

025

SCSL-2003-05-PT-1P-025
(645-832)

645

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

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 29 April 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY

also known as (aka) ISSA SESAY

CASE NO. SCSL – 2003 – 05 – PT

**PROSECUTION REPLY TO RESPONSE OF DEFENCE OFFICE TO
“PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE
MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-
PUBLIC DISCLOSURE”**

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions

Brenda J. Hollis, Senior Trial Counsel

Defence Office:

John R. W. D. Jones,
Acting Chief of Defence
Office and Legal Advisor

SPECIAL COURT FOR SIERRA LEONE	
COURT RECORDS	
RECEIVED	
NAME	<i>Rustace Thompson</i>
SIGNATURE	<i>[Signature]</i>
DATE	29-4-03
TIME	4:16 pm

646

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

THE PROSECUTOR

Against

ISSA HASSAN SESAY

also known as (aka) ISSA SESAY

CASE NO. SCSL – 2003 – 05 – PT

**PROSECUTION REPLY TO RESPONSE OF DEFENCE OFFICE TO
“PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE
MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-
PUBLIC DISCLOSURE”**

INTRODUCTION

The arguments raised in the submission filed by the Acting Chief of Defence Office and Legal Advisor (Acting Chief) should be rejected. As to the substantive issues addressed, the Acting Chief’s assertions fail to appreciate the difference between Rule 69 (C) of this Court’s Rule’s of Procedure and Evidence (Rule) and Rule 69 (C) of the ICTY’ Rules of Procedure and Evidence (Rule). In addition, the assertions are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals. Finally, as a procedural matter, the Acting Chief attempts to inappropriately qualify his response to the Prosecution motion.

ARGUMENT

I. Rule 69 (C)

1. Rule 69 (A) states that, in exceptional circumstances, a Judge or Trial Chamber may order the non-disclosure of the identity of a victim or witness. Rule 69 (C) states that “the identity of the victim or witness shall be disclosed in sufficient

time before the witness is to be called to allow adequate time for preparation of the prosecution and the defence.” (Emphasis added.) The ICTY Rule 69, on the other hand, states that “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.” See Authority No. 2 to the Prosecution motion. There is a significant difference between sub-part (C) of the two rules. This Court’s Rule reflects the determination that the appropriate triggering event for disclosure of the protected witnesses’ identity is the time they are being “called” to testify, not the commencement of trial as is the case in the ICTY. Defence Counsel’s assertions fail to deal with this critical difference, rather relying on decisions of the ICTY which must deal with disclosure in the context of that Tribunal’s Rules.

2. Current Rule 69 (C) of the ICTR Rules of Procedure and Evidence is consistent with the approach taken by this Court and the relief requested by the Prosecution. The Judges of ICTR amended the language of Rule 69(C) during their 12th Plenary Session, held on 5-6 July 2002. They replaced the existing language, “shall be disclosed in sufficient time prior to the trial” with “shall be disclosed within such time as determined by the Trial Chamber”. This amendment reflected the common practice of the ICTR, and was done to afford The Chamber “the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper”, (See *Prosecutor v. Emmanuel Rukundo*, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses, ICTR- 2001-70-I, 24 October 2002, paragraph 22).

II. “21 day rule”

3. The Acting Chief incorrectly asserts that only two ICTR decisions, *Muvunyi* and *Karemera*, order that disclosure of identifying data shall be made 21 days before the witness testifies. A careful reading of paragraph 11 of the *Karemera Decision* reveals that the 21 day practice was “consistent with earlier decisions issued by the Tribunal on this matter” citing 3 other cases: *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 97-29-I, 21 May 1999.
4. In reality, using the “21 day rule”, i.e., 21 days prior to testimony, as the ultimate deadline by which to disclose the identity of protected witnesses is the common practice followed by the ICTR in the vast majority of its recent decisions. Initially the practice was to order no definite timeline for the disclosure of the identity of protected witnesses, rather to order disclosure in such language as: “in sufficient time to allow the defence to prepare for trial”¹ or “until such time as the said

¹ (See *Prosecutor v. Jean Paul Akayezu*, ICTR 96-4-T, 27 September 1996; *Prosecutor v. Clement Kayishema*, ICTR 95-1-T, 6 November 1996); *Prosecutor v. Hassan Ngeze*, ICTR 97-27-T, 23 November 1999).

victims and witnesses are brought under the protection of the Tribunal”². As the ICTR practice evolved, the ICTR adopted the “21 day rule” as the ultimate deadline for the Prosecutor to disclose to the defence the identity of the protected witnesses. Most of the recent decisions state “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” and then, consistent with Rule 69 (C) before it was amended, order 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 days before the testimony of said witnesses. *See*:

- Prosecutor v. Nsabimana and Nteziryayo, supra;*
- Prosecutor v. Edouard Karemera, supra;*
- Prosecutor v. Mathieu Ngirumpatse, ICTR 98-44-I, 6 July 2000;*
- Prosecutor v. Juvenal Kajelijeli, cited in Prosecution motion;*
- Prosecutor v. Jean de Dieu Kamuhanda, ICTR 99-50-I, 7 July 2000;*
- 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. Andre Rwamakuba, ICTR 98-44-I, 22 September 2000;*
- Prosecutor v. Samuel Musabyimana, ICTR 2001-62-I, 19 February 2002;*
- Prosecutor v. Hormisdas Nsengimana, ICTR 2001-69-T, 2 September 2002.*

5. Other recent decisions require the Prosecutor to make such disclosure: “no later than 21 days before the witness is to testify at trial, unless the Chamber decides otherwise”(*See Prosecutor v. Mika Muhima, ICTR 95-1B-I, 9 March 2000; Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, ICTR 97-34-I, 19 May 2000; Muvunyi, supra*);

“until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection...or twenty-one days before the victim or witness is to testify at trial, which ever come first”(*See Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, ICTR 96-17-T, 22 August 2000*);

“until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection...and in any event, that the prosecutor is not required to reveal the identifying data to the defence sooner than twenty-one days before the victim or witness is to testify at trial” (*See Prosecutor*

² (*See Prosecutor v. Joseph Kanyabashi, ICTR 96-15-T, 6 March 1997; Prosecutor v. Anatole Nsengiyumva, ICTR 96-12-T, 26 June 1997; Prosecutor v. Andre Ntagerura, ICTR 96-10A-I, 27 June 1997; Prosecutor v. Ferdinand Nahimana, ICTR 96-10A-I, 27 June 1997*).

