2. *Prosecutor v. Edouard Karemera*, ICTR 98-44-I, 6 July 2000



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**TRIAL CHAMBER II**

Original : French

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:** John Kiyeyeu

**Decision of:** 6 July 2000

**THE PROSECUTOR**

**V.**

**Édouard Karemera**

*ICTR-98-44-I*

**DECISION ON THE PROSECUTOR'S MOTION  
FOR PROTECTIVE MEASURES FOR WITNESSES**

**Counsel for the Prosecutor:**

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

**Counsel for the Defence :**

Mr Didier Skornicki

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

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

807

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

**CONSIDERING** the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

**CONSIDERING** that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

**WHEREAS** Defence Counsel for Édouard Karemera has not responded to the Prosecution's Motion;

**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 the following orders articulated at point 3 of its Motion:
  - 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;
  - 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;
  - 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;
  - 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;
  - e) 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;

808

- f) 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;
- g) 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;
- h) 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;
- i) 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 of 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;
- j) 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.

3. 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.

#### **HAVING DELIBERATED,**

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

4. 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), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

5. 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 Ex-

809

Yugoslavia (“ICTY”) in Prosecutor v. Tadić, IT-94-I-T. In its decision of 10 August 1995, the Chamber 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 decision, the ICTY determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

6. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of 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. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

***On point 3(f) of the Motion***

7. 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.

8. 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***

9. 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):***

10. According to the Chamber, the seven (7) day 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.

11. 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);).

***On the Use of Pseudonyms (point 3(j) of the Motion)***

12. 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

810

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.

Arusha, 6 July 2000

Laïty Kama  
Presiding Judge

William H. Sekule  
Judge

Mehmet Güney  
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

3. *Prosecutor v. Mathieu Ngirumpatse*, ICTR 98-44-I, 6 July 2000



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

## TRIAL CHAMBER II

Original : French

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:** John Kiyeyeu

**Decision of:** 6 July 2000

**THE PROSECUTOR**

**V.**

**Mathieu Ngirumpatse**

*ICTR-98-44-I*

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### DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

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**Counsel for the Prosecutor:**

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

**Counsel for the Defence :**

Mr Charles Roach

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

**SITTING** as Trial Chamber II, composed of Presiding Juge Laïty 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. Mathieu Ngirumpatse (the "Motion"), submitted on 9 March 2000;

**CONSIDERING** the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;



**CONSIDERING** that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

**WHEREAS** Defence Counsel for Mathieu Ngirumpatse has not responded to the Prosecution's Motion;

**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 the following orders articulated at point 3 of its Motion:
  - 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;
  - 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;
  - 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;
  - 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;
  - e) 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;
  - f) 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

814

specified in Paragraph 2 above;

- g) 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;
- h) 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;
- i) 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 of 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;
- j) 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.

3. 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.

#### **HAVING DELIBERATED,**

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

4. 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), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

5. 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 Ex-Yugoslavia ("ICTY") in Prosecutor v. Tadić, IT-94-I-T. In its decision of 10 August 1995, the Chamber 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 decision, the ICTY determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

6. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of 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. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

***On point 3(f) of the Motion***

7. 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.

8. 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***

9. 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):***

10. According to the Chamber, the seven (7) day 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.

11. 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);).

***On the Use of Pseudonyms (point 3(j) of the Motion)***

12. 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:**

816

**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.

Arusha, 6 July 2000

Laïty Kama  
Presiding Judge

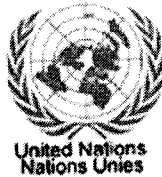
William H. Sekule  
Judge

Mehmet Güney  
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

4. *Prosecutor v. Prosper Mugiraneza*, ICTR 99-50-T, 12 July 2000



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**TRIAL CHAMBER II**

Original : English

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:** John Kiyeyu

**Decision of:** 12 July 2000

**THE PROSECUTOR**

**V.**

**PROSPER MUGIRANEZA**

*ICTR-99-50-T*

**DECISION ON THE PROSECUTOR'S MOTION  
FOR PROTECTIVE MEASURES FOR WITNESSES**

**Counsel for the Prosecutor:**

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

**Counsel for the Defence :**

Mr Michael Greaves

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

SITTING as Trial Chamber II, composed of Presiding Juge Laïty 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. Prosper Mugiraneza (the "Motion"), submitted on 8 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 8 March 2000;  
CONSIDERING the "Defence Counsel's Response to the Prosecution Motion For Witnesses Protection filed on 26 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;
  - 3.e) 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;
  - 3.f) 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;
  - 3.g) 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;

3.h) 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;

3.i) 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;

3.j) 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.