649

v. *Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, ICTR 97-21-T, 27 March 2001).

6. Finally, in the most recent decision on Protective Measures, *Prosecutor v. Protais Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003, paragraph 17, the Court stated: “Finally, contrary to the Defence objection summarized at para. 4(iv) above, the Chamber has accepted to order non-disclosure of the protected witnesses’ identifying details until 21 days prior to their testimony. Indeed, pursuant to Rule 66(A)(ii) of the Rules, the Defence has already received or will receive, on a continuous basis, [sic] a copy of the statements of the witnesses the Prosecutor intends to call at trial, subject to redactions aimed at protecting the identity of the witnesses hereby protected. By the time the Defence receives full disclosure, it will therefore already have material on the basis of which to prepare a defence. This is in conformity with Rule 69 (C) of the Rules.”
7. Based on the above cited authorities and those cited in its motion, the Prosecution submits that the jurisprudence of the ICTR supports the relief requested in the Prosecution motion.
8. Delaying the disclosure of identifying data until no later than 21 days before the witness testifies is consistent with the language of this Court’s Rule 69 (C). Reasonable minds may differ as to how much time constitutes “sufficient time ... to allow adequate time for preparation of ... the defence.” However, the triggering event for such calculation is clearly the date on which the witness will testify, not the commencement of trial. The Acting Chief’s asserts that requesting 21 days is of itself arbitrary. As to what constitutes sufficient time before the witness testifies, the Prosecution reiterates its position that 21 days prior to such testimony is sufficient time. Given that the substance of the witness’ testimony will have been previously disclosed to the Defence, 21 days is sufficient time to allow the Defence to conduct any remaining investigation, e.g., inquiries relating to the credibility of the identified witness. See *Prosecutor v. Protais Zigiranyirazo*, *supra*.

III. Five conditions for anonymity set forth in the decisions in *Tadic* and *Blaskic*

9. The Acting Chief incorrectly relies on the five conditions set forth in the *Tadic* and *Blaskic* decisions and misapprehends the meaning of anonymity as defined in those decisions. The five conditions are in fact, requirements that must be met before a witness will be allowed **to testify anonymously**, i.e. before the Court will allow testimony from a witness whose identity is **never made known** to the Accused or the Defence. See *Prosecutor v. Tadic*, ICTY, IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paragraphs 53 – 86, in particular paragraphs 62 – 66; *Prosecutor v. Blaskic*, ICTY, IT-95-14, Decision on the Application of the

650

Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996.

10. In regard to anonymity, the Acting Chief also incorrectly asserts that in the *Tadic* case anonymity was used only for Dragan Opacic, who was granted the pseudonym Witness L (*see Tadic, supra*, Trial Chamber Judgement, 7 May 1997, paragraph 452). The Trial Chamber granted anonymity for several witnesses. The Acting Chief correctly states that only one witness testified anonymously, but incorrectly states that the witness was Dragan Opacic. In fact, Mr. Opacic was never granted anonymity. He was granted confidentiality. The Defence was given the name of this witness. Witness H was the witness who testified anonymously. *See Tadic* Judgement, paragraph 30.
11. The Prosecution further submits the Acting Chief misuses the word anonymity when characterizing the protective measures ordered by the ICTR. The Acting Chief makes a broad and unfounded assertion that the ICTR has granted anonymity. The Acting Chief has cited no ICTR cases in which anonymity has been granted. To the knowledge of the Prosecution, the ICTR has never granted anonymity to any witness.
12. In the motion now before the Court, the Prosecution is not seeking anonymity for any witness; rather, the Prosecution seeks delayed disclosure of identifying data. As for delayed disclosure, such is common practice before both ad hoc tribunals, as shown by the cases cited herein and in the Prosecution motion, and as reflected in the language of *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, ICTY, IT – 02-54 & IT-01-50, 19 February 2002, paragraph 28. Even though the *Milosevic* Trial Chamber found it regrettable in the context of former Yugoslavia, the Trial Chamber noted "... the granting of such protective measures [delayed disclosure of identifying data of protected witnesses] ... has become almost the norm in proceedings before the Tribunal."

IV. Conditions which must be met for the requested relief to be granted

13. The Acting Chief has made no showing that the practice of either the ICTY or ICTR requires proof of each of the five conditions set forth in *Tadic* and *Blaskic, supra*, before granting delayed disclosure of identifying data. However, the jurisprudence of the ICTY and ICTR does indicate 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. In addition, the plain language of Rule 69 establishes a requirement that there be a showing of exceptional circumstances.
14. The existence of these conditions is established by Mr Lengor's Investigator's Statement, dated 05 March 2003 and the 7 April 2003 Declaration of Dr. White, Chief of Investigations.

651

15. However, to further assist the Court in response to Defence Counsel’s submission, the Prosecution provides four additional attachments, the Declaration of Allan Quee, Director of Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), a national NGO which deals directly with ex-combatants, dated 25 April 2003 (Attachment A); Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit, SCSL, dated 28 April 2003 (Attachment B); letter from President Kabbah to the President of the UN Security Council, dated 14 March 2003 and enclosures (Attachment C); Declaration of Keith Biddle, Inspector General of Sierra Leone Police, dated 29 April 2003 (Attachment D). All these attachments support the relief requested by the Prosecution.

The Investigator’s Statement of Morie Lengor

16. The existence of real fear for the safety of potential witnesses is set forth in Mr Lengor’s Investigator’s Statement, dated 05 March 2003, at paragraphs 6, 7 and 8.

17. Paragraphs 9 and 10 of Mr Lengor’s statement set forth his assessment that the fears are genuine and well founded. In paragraph 9 and paragraph 7, Mr Lengor sets forth circumstances providing an objective basis for these fears. 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. The Prosecution submits these circumstances are sufficient to reflect a security situation *vis a vis* potential witnesses which supports applying the requested protective measures to the categories listed in the Prosecution motion. See *Rwamakuba, supra*; and the authorities cited in the Prosecution motion. In addition, the objective basis for the fears expressed is provided by the “horrendous nature and ruthless character of the alleged crimes”. See *Tadic Decision, supra*, paragraph 62.

Additional Bases

18. The declaration of the Chief of Investigations also provides information which establishes both a real fear for the safety of witnesses and their families and an objective basis for these fears, as do Attachments A, B and D.

V. Exceptional circumstances

19. To the extent the Acting Chief is arguing that exceptional circumstances do not exist to warrant the relief requested, the Prosecution submits that the circumstances set forth by Mr. Lengor, the Chief of Investigations, and Attachments A through D provide a sufficient basis to find exceptional

circumstances exist to support the relief requested, including protective measures for categories of witnesses. 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 also Rwamakuba, supra*, 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.

20. The Acting Chief seems to rely on two reports to show the three requirements are not met herein, and to distinguish between the situation in Sierra Leone and that in Rwanda. The two reports state that the security situation in Sierra Leone “remains calm and stable” (UNAMSIL Security Report) and that “the human rights situation in Sierra Leone is improving” (U.S. Department of State Report). However, a closer reading of the U.S. State Department report indicates “there were serious problems in several areas.” “There were some reports of abuses committed by former RUF rebels.” The report contains many examples of violence by members of former warring groups, which violence was not acted upon by the government of Sierra Leone. Finally, the United States Department of State is a reputable governmental agency; however, it is neither independent nor “an international human rights organisation[s]” as asserted by the Acting Chief (*See* paragraph 34 of the Response). It is interesting to note that the one page of the UNAMSIL report which is attached by the Acting Chief mentions the unstable situation in neighbouring countries of Liberia and Ivory Coast. Thus, the UNAMSIL submission supports the Prosecution request for protection for witnesses outside of Sierra Leone but within the region of West Africa. Neither the State Department report nor the UNAMSIL report address the real issue before the Court, the concern of the general population of Sierra Leone, including the victims and potential witnesses about their security, but rather, address the overall security and human rights situation in the country.

21. The Prosecution submits 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 Leone which involve members of the same factions which fought in the Sierra Leone conflict. This commonality supports the application of similar protective measures, such as those requested by the Prosecution.

VI. ICTY Practice

22. The Acting Chief does not support his assertion that in most cases before the ICTY the Defence has been provided with the names of all witnesses from the outset and that the Defence was permitted to interview Prosecution witnesses

without any need to apply to the Chamber. Indeed, if the practice were as the Acting Chief alleges, i.e., that names of all witnesses were given to the Defence at the outset, what would be the meaning of the Trial Chamber’s language in *Prosecutor v. Milosevic, supra*, wherein the Trial Chamber states that the granting of [delayed disclosure of identifying data of witnesses] “has become almost the norm in proceedings before the Tribunal”? The Prosecution submits the unsupported assertions as to the practice before the ICTY are incorrect.

- 23. The potential divergence in the evolving jurisprudence of ICTR and ICTY relate primarily to the granting of requests for protection of categories of potential witnesses. The Prosecution submits the approach taken in the jurisprudence of the ICTR, which has not been struck down by the Appeals Chamber of the ad hoc tribunals, reflects a similar factual situation, supports the Prosecution requests for protective measures for categories of witnesses, and is appropriate here. Furthermore, the Prosecution submits that the fact that the Rules of this Court were originally taken from the Rules of the ICTR, gives great relevancy to ICTR practices. In regard to delayed disclosure of identifying data, the Prosecution submits, as discussed above, such delayed disclosure is common in the practice of the both the ICTR and ICTY, though the triggering events for disclosure are different.

VII. Statute of the Special Court

- 24. The Acting Chief incorrectly states the language of the Statute. Article 14.2 does not mandate that this Court be guided by the Criminal Justice Act, 1965 of Sierra Leone. Rather, Article 14.2 states that the judges of the Special Court, when amending or adopting Rules of Procedure and Evidence, **may** be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone. (Emphasis added) The Prosecution submits there is a presumption that the judges considered this language when they amended the Rules of Procedure and Evidence on 7 March 2003, including the amendment to Rule 69 (C), establishing the time when the witness is “called” to testify as the triggering event for disclosure of identifying data.

VIII. Objections to specific relief requested in Prosecution motion, paragraph 20

- 25. a) *allowing the Prosecution to withhold identifying data until 21 days before the witness is to testify* – the opposition to this request must relate to the suggestion that such delayed disclosure continue until 21 days before the witness testifies. The other language of the request is fully consistent with Rule 69 (C). Reasonable minds may differ as to how much time constitutes “sufficient time ... to allow adequate time for preparation of ... the defence.” The Prosecution reiterates its position that, as the substance of the witness’ testimony will have been previously disclosed to the Defence, 21 days is sufficient time to allow the Defence to conduct any inquiries relating to credibility of the identified witness.

26. g) *maintain a Defence log containing the particulars of each person or entity to whom non-public information is disclosed and the date of such disclosure; Defence shall ensure those to whom the material is disclosed comply with non-disclosure requirements* - These measures provide the most direct means by which this Court can exercise oversight regarding the implementation of protective measures. Maintaining a log will provide the Court a means, if necessary, to pursue alleged violations of its orders. Requiring the Defence to ensure those to whom they provide protected material comply with existing orders is a practical means to maximize the protections the orders provide.
27. k) *requiring a written request for permission to contact any protected witness or relative of such person* - This provides a very important protection for witnesses. The Prosecution submits that the Defence has no right to conduct pre-trial interviews of Prosecution witnesses. *See Prosecutor v. Kovacevic*, ICTY, IT-97-24, Decision on Prosecution Motion to Protect Victims and Witnesses, 12 May 1998, citing *Prosecutor v. Delalic et al*, ICTY, IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, and denying pre-trial Defence interviews of Prosecution witnesses. Should the Court be disposed to allow some contact with witnesses who consent to such contact, this provision would permit it. However, the provision ensures that the Court is aware of all requested contacts by the adverse party, and provides the Court a mechanism by which to protect the privacy and security of the witnesses. It prevents an opposing party from appearing uninvited at the residence of a witness and intimidating the witness simply by such unannounced and uninvited appearance. It also protects the choices of witnesses who wish to have no contact with the opposing party or who consent to such contact only if certain conditions are met, such as contact away from the residence of the witness.

IX. Qualified Response

28. The Prosecution submits that the Acting Chief has inappropriately qualified his response to the Prosecution motion for protective measures. At paragraph 3, the Acting Chief states that his response is submitted without prejudice to the position that might be taken by the Accused's assigned counsel once such counsel is assigned. What the Acting Chief apparently envisions is that he will be allowed to file a full response to the Prosecution motion, and that each and every subsequent counsel appointed for the Accused or hired by the Accused will be allowed to revisit the issue. The Prosecution submits that such procedure unduly delays final disposition of issues, inappropriately interjects uncertainty into the proceedings, and is not required by fundamental fairness or international standards of justice.
29. The Accused does not have unlimited opportunities to respond to the Prosecution motion. The Accused has the opportunity to now file a response to the motion or to request a delay in filing his response until counsel is appointed or hired. The

655

Acting Chief, by filing this response, indicates that the Accused has chosen the former action. The Prosecution submits the Accused has no right to make further submissions on the matter simply because different counsel represents him, unless, of course, such counsel successfully obtains leave for such further submissions, upon a showing of good cause why such should be allowed. The Prosecution submits the attempted qualification should be rejected.