4. 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 DEFENCE,**

5. Defence for Mugiraneza agrees to the Prosecutor's requests in paragraphs 1 to 2 and 3(e), 3(g), (i), (j) and (k) as long as Defence's witnesses benefit from the same protections accorded to the Defence witnesses, mutatis mutandis.

6. Defence for Mugiraneza 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 unless the Prosecution accepts the following:

(i) The Defence witnesses should have the same rights and protections the Prosecution witnesses have.

(ii) The Prosecutor should be compelled to designate the names of the team members since the Defence did the same. Risks to the Defence witnesses are equal or greater than the risks posed to the Prosecutor's witnesses who at least benefit from having support from the Government of Rwanda.

7. Defence for Mugiraneza submits that if the Prosecutor agrees to the above propositions, he will withdraw his objection regarding paragraph 3 (f).

8. Defence Counsel further objects to paragraph 3 (h) for three reasons:



(i) First, Defence for Mugiraneza 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 Mugiraneza contends, inter alia, that the measures, 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 Mugiraneza argues that, during trial, the Defence team will be paralyzed when conducting its inquiries in Arusha, while the Prosecutor's 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 to allow adequate time prior to the Defence.

(iii) Third, Defence for Mugiraneza argues that the Prosecutor's allegations failed to demonstrate that withholding the identity of the witnesses is fair, reasonable and will best serve the overall interests of justice. He contends that under Rule 69 (A) of the Rules, withholding the identity of the cases is justified only in limited circumstances where withholding the identity of the witnesses does not infringe upon the accused right to a fair trial and to examine the witnesses. The Defence requests that, in absence of such showing, the present motion be dismissed.

#### **HAVING DELIBERATED,**

*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), 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 Tribunal 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 included in annex to its brief in support of 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 Prosper Mugiraneza 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.

822

*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*

14. Taking note that the Defence did not object to these measures, the Chamber considers that these are normal protective measures that 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)). On the Use of Pseudonyms (point 3(j) of the Motion)

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

823

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.

Arusha, 12 July 2000

Laity Kama  
Presiding Judge

William H. Sekule  
Judge

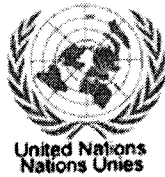
Mehmet Güney  
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

5. *Prosecutor v. Justin Mugenzi*, ICTR 99-50-I, 12 July 2000

825



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

## TRIAL CHAMBER II

Original : English

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:** John Kiyeyeu

**Decision of:** 12 July 2000

### THE PROSECUTOR

V.

JUSTIN MUGENZI

*ICTR-99-50-T*

### DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

**Counsel for the Prosecutor:**

Mr Ken Fleming Mr Don Webster Ms Ifeoma Ojemeni

**Counsel for the Defence :**

Ms Howard Morrison

### THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")

SITTING as Trial Chamber II, composed of Presiding Juge Laïty 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");

826

**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;
  - 3.e) 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;
  - 3.f) 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;
  - 3.g) 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;
  - 3.h) 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

827

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;

3. i) 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 of 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;

3. j) 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.

4. 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 DEFENCE**

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

PROSECUTION INDEX OF AUTHORITIES

6. *Prosecutor v. Jerome Clement Bicamumpaka*, ICTR 99-50-I, 12 July 2000





International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

829

**TRIAL CHAMBER II**

Original : English

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:** John Kiyeyeu**Decision of:** 12 July 2000**THE PROSECUTOR**

V.

**JEROME-CLEMENT BICAMUMPAKA***ICTR-99-50-T***DECISION ON THE PROSECUTOR'S MOTION  
FOR PROTECTIVE MEASURES FOR WITNESSES****Counsel for the Prosecutor:**

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

**Counsel for the Defence :**

Ms Francine Veilleux

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

SITTING as Trial Chamber II, composed of Presiding Juge Laïty 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. Jérôme-Clément Bicamumpaka (the "Motion"), submitted on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

CONSIDERING "Jérôme Clément Bicamumapaka's Response to the Prosecution Motion For Witnesses

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 points made in paragraph 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;
  - 3.e) 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;
  - 3.f) 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;
  - 3.g) 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;

83/1

3.h) 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;

3.i) 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 of 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;

3.j) 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.

4. 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 DEFENCE**

5. On point 3(h) of the Motion, Defence for Bicamumpaka submits, inter alia, that the disclosure of the identity of the witness seven days before a witness testifies is unreasonable and does not allow for the preparation of the Defence. This short period is contrary to a good administration of justice and violates Rules 69 (C) and 75 (A) of the Rules.

Defence for Bicamumpaka submits that these measures should only be exceptional according to Rule 69.

Defence for Bicamumpaka argues that she needs sufficient time to lead proper investigation about Prosecutor's witnesses, notably those who reside in Rwanda. She contends that according to the documentation annexed in the Motion, there is a risk of false testimony of witnesses residing in Rwanda due to vast human rights violations and lack of democracy in the country. She requests that the Prosecutor disclose the identity of witnesses one month before they testify at Trial, and only in exceptional circumstances to allow a reasonable preparation of the Defence case.

6. Defence for Bicamumpaka requested that the same conditions and time limits be accorded to the witnesses appearing for the Defence.

#### **HAVING DELIBERATED,**

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

7. 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), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

8. 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 Tribunal in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses, 20 November 1998) quoting the findings of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in *Prosecutor v. Tadić*, IT-94-I-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 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.

9. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of 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. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

*On point 3(f) of the Motion*

10. 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.

11. 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*

12. 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):*

13. Taking note of the Defence's arguments against the disclosure of the identity of the witnesses seven days before these witnesses are due to testify at trial, the Chamber is of the view that this period requested by the Prosecutor to disclose identifying before the witness is to testify at trial is not reasonable to allow the accused a reasonable 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.

14. 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);). On the Use of Pseudonyms (point 3(j) of the Motion)

15. 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.

Arusha, 12 July 2000

Laïty Kama  
Presiding Judge

William H. Sekule  
Judge

Mehmet Güney  
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

7. *Prosecutor v. Eliezer Niyitegeka*, ICTR 96-14-I, 12 July 2000

ICTR-96-14-1  
12-17/2000  
(976-971)

835-  
976  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original: English

Before: Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 12 July 2000

THE PROSECUTOR

v.

ELIÉZER NIYITEGEKA

ICTR-96-14-I

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RECEIVED  
ICTR

2000 JUL 12 P 3 42

DECISION ON THE PROSECUTOR'S MOTION  
FOR PROTECTIVE MEASURES FOR WITNESSES

Counsel for the Prosecutor:

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

Counsel for the Defence :

Ms Sylvia Geraghty

975 836

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

**SITTING** as Trial Chamber II, composed of Presiding Juge Laïty 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. Eliézer Niyitegeka* (the "Motion"), filed on 9 March 2000;

**CONSIDERING** the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

**CONSIDERING** that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

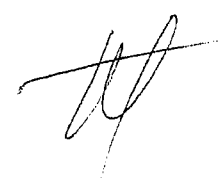
**WHEREAS** Defence Counsel for Eliézer Niyitegeka responded to the Motion on 3 May 2000 in a « Defence Motion in response to Prosecutor's motion for protection of witnesses dated 9 March 2000 » (« the Response »), filed with the Registry on 4 May 2000;

**CONSIDERING** that this short delay after the deadline set on 3 May 2000 is not unreasonable in view of the filing process within the Registry, the Chamber decides to consider the Defence Response despite its late filing;

**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 points made in paragraph 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;
- 3(e). 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;
- 3(f). 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;
- 3(g). 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;
- 3(h). 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;
- 3(i). 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;
- 3(j). 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

ICTR-96-14-I

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.