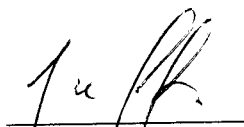
30. As to any remaining points raised by Defence Counsel, the Prosecution relies on the submissions contained in its motion.

CONCLUSION

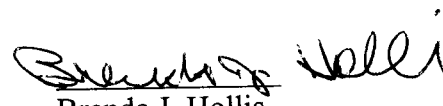
The Court should grant the relief requested in the Prosecution motion for protective measures.

Freetown, 29 April 2003

For the Prosecution,



Luc Côté,
Chief of Prosecutions



Brenda J. Hollis
Senior Trial Counsel

Index of Attachments

- A. Declaration of Allan Quee, Director of Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), a national NGO which deals directly with ex-combatants, dated 25 April 2003.
- B. Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit, SCSL, dated 28 April 2003.
- C. Letter from President Kabbah to the President of the UN Security Council, dated 14 march 2003 and enclosures
- D. Declaration of Keith Biddle, Inspector General of Sierra Leone Police, dated 29 April 2003.

657

**DECLARATION
FROM
POST-CONFLICT REINTEGRATION INITIATIVE
FOR DEVELOPMENT AND EMPOWERMENT
(PRIDE)**

Background

PRIDE is an indigenous non-governmental organization working to advance lasting reintegration and development by ameliorating the socio-economic and mental conditions of ex-combatants and war affected parties. We were formed in April of 2001 and now consist of four staff and 35 volunteers, actively involved in projects throughout the country. Our main projects are (1) an effort to educate and consult with ex-combatants about the TRC and the Special Court, and (2) a project sensitizing ex-combatants about ending cycles of sexual and gender based violence. We are supported by the Open Society Institute for West Africa, the United States Embassy in Sierra Leone, and private individuals. We have also received consultancy contracts from the International Center for Transitional Justice, Global Witness, and the Truth and Reconciliation Commission.

PRIDE's mission is to support ex-combatants from all factions who are committed to reintegration. We work with former rank-and-file fighters and through relationships with former faction leaders in the areas we are active. We continually study ex-combatant attitudes towards the TRC and Special Court and provide policy analysis based on our findings.

In November of 2002, PRIDE launched a project to "Educate and Consult with Ex-Combatants about Accountability Mechanisms" (ECECAM). Since that time, we have reached approximately 7,000 ex-combatants through workshops and other programs. Our efforts have included ex-combatants in every district of the country except Kambia. The ECECAM project has concentrated in the following locations – Freetown, Kailahun, Koidu and Tongo (Kenema district), Pujehun and Makeni. As suggested by this geographical distribution, we work with all factions from the conflict, most notably ex-RUF, ex-AFRC/SLA, and CDF.

In October of 2002, PRIDE released a national survey of ex-combatants awareness of and attitudes towards the TRC and Special Court. The research project included a national survey and focus groups of ex-combatants in four locations around the country. We conducted the research under a consultancy with the International Center for Transitional Justice (available at <http://www.ictj.org/downloads/PRIDE%20report.pdf>).

Since the indictments in early April, we have communicated with ex-combatants in the following areas – Zimmi, Tongo, Kailahun, Bo, Kenema, Magburaka, Makeni, Kabala, Moyamba, and the Western Area (urban and rural). During all of these trips, we have been assessing the threat to and by ex-combatants in relation to the Special Court.

Declaration of Threat to Witnesses

Based on our interactions with ex-combatants from all factions throughout the country, we believe that Sierra Leoneans who give statements to the Special Court are at some

degree of risk. Ex-combatants who provide testimony against former commanders or colleagues fear retribution and we have extensive direct experience to suggest that such perceptions are justified. Furthermore, we hear regularly from non-combatants in these communities that they fear harm if they speak to the Special Court, and our experience with ex-combatants suggests that this perception as well is justified.

Since we began our work relating to the TRC and Special Court, ex-combatants have told us fiercely and consistently that they are worried about being called to testify before the Special Court because they fear being hurt or killed by their former commanders. Since the indictments and arrests in early April, the fear has intensified considerably. For the first time since we began our ECECAM efforts, we have had trouble getting ex-combatants to attend events in some locations because they are scared of being seen as speaking to the Special Court. We discovered this by speaking in informal setting to those ex-combatants who chose not to attend.

All factions express this fear. For the past year, the former RUF fighters have been slightly more concerned, and since the arrests, it is the former CDF members that are the most concerned about being harmed if they testify.

In our survey, we found that willingness of ex-combatants to testify was very low until we told them that the Special Court would be providing witness protection. For example, of ex-RUF members in the survey, before our sessions, only 27% said they would give testimony, but after our session at which witness protection was discussed, that number rose to 55%. PRIDE believes that this change demonstrates a fear of retribution from giving statements to the Special Court.¹ Our subsequent experience with ex-combatants confirms these findings, namely that ex-combatants are extremely concerned about witness protection with regards to the Special Court.

The report also notes that, "A corollary to the rank-and-file's witness protection concern is a continuing economic dependence on their former commanders. The rank-and-file in Bo particularly made it clear in the focus groups that ...[m]any still lack economic independence from commanders and have deeply ingrained fears of disobeying or betraying them."² Again, our subsequent experience confirms that most ex-combatants fear their former commanders not only because of physical threats but also because those same individuals still control the NGOs and other sources of jobs, the money, and the distribution of food on which most ex-combatants rely. For these reasons, ex-combatants feel particularly vulnerable because their life can depend on it.

Our assessment of the threat to witnesses also comes from hearing direct threats from individuals, including high ranking ex-combatants and faction loyalists. For example, one former Chief Security Officer in the East who made it clear that there would be

¹ Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court", page 17 at <http://www.ictj.org/downloads/PRIDE%20report.pdf>. We believe that this increase in willingness to participate may also result from other information, such as the knowledge that the Special Court is only going after those who "bear the greatest responsibility."

² Ibid, page 18.

problems for the Special Court and anyone who was with them. The first time our staff visited Kailahun, a group of ex-combatants threatened to "take our heads off" if we came around talking about the Special Court.