4. 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.

#### RESPONSE OF THE DEFENCE

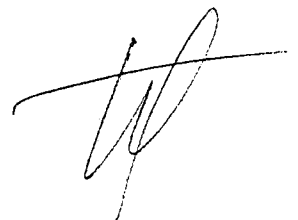
5. Counsel for Niyitegeka objects to point 3(f) of the Motion whereby she should have to disclose the members of her team that were appointed by the Registrar ;
6. Counsel for Niyitegeka contends that point 3(f) violates Rule 69 (c) by limiting the right of the Accused to know the identity of those who will testify at trial until seven days before their appearance. Such a measure would be unreasonable given the Defence's difficulties to conduct investigations and her limited resources. She submits that a period of not less than 60 days prior to the intended appearance of the witnesses would be appropriate.
7. Counsel for Niyitegeka submits that the Prosecutor should set out the specific risks alleged for each Prosecution witness.

#### HAVING DELIBERATED,

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

8. 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), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

9. 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 Tribunal in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses, 20 November 1998) quoting the findings of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in *Prosecutor v. Tadić*, IT-94-I-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 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.



ICTR-96-14-I

10. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation 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. The Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

***On point 3(f) of the Motion***

11. 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.

12. 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***

13. 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):***

14. Counsel for Niyitegeka submitted that the seven day period was unreasonable considering that Rule 69(c) provides that subject to Rule 75, the identity of witness shall be disclosed in sufficient time prior to the trial to allow for the preparation of the Defence. Counsel for Niyitegeka submitted that the disclosure period should be not less than 60 days prior to the appearance of the witnesses.

15. According to the Chamber, the seven (7) day 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);).



840  
971

ICTR-96-14-I

*On the Use of Pseudonyms (point 3(j) of the Motion)*

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:**

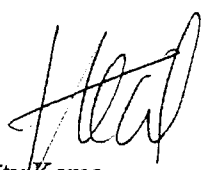
**GRANTS** the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

**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.

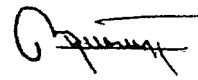
Arusha, 12 July 2000



Laity Kama  
Presiding Judge



William H. Sekule  
Judge



Mehmet Güney  
Judge

(Seal of the Tribunal)



PROSECUTION INDEX OF AUTHORITIES

8. *Prosecutor v. Casimir Bizimungu*, ICTR 99-50-T, 22 September 2000



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**TRIAL CHAMBER II**

Original : English

**Before:**

Judge Laïty Kama, Presiding Judge  
Judge William H. Sekule  
Judge Mehmet Güney

**Registry:**

John Kiyeyeu

**Decision of:** 22 September 2000

**THE PROSECUTOR  
V.  
CASIMIR BIZIMUNGU**

*ICTR-99-50-T*

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**DECISION ON THE PROSECUTOR'S MOTION  
FOR PROTECTIVE MEASURES FOR WITNESSES**

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**Counsel for the Prosecutor:**

Mr Ken Fleming  
Mr Don Webster  
Ms Ifeoma Ojemeni

**Counsel for the Defence:**

Ms Judith Bourne

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

**SITTING** as Trial Chamber II, composed of Presiding Judge Laïty 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. Casimir Bizimungu* (the "Motion"), submitted on 8 March 2000;

843

**CONSIDERING** the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 8 March 2000;

**CONSIDERING** "the Defence Counsel's Objection to the Prosecution Motion for the Protection of the Witnesses" 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 points made in paragraph 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;
  - 3.e) 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;
  - 3.f) 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;

844

3.g) 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;

3.h) 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;

3.i) 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;

3.j) 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.

4. 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 DEFENCE**

5. Defence for Bizimungu submits, *inter alia*, that the Motion fails to demonstrate that the measures sought are justified in the present circumstances. In support to her submissions, she contends that the documents filed in the Annex tend to describe broadly a volatile security situation in Rwanda without showing any direct threats to specific prosecution witnesses.

6. Disclosing the identity of a witness seven days before a witness testifies does not allow a reasonable time to investigate and to prepare for cross-examination of witnesses, particularly for those residing in Rwanda, when considering the vast human rights violations in the country. She contends, *inter alia*, that these systematic violations pose a risk of false testimonies.

7. Defence for Bizimungu contends that, if ordered, the non-disclosure measures 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 Bizimungu requests the denial of the Motion.

#### **HAVING DELIBERATED,**

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



845

8. 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.

9. 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 for 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.

10. 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 neighbouring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses.

***On point 3(f) of the Motion***

11. 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.

12. 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***

13. 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):***

14. 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-

846

examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

15. 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);).

16. 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.

Arusha, 22 September 2000

Laïty Kama  
Presiding Judge

William H. Sekule  
Judge

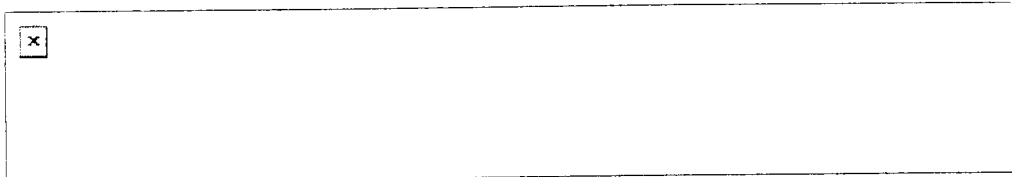
Mehmet Güney  
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

9. *Prosecutor v. Samuel Musabyimana*, ICTR 2001-62-I, 19 February 2002

848



OR: ENG

**TRIAL CHAMBER II**

**Before:**

Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registry:** Adama Dieng

**Date:** 19 February 2002

**The PROSECUTOR**  
v.  
**Samuel MUSABYIMANA**

*Case No. ICTR-2001-62-I*

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**DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR  
VICTIMS AND WITNESSES**

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**The Office of the Prosecutor**

Silvana Arbia  
Jonathan Moses  
Faria Rekkas  
Counsel for the Defence  
Gerardus Knoops

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),**

**SITTING** as Trial Chamber II, composed of Judges William H. Sekule, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramaroson (the "Chamber");

**BEING SEIZED** of:

(i) the "Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 24 September 2001, (the "Motion");

849

- (ii) the "Brief in Support of the Motion by the Prosecutor for Protective Measures for Victims and Witnesses" (the "Brief");
- (iii) the "Response Motion to the Prosecutorial Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Brief in Support thereof" filed by the Defence on 5 November 2001;
- (iv) the "Reply by the Prosecutor to the Defence Response in Respect of the Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment" filed on 20 November 2001.

**CONSIDERING** that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules and Procedure and Evidence (the "Rules");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules; in particular Articles 19, 20, and 21 of the Statute and Rules 69 and 75 of the Rules;

## **SUBMISSIONS OF THE PARTIES**

### **The Prosecution**

1. The Prosecution requests that the Chamber order protective measures for persons who fall into three categories, described at paragraph 3 of the Motion:
  - (a) Victims and potential Prosecution witnesses who presently reside in Rwanda, and who have not affirmatively waived their right to protective measures;
  - (b) Victims and potential Prosecution witnesses who presently reside outside Rwanda but in other countries in Africa and who have not affirmatively waived their right to protective measures, and;
  - (c) Victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.
2. The Motion for protective measures is framed in the following terms:
  - (a) An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses described hereinafter be sealed by the Registry and not included in any records of the Tribunal, other than the **CONFIDENTIAL** material provided to the Trial Chamber in support of this motion; that the said witnesses will bear the following pseudonyms: **CAA, CAB, CAC, CAD, CAE, CAF, CAG, CAH, CAI, CAJ, CAK, CAL, CAM** and any other additional witnesses will also be assigned pseudonyms which will be used during the course of the trial;
  - (b) An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described in Paragraph 2, be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures of these individuals;