Also, most of our volunteers are ex-combatants, and they are regularly threatened and branded "traitors" for being perceived to cooperate with the Special Court. We explain that our job is to provide accurate information about the Special Court rather than to advocate for it, but the environment is very tense and the threat of violence towards those seen as being with the Special Court are very real.

We also hear from ex-combatants and from non-combatant residents of the many communities that we visit that they are particularly scared because many former high-ranking perpetrators are still in the army and thus can hurt them. Specifically, some of those who have been indicted still have strong allies in the Army, so all people are afraid that those strong men will punish them for helping to put their friends in prison.

Signed,



Allan Quee, Director

25th April 2003

Date



660

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

DECLARATION

I, Saleem Vahidy, Chief of the Witness and Victims Unit, of the Special Court for Sierra Leone (SCSL) solemnly declare that the following facts are true and accurate to the best of my knowledge.

I have served as Chief of the Witness and Victims Unit at the SCSL since 6 January 2003. Essentially I am a police Officer from Pakistan with over 23 years of policing experience, and have held several important and sensitive postings there, including Chief of Karachi Police, a city of over ten million inhabitants. In the years before joining the UN in 1998, I was the Provincial Chief of the Anti-Kidnapping for Ransom Unit, and investigated and prosecuted several high profile cases, and also established a Witness Protection Unit to look after threatened witnesses. From 1998 to December 2002, for over 4 years, I was Chief of the Witness and Victims Support Section (Prosecution) at the International Criminal Tribunal for Rwanda (ICTR), and dealt with over 400 protected witnesses and with all witness management issues, including threat assessments and relocations. I have also written a number of reports on protection issues at the request of the various Trial Chambers of the ICTR.

As Chief of the Witness and Victims Unit, I am required to conduct ongoing assessments of the general security situation in Sierra Leone and security threats to witnesses in particular. In carrying out these responsibilities, I regularly consult with Sierra Leone Police officials, Sierra Leone attorneys, the Security Section of SCSL, NGOs and UNAMSIL. The opinions expressed below are based on these consultations, the threats assessments relevant to particular potential witnesses, conversation with potential witnesses and other reports of threats against witnesses.

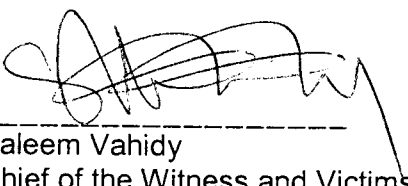
The 10 years of civil war in Sierra Leone has really damaged the whole system of Administration of Justice, and the overall level of protection available to the citizens is generally speaking, less than what it should be, although the Government is making every effort to revamp the Army, Police and Court system, doubts as to the efficacy of the institutions still remain, more so in the minds of the witnesses. The situation in Sierra Leone was further aggravated by the fact that the Government institutions like the Army and Police took sides with various parties to the conflict, and their impartiality became questionable.

In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that, witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion, before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.

At present the Unit is already looking after numerous witnesses, and several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested factions to determine their exact locations, probably with a view to carrying out reprisals.

Given the resources at the disposal of the Unit and the overall financial constraints of the SCSL, it is not possible for the Unit to implement complete protective measures for all witnesses, such as relocation to safe premises, change of identity, and other similar methods. Therefore utmost efforts are concentrated on keeping secret and confidential the fact that a person is a potential witness. The longer the witness' identity is withheld, the safer he or she is going to remain.

Therefore, it should be remembered that full un-redacted disclosure at the initial stages of the proceedings implies that witnesses will be completely identified to the accused several months or even longer before they are called for testimony. This certainly increases the risk of threats or even more severe actions being taken against them, and would make the work of the Witness Unit, and indeed the Court itself, much more difficult.



Saleem Vahidy
Chief of the Witness and Victims Unit
The Special Court for Sierra Leone (SCSL)

Date: 28 Apr 03

662



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

DECLARATION

I, Saleem Vahidy, Chief of the Witness and Victims Unit, of the Special Court for Sierra Leone (SCSL) solemnly declare that the following facts are true and accurate to the best of my knowledge.

I have served as Chief of the Witness and Victims Unit at the SCSL since 6 January 2003. Essentially I am a police Officer from Pakistan with over 23 years of policing experience, and have held several important and sensitive postings there, including Chief of Karachi Police, a city of over ten million inhabitants. In the years before joining the UN in 1998, I was the Provincial Chief of the Anti-Kidnapping for Ransom Unit, and investigated and prosecuted several high profile cases, and also established a Witness Protection Unit to look after threatened witnesses. From 1998 to December 2002, for over 4 years, I was Chief of the Witness and Victims Support Section (Prosecution) at the International Criminal Tribunal for Rwanda (ICTR), and dealt with over 400 protected witnesses and with all witness management issues, including threat assessments and relocations. I have also written a number of reports on protection issues at the request of the various Trial Chambers of the ICTR.

As Chief of the Witness and Victims Unit, I am required to conduct ongoing assessments of the general security situation in Sierra Leone and security threats to witnesses in particular. In carrying out these responsibilities, I regularly consult with Sierra Leone Police officials, Sierra Leone attorneys, the Security Section of SCSL, NGOs and UNAMSIL. The opinions expressed below are based on these consultations, the threats assessments relevant to particular potential witnesses, conversation with potential witnesses and other reports of threats against witnesses.

The 10 years of civil war in Sierra Leone has really damaged the whole system of Administration of Justice, and the overall level of protection available to the citizens is generally speaking, less than what it should be, although the Government is making every effort to revamp the Army, Police and Court system, doubts as to the efficacy of the institutions still remain, more so in the minds of the witnesses. The situation in Sierra Leone was further aggravated by the fact that the Government institutions like the Army and Police took sides with various parties to the conflict, and their impartiality became questionable.

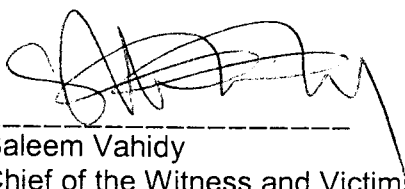
663

In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that, witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion, before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.

At present the Unit is already looking after numerous witnesses, and several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested factions to determine their exact locations, probably with a view to carrying out reprisals.

Given the resources at the disposal of the Unit and the overall financial constraints of the SCSL, it is not possible for the Unit to implement complete protective measures for all witnesses, such as relocation to safe premises, change of identity, and other similar methods. Therefore utmost efforts are concentrated on keeping secret and confidential the fact that a person is a potential witness. The longer the witness' identity is withheld, the safer he or she is going to remain.

Therefore, it should be remembered that full un-redacted disclosure at the initial stages of the proceedings implies that witnesses will be completely identified to the accused several months or even longer before they are called for testimony. This certainly increases the risk of threats or even more severe actions being taken against them, and would make the work of the Witness Unit, and indeed the Court itself, much more difficult.



Saleem Vahidy
Chief of the Witness and Victims Unit
The Special Court for Sierra Leone (SCSL)

Date: 28 Apr 03

664



Security Council

Distr.: General
18 March 2003

Original: English

Comment: <<ODS JOB
NO>>N0328729E<<ODS JOB NO>>
<<ODS DOC
SYMBOL1>>S/2003/330<<ODS DOC
SYMBOL1>>
<<ODS DOC SYMBOL2>><<ODS
DOC SYMBOL2>>

665 -

Letter dated 14 March 2003 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council

On instructions from my Government, I have the honour to transmit herewith two letters and an aide-memoire addressed to the Secretary-General by His Excellency, Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone (see annex).

I should be grateful if the present letter and its annex could be issued as a document of the Security Council.

(Signed) Joe Robert **Pemagbi**
Ambassador
Permanent Representative

666

S/2003/330

Annex to the letter dated 14 March 2003 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council

Review of progress made so far in consolidating peace and security in Sierra Leone and in promoting national recovery

14 March 2003

I am pleased to inform you that my Government recently undertook a brief review of the outcome so far of the collective efforts of the Government of Sierra Leone and the international community, particularly the United Nations Mission in Sierra Leone (UNAMSIL), geared towards the consolidation of peace and security in Sierra Leone and the promotion of the recovery of the country from the effects of the war.

The review was presented in the form of an aide-memoire at the latest of a series of high-level group meetings periodically held between the Government and UNAMSIL (see enclosure I).

I have also addressed a separate letter to you with regard to the security needs of the Special Court for Sierra Leone, which has now started issuing indictments (see enclosure II).

(Signed) Alhaji Ahmad Tejan Kabbah
President of the Republic of Sierra Leone

667

Enclosure I

AIDE MEMOIRE

**REVIEW OF PROGRESS ACHIEVED SO FAR IN
CONSOLIDATING PEACE AND SECURITY
IN SIERRA LEONE AND IN PROMOTING
NATIONAL RECOVERY**

INTRODUCTION

1. This Aide Memoire seeks to highlight the progress that has been made in the efforts to restore and consolidate peace and security in Sierra Leone. It also highlights areas of ongoing, new and anticipated difficulties, which would require close monitoring. In this regard, the Government of Sierra Leone will need to continue to work in close collaboration with the international community, particularly UNAMSIL, if it should succeed in meeting these challenges.

SECURITY ISSUES

2. **Perceived threat to security.** Even with the end of the rebel war and the holding of violence free and successful Presidential and Parliamentary elections, Sierra Leone continues to face the following direct external and internal security threats, among others:

(a) **External threats.**

(i) the border area between Sierra Leone and Liberia is home to dissident groups whose loyalty is transient and are known to serve as a recruitment pool for both the LURE) and the Armed Forces of Liberia (AFL), and possibly by factions in the Ivorian conflict. There is also strong intelligence indicating the presence in Liberia of the former RUF battlefield commander. Sam Bockari and 1500/1800 RUF combatants.

668

(ii) recruitment of ex-combatants from Sierra Leone by warring factions in the sub region poses medium to long-term disarmament and reintegration problems in the event of their returning to the country armed

S/2003/330

- (iii) the presence in Liberia of Sam Bockari and his group could provide President Charles Taylor with a significant capability to destabilize Sierra Leone again if the opportunity presented itself
- (iv) the fighting in Liberia continually creates tension along the Sierra Leone/Liberian border in Eastern Sierra Leone. It directly causes the movement of displaced persons/refugees into Sierra Leone. This places additional pressures on the already fragile economy of the country.
- (v) the existence of organised units of Sierra Leonean mercenaries engaged in sub-regional conflicts may form the basis of future insurgencies.

(b) Internal threat.

(i) recent attacks on military facilities in the east end of Freetown involving a former faction leader, J P Koroma suggest that there remain potential dissident groups who would be disposed to staging coup attempts if the opportunity presented itself;

(ii) there are frequent challenges to Government authority by vigilante type groups mainly in the diamond mining areas who take advantage of the inability of Government to enforce its authority because of the continued weakness of its institutions;

(iii) disaffection amongst the unemployed youth groups whose expectations cannot be fulfilled by government because of its weak resource base, leaves them open to exploitation by criminal and anti-democratic elements;

(iv) the commencement of criminal proceedings by the Special Court against key figures of the former warring factors may create new tensions which will further stretch the capacity of government and UNAMSIL to maintain law and order;

(v) there may still be disloyal elements in the Republic of Sierra Leone Armed Forces (RSLAF). Maintaining attractive Terms and Conditions of Service for the forces is therefore critical even as the government resource base is currently weak. Failure to do so could present a catalyst for dissent;

(vi) the RSLAF has not yet developed the capability to provide Military Aid to the Civil Power. This function is currently the responsibility of the Operational Support Division (OSD) in the Police but do not themselves have limited equipment and training.

669

3. Government continues to develop the necessary policies and strategies as well as provide resources to effectively address the above-mentioned threats. However, Government's efforts are being undermined by severe resource constraints and other capacity problems arising mainly from a fragile economy, weak political and security institutions as well as weak human resource base.

Strengthening of RSLAF. The RSLAF is still in transition and whilst it is being progressively equipped and trained mainly by the British-led International Military Advisory and Training Team (IMATF), it is also thinly spread around the country and therefore it is not yet in a position to provide enduring, credible and sustainable security to Sierra Leone. The current deployment programme codenamed Operation PERU seeks to re-build and house the RSLAF in approximately 10 sites as opposed to the current 50 locations. This programme may take 213 years to complete and must run parallel with aligning provincial/district boundaries with brigade boundaries.

Strengthening of the SLP During the almost 11 year civil war in Sierra Leone, the Sierra Leone Police lost many of its personnel either by death or some moved to other countries as refugees. Up to date, it has been difficult to arrive at an exact personnel strength of the SLP.

6. The SLP also suffered heavy damage to its infrastructure as a result of the war. This is now being rebuilt with Government and donor partner resources.

7. There is an uneven and sparse deployment of personnel in the country due to the inadequacy of Police accommodation and stations countrywide.