850

- (c) An order requiring that to the extent that any names, relations, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal;
- (d) An order prohibiting the disclosure to the public or the media, of the names, relations, addresses, whereabouts of, and any other identifying data in supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential prosecution witnesses, and this order shall remain in effect after the termination of this trial;
- (e) An order prohibiting the Defence and the Accused from sharing, discussing or revealing, 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 specified in Paragraph 2 (sic), to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, such persons so designated by the assigned Counsel or the Accused;
- (f) An order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 3(e) above, have access to any information referred to in Paragraphs 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 requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 (sic);
- (g) An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witness at any time or place without leave of the Trial Chamber and parties;
- (h) An order prohibiting the disclosure to the Defence of the names, relations, 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 Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing 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, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than twenty-one (21) days before the victim or witness is to testify at trial;
- (i) An order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential prosecution witnesses or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;
- (j) An order that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public;

851

(k) An order prohibiting any member of the Defence team referred to in Paragraph 3f above, from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

(l) An order prohibiting the Accused individually or any member of the Defence team, from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;

(m) An order prohibiting the Accused individually from personally possessing any material which includes, (but not limited to) any copy of a statement of a witness even if the statement is in redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and instructing the Detention Centre authorities to ensure compliance with the prohibition set out in this Paragraph.

3. The Prosecution contends that there is a substantial danger for potential victims and witnesses if their identities are known. There is particular risks in north western and central areas of Rwanda where the Prosecutor submit that violence has increased.

4. The Prosecution relies on two affidavits, one from Remi Abdulrahman, Chief of the Security and Safety Section of the Tribunal in Kigali, dated 6 September 2001, and the other from Samuel Akorimo, Commander of Investigations for the Tribunal, dated 14 August 2001, and on informative material in Annexes C to K to the Brief. The aforementioned documents contain reports on attacks on Tutsi refugee camps and other genocide survivors by Rwandan rebels, ex-FAR militiamen and Interahamwe who have spread into central Rwanda, as far as the Gitarama *prefecture*. Due to the presence of Interahamwe in Uganda, of ex-FAR members in Burundi and considering the ongoing war in the Democratic Republic of Congo (DRC), the Prosecution argues that the risk of violence in Rwanda and the African Great Lakes Region has increased.

5. Relying on the affidavit of Mr Akorimo, the Prosecution exposes the risk of violence against victims and Prosecution witnesses in the Gitarama *prefecture*, after a group of armed infiltrators killed persons in the Gitarama area in June 2001. Further, the Prosecution submits that, in the Gitarama *prefecture*, the perpetrators and victims of the genocide live in absolute proximity with each other, and the likelihood of harm from perpetrators to victims is very high.

6. Moreover, the Prosecution alleges that these threats affect not only victims and potential witnesses residing in Rwanda but also those living in those areas and even outside the continent, due to the presence in those areas of Interahamwe groups, former Rwandan Armed Forces (ex-FAR) and members of the former civilian government of Rwanda.

7. Finally, the Prosecution relies on the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR to demonstrate that such orders as those requested have been granted in the past and would not affect the Accused's rights.

### **The Reply by the Defence**

8. Counsel for Musabyimana opposes the measures requested by the Prosecutor. The Defence argues that there are insufficient grounds to grant the use of pseudonyms insofar as the enumerated threats emanate from governmental or military sources and the Accused, who is a bishop, fulfils his religious functions and is not affiliated with the government or the military.

852

9. The Defence alleges that several procedural safeguards can be implemented instead of the drastic measure of "anonymous witnesses".

10. Alternatively, the Defence requests that the order not to disclose identifying data to the Defence sooner than 21 days before the victim or witness is to testify at trial" be rejected by the Chamber.

### **The Response by the Prosecution**

11. The Prosecution argues that, in accordance with the jurisprudence of the Tribunal, there is compelling evidence to grant the measures requested. Furthermore, the full names and identifying features of the witnesses will be provided to the Defence in time for adequate preparation.

12. The Prosecution maintains that the fact that the Accused holds a non-military and non-governmental position is irrelevant to the issue of witness protection. The Prosecution contends that disclosing the names and details of witnesses at an early stage causes an increased risk of danger to witnesses by the Accused, or his supporters, or those who oppose of the work of the Tribunal.

13. The Prosecution rejects the suggestion of the Defence to use "other" procedural safeguards since the Defence has failed to distinguish between protective measures during trial and protective measures presently requested, which are to be implemented before trial.

14. Moreover the Prosecution asserts that the "21 days" request is in accordance with the earlier Decision of the Tribunal in *the Prosecutor v. Tharcisse Muvunyi and Others* (Case No. ICTR-2000-5-I, 25 April 2001) and that such period provides adequate time for preparation of the Defence.

### **HAVING DELIBERATED**

#### **Legal Basis of the Motion**

15. The Chamber recalls that, pursuant to Article 19 of the Statute, a trial shall be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses". The Chamber also acknowledges that, pursuant to Articles 14 and 21 of the Statute, the Tribunal shall provide for the protection of victims and witnesses, "[which] protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of victim's identity" (Article 21 of the Statute).

16. Pursuant to Article 20 of the Statute and mindful of the specific right, "[t]o have adequate time and facilities for the preparation of his or her Defence" and the right "[t]o examine, or have examined, the witnesses against him or her", the Chamber may order on a case by case basis, pursuant to Rules 69 and 75 of the Rules, any appropriate measures for the protection of witnesses.

17. Rule 69(A) of the Rules provides that "[i]n exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise". Rule 75(A) of the Rules further stipulates that "[a] Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Support Section (the "WVSS"), order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."

18. The Chamber also recalls Rule 69 (C) of the Rules whereby "the identity of the victim or witness



853

shall be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the prosecution and the defence."

19. To determine the appropriateness of such protective measures, the Chamber must be satisfied that "an objective situation exists whereby the security of the said witnesses is or may be at stake." (*See The Prosecutor v. Nteziryayo, Case No. ICTR-97-29-T, "Decision on the Defence Motion for Protective Measures for Witnesses"*, 18 September 2001). In the instant case, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information contained in the supporting documents to the Motion.

20. To demonstrate the existence of exceptional circumstances, the Tribunal also requires that the Parties provide updated information when seeking the granting of these protective measures (*See The Prosecutor v. Ntagerura, Case No. ICTR-96-10A-I, "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses"*, 27 June 1997). The Chamber notes that some of the evidence adduced in support of the volatile security situation in Rwanda and the Great Lakes region as annexed to the Brief is more than two years old and does not adequately address the present security situation in these areas.

21. Nonetheless, the Chamber notes that the affiant Remi Abdulrahman, in his capacity as Chief of the Security and Safety Section of the ICTR in Kigali, has presented an updated assessment of the security situation in Rwanda and the neighbouring countries. The latter's affidavit indicates that the security situation in the western part of Rwanda, in the areas of Gisenyi and Ruhengeri, presents a certain threat level. Moreover, the affidavit of Samuel Akorimo indicates that infiltrators in Ruhengeri and Gisenyi Provinces in early May 2001 have aggravated the potential for reprisals from armed dissidents. The Trial Chamber finds that these affidavits contain serious and detailed allegations of violence and that the objective security situation prevalent in Rwanda and neighbouring countries could be of such nature as to put at risk the lives of victims and potential Prosecution witnesses residing there.

22. The Chamber finds that the Prosecutor has not provided substantive evidence of threats to the lives of witnesses residing outside Africa. However, the Chamber concurs with its reasoning in the "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members" of 20 March 2001 (*Case No. ICTR-97-21-0338*). In that instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears in regard to potential witnesses residing outside Rwanda and the region, it decided that the present security situation "would affect any potential witness even if residing outside the region."

23. In the exceptional circumstances of this case, the Chamber finds justified the measures required by the Prosecution at points (a), (b), (d), (e), (h), (i), (k) and (l), noting that these measures are in accordance with orders formerly granted by the Tribunal in similar exceptional circumstances.