8. An estimated personnel strength of 9,500 is required for effective nationwide police deployment. The personnel strength is currently only about 7700, and at the current rate of recruitment and training the total strength by 2004 will be only 8884. Therefore both recruitment and training need to be accelerated. This requires substantial resources, improved infrastructure, particularly the expansion of the Police Training School (PTS), and the prompt deployment of training advisers, mentors and strategic advisers promised by UNCIVPOL.

9. Resources are currently being provided by the Government, DFID and the UNOP to address some of these difficulties, including the rebuilding of police infrastructure. However, these efforts, particularly the expansion of the PTS and the rebuilding of barracks and police stations, need to be accelerated if the efficiency of the police, as envisaged in UNSC Resolution 1436(2002) is to be assured.

10. Future of ex-Combatants

a. DDR Completion. Phase-Out and Future of Ex-Combatants

The NCDDR plans to complete its mandate and phase out by 31 December 2003. This was confirmed with donors at the last CG meeting in Paris (Nov 2002).

b. Reintegration.

About 56,751 ex-combatants registered for reintegration support all over the country by the end of 2002. 75% (i.e. 38,689) of these either in ongoing or completed programmes or awaiting to be placed in approved projects. The total outstanding caseload of ex-combatants is estimated to be 14,700. It is planned that they will be placed into programmes before the deadline of 30 June 2003.

c. Challenges

- i. The high inter-District mobility of the outstanding caseload of ex-combatants together with their settlement in very dispersed villages/locations is posing serious difficulties for the programme.
- ii. Inability in the border areas has prevented the operation of credible agencies capable of providing sustainable reintegration support in the affected chiefdoms.

d. Funding. Additional funding requirement to complete the programme is about IJSS6 million. No additional pledges of financial support have been received to meet this gap. Although Germany and the EU have indicated they would consider to provide further assistance later.

11. The Way Ahead. Reintegration is a long-term process and really takes place at community level. After NCDDR's short-term support to the ex-combatants, other key players will have to take over the longer-term process of generating jobs and opportunities for them (and the other unemployed). Although we are witnessing some positive developments in this direction in some areas and sectors, more needs to be done to prevent disillusionment among them.

671

12. A transition programme that focuses on "advocacy" and cautious support post DDR has been developed. This entails identifying some capacity within the National Commission for Social Action (NaCSA) to advise the Commissioner on specific ex-combatant related problems that could be addressed by the existing programmes within the Commission. Discussions are on-going with NaCSA Management.

13. It is anticipated that UNAMSIL's presence during that transition phase would help to provide confidence in the process.

14. **Disbandament of CDF Structures.** In November 2001, the National Security Council chaired by His Excellency the President agreed to dismantle the command structure of the Civil Defence Force (CDF) and dissolved its national coordinating office.

15 This policy has been progressively implemented. All the CDF ex-combatants have now been disarmed and demobilized.

16. However, traces of CDF command structures continue to exist in parts of the rural areas. Government is responding to these challenges with the implementation of its programme for the extension of police presence and the general restoration of government's authority throughout the country.

RESTORATION OF GOVERNMENT AUTHORITY

17. The National Recovery process has been on going since the end of the war in January 2002. The immediate challenge was the restoration of civil authority in the seven districts that were hitherto held by the rebels. Recovery and Restoration processes commenced in April with the establishment of the National Recovery Committee chaired by the Vice President. The NRC had the mandate to coordinate the implementation of the restoration and recovery processes nation-wide.

18. By August 2002 the Recovery framework had been established in the twelve districts to coordinate and give leadership to the process at district level. Appropriate mechanism were put in place to facilitate planning, management and monitoring of developmental activities in every district. The goal was to firm tip the restoration of Civil Authority in all the twelve districts within 12 months but this has been hampered by a number of factors, including delays in the DDR process and the recently held Presidential and Parliamentary elections and resource constraints.

19. In terms of the recovery process, the needs are enormous. Key institutions were destroyed. Some of the structures are beyond repair. Schools, hospitals, administrative buildings, chiefdom detention facilities/prisons were all damaged or destroyed. While a lot has been done, much more has yet to be accomplished.

20. Civil Administration. Government is still grappling with the return of key administrative personnel throughout the country, especially to the remote districts of Kailahun, Kono, Pujehun and Koinadugu, to man critical sectors such as health (doctors, nurses and education (teachers)). Local administration is functioning only minimally in some areas.

21. The holding of Paramount Chieftaincy elections in 61 vacant Chiefdoms to provide leadership for the decentralization gave strong boost to the restoration of civil authority. Sensitization is currently going on to prepare the population for the proposed decentralization programme. In this regard, Local Government elections are scheduled to be held in December 2003 to widen the democratic sphere nationally and to reinforce the restoration of Government authority at all levels nationally. The successful conclusion of local government elections nationwide will be a test of the viability of our democracy. However, continued support by UNAMSIL will be critical until the following:-

- a. That the forthcoming Local Government Elections may pose a threat in remote areas where Government authority has not been firmed up.
- b. The resettlement process of ex combatants in certain localities can prove volatile.
- c. The recently elected 61 Chiefs will need security support from a neutral body to fully establish their authority in the areas where they have been recently installed as Chiefs
- d. The enforcement of mining regulations in some mining districts with large presence of ex combatants would require neutral security policing to avoid this triggering conflict.
- e. Chiefdom administrative penal system has not yet been fully established in most of the Chiefdoms to enforce law and order. Security support is required to preserve peace and stability.

DIAMOND MINING

22. With the relative restoration of Civil Authority in some parts of the country, the Ministry has established some presence in most parts of the country in an effort to restore orderly mining and marketing activities.

673

23. UNAMSIL has been very helpful in providing logistics support to the Ministry to facilitate monitoring in a bid to discourage illicit mining activities, which have the tendency of disturbing the peace in diamond mining areas.

24. With the presence of UNAMSIL there has been progress in the control of illicit mining sector activities and law and order have been largely maintained in the mining areas. They have also afforded Government the opportunity to introduce control measures such as proper licensing systems. Consequently government has realized more revenue generated from the mining sector. This steady progress could be affected by the hasty withdrawal of UNAMSIL's presence in the mining areas.

25. It is anticipated that their continued presence will enable government to steadily build on the necessary structures that will ensure more effective enforcement of diamond mining regulations to sustain the sector.

26. Since the imposition of the certification system by UNSC (Resolution 1306 (2000) on 5th July 2000), and the implementation of the Certificate of origin in October 2000, diamond exports through legal channels have improved considerably. Diamond exports in 2000 amounted to US \$10 million, US \$26 million in 2001 and US\$41 million in 2002.