#### **On point 2 (c) of the Motion**

24. The Chamber modifies, *proprio motu*, measure (c) by adding the words "that such identifying information be expunged from the documents in question" insofar as the original order lacked such precision regarding measures to be taken in case of identifying information concerning witnesses in existing records of the Tribunal. (*See The Prosecutor v. Kajelijeli Case No. ICTR-98-44-I "Decision on the Prosecutor's Motion for Protective Measures for Witnesses"*, 6 July 2000).

#### **On point 2 (f) of the Motion**

854

25. The Chamber grants the measures requested by the Prosecutor, with a simplification and modification of the measure which provides that any member leaving the Defence team remit "all materials" that could lead to the identification of protected individuals, given that the term "information" used in the requested order may be understood to include intangibles which, naturally, cannot be remitted (*The Prosecutor v. Bagambiki and Imanishimwe, Case No. ICTR-97-36-I and 36-T, Decision of 3 March 2000*).

#### **On point 2 (g) of the Motion**

26. The Chamber, in accord with its Decision of 18 September 2001 in *the Prosecutor v. Nteziryayo, (Case No. ICTR-97-29-T)*, agrees with measure (g) subject to the deletion of the words "and the parties" in regard to the responsibility to prohibit photographing, audio and/or video recording, or sketching of any Prosecution witness.

#### **On point 2 (h) of the Motion, Timing of Disclosure of Unredacted Witness Statements**

27. The Chamber notes that the Prosecution requests that the disclosure of identifying data which would reveal, *inter alia*, the identity of potential witnesses be prohibited to the Defence "until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing 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, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than twenty-one (21) days before the victim or witness is to testify at trial". The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and be conditioned to the implementation of protective measures.

28. The Chamber notes that the Tribunal's jurisprudence on the timing of disclosure of identifying information and unredacted statements in witness protection orders has varied since the first orders rendered in 1996, due to the specific circumstances of the cases examined.

29. The Chamber recalls that in several decisions rendered between July and September 2000, Trial Chamber II ordered the Prosecution 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 the witnesses (See for instance the said Order in the *Prosecutor v. Karemera*, 6 July 2000).

30. Accordingly, in light of the necessity to strike a balance between the right of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily conceal identifying information concerning its witnesses but modifies, *propriu motu*, measure (h) by ordering that: "Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence."

#### **On point 2 (m) of the Motion**

31. The Chamber concurs with the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", dated 21 May 1999, in the *Prosecutor v. Nsabimana and Nteziryayo*, finding that such request "is overly broad and may impinge Article 20(4)(b) of the Statute". The Chamber therefore denies measure 2(m).

32. The Chamber finally recalls that, in conformity with the Tribunal's jurisprudence, such protective

855

measures are granted on a case by case basis, and shall take effect only once the particulars and locations of the potential witnesses have been forwarded to the Victims and Witness Support Section by the Prosecution, bearing in mind the practicalities involved

**FOR THE ABOVE REASONS, THE TRIBUNAL:**

**GRANTS** measures (a), (b), (d), (e), (i), (j), (k) and (l);

**DENIES** measures (m);

**MODIFIES** measures (c), (f), (g) and (h) **GRANTING** them as follows:

(c) An order requiring to the extent that any names, relations, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, that such identifying information be expunged from the documents in question;

(f) An order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 3(e) above, have access to any information referred to in Paragraphs 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 requiring Defence Counsel to ensure that any member departing from the Defence team has remitted *all materials* that could lead to the identification of persons specified in Paragraph 2;

(g) An order prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Trial Chamber;

(h) An order prohibiting the disclosure to the Defence of the names, relations, addresses, whereabouts of and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry until such time as the Trial Chamber is assured that witnesses are protected. Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence.

Arusha, 19 February 2002

William H. Sekule

Presiding Judge

Winston C. Matanzima Maqutu

Judge

Arlette Ramaroson

Judge

[Seal of the Tribunal]