27. Moreover the Kimberly Process Certification System has been recently adopted by over 40 diamond producing and importing countries and this has further created a deterrent to diamond smugglers.

GENERAL ECONOMIC OUTLOOK

28. **Macroeconomic Performance.** Sierra Leone has made remarkable progress in advancing economic recovery, largely facilitated by the full deployment of the UN peacekeeping force (UNAMSIL). The increasing optimism and confidence generated has boosted economic activity and improved the environment for the normalisation of relations with development partners and the implementation of government's poverty reduction and growth policies. During this period, the economic strategy has focussed on addressing the immediate post-war needs and the longer-term development and poverty reduction issues.

67H

29. Satisfactory progress has been achieved with programmes supported by the key multilateral and bilateral development partners including the International Monetary Fund (IMF), the World Bank, the ~~European Commission, the African Development Bank, BADEA, Islamic Development Bank, UNDP~~ ^{the} ~~UNDP~~ ^{2003/330}

and the United Kingdom. At the meeting of the Consultative Group in Paris during November 13-14, 2002, donors committed to providing highly concessional external aid in the order of US\$650 million over the next 3-5 years. A donors meeting with the Organisation of Islamic Countries (OIC) early this year has also committed some aid to Sierra Leone.

30. In terms of economic performance, the real GDP has improved significantly from -17.6% in 1997 to -8.1% in 1999 and 3.8% in 2000. Real GDP is estimated to have increased further in 2002 by 6.3%, while the rate of inflation further declined to about -3%. Following a steep depreciation in 2001, the leone appreciated slightly against the US dollar during 2002. At the same time, the real effective exchange rate remained relatively stable and the spread between the official and parallel market exchange rates also remained steady in the range of 5-8%. The foreign exchange reserves level has also improved. With strong donor support, substantial structural reforms have been undertaken in the fiscal and financial sectors and have particularly improved public financial management. The external current account deficit is however projected to rise significantly over the medium-term, reflecting the poor export performance and the large import requirements for reconstruction.

31. Macroeconomic Outlook Discussions relating to the third annual review under the three-year poverty reduction and growth facility supported by the IMF were recently concluded with IMF staff. A memorandum of economic and financial objectives and policies of the government for 2003 was negotiated and agreed. A budget profile over the period 2003-2004 was also outlined. The programme targets a real GDP growth rate of about 6.5%, supported mainly by the assumed continued recovery of activities in agriculture, mining, service industry, construction, public works and investment. The budget profile envisages a substantial increase in government revenue through the operationalisation of the newly formed National Revenue Authority and the restructuring of tax administration. Expenditure policies aim to further strengthen fiscal discipline on the part of the government. The challenge for monetary policy will be to sustain the low level of inflation, maintain a stable exchange rate improve on foreign reserves mobilization and sustain level of economic growth

32. All the objectives defined in the Interim Poverty Reduction Strategy Paper (IPRSP) have been achieved and the full PRSP is expected to be completed by the end of 2003. The government is focusing on advancing a number of reform programmes including public enterprise divestiture and restructuring, civil service and procurement reform and strengthening public financial management.

33. Maintaining this impressive progress requires improved security and political stability, since this sustains the investor and consumer confidence that provides the main boost to sustained economic recovery and growth. A growing economy will in turn provide a strong base for the further consolidation of the peace

by creating employment and generating revenue for Government that enhances its ability to provide the necessary public services, including law and order.

675

ENERGY SUPPLIES

34. Under the liberalization programme, the private sector has assumed full responsibility for the supply of petroleum products and the fixing of pump prices. Government however has a responsibility to guarantee adequate supply of products as well as competitive retail prices free from extortionist influences or practices.

35. However, recent substantial increases in world oil prices have led to unavoidable increases in the retail prices of petroleum products in the country. This has given rise to additional hardship for an already impoverished population. Besides high oil prices are having a direct negative impact on Government's poverty alleviation and post conflict recovery programmes. Government is concerned that ripple effects arising from these difficulties could further weaken the security situation, for which it is necessary to maintain a robust security apparatus.

36. Government intended measures to address current difficulties and stabilize the sector.

- a. Government is actively investigating the possibility of creating a six weeks strategic petroleum products stocks programme for Sierra Leone as we need to be sufficiently positioned to ensure continued fuel availability at all times. But the fledgling economic situation with various competing priorities following the end of the war affects the speed with which this can be done.
- b. The technical aspects of the pricing structure and its implementation are being closely monitored by an independent Petroleum Unit manned by downstream experts.
- c. The Ministry of Trade and Industry in consultation with the Petroleum Unit has set up a "Task Force" to address the uncertainties in the oil market as well as the incidence of illegal cross-border trade in petroleum products in our neighborhood

SITUATION IN LIBERIA

37. Upsurge of fighting in Liberia. There is an upsurge in the fighting in Liberia. Latest reporting indicates that the MANO RIVER BRIDGE, BO WATERSIDE, TIENI, SINJE, IENDEMA BRIDGE and

ROBERTSPORT are occupied by LURD. We can expect that AFL/ATU counter attacks may take place in these areas provoking a variety of border security problems.

S/2003/330

676

38. The Refugee and IDP Situation. Government is obliged to always ensure that the repatriation of refugees and resettlement of IDPs are done in conditions which guarantee their safety and dignity. Government has recently signed a tripartite agreement with the UNI-ICR and the Government of Guinea to promote the repatriation of an estimated 60,000 Sierra Leonean refugees in Guinea. A similar agreement

will be signed with various governments in the sub-region to promote the repatriation of another 70,000 refugees from those countries, mainly Liberia, Nigeria, the Ivory Coast etc. Even though much progress has been achieved in the peace process - disarmament of ex-combatants, conduction of peaceful elections, extension of state authority etc. yet the ideal situation for repatriation is not yet met. There are still gaps in the physical and effective presence of the Police and other government functionaries in various parts of the Eastern Province where a good number of the returnees will be resettling. UNAMSIL is therefore filling this gap in various ways as well as acting as a deterrent to cross border incursions from Liberia.

39. UNAMSIL also supports Government in the assessment of the safety and security of Chiefdoms for resettlement and provides logistical support (transportation, repairs of roads and bridges) for resettlement.

40. The Liberian crises has also created a large influx of Liberian Refugees who are entering from different crossing points and who are being transported to various camps with a significant support from UNAMSIL. An estimated population of 65,000 refugees are in the country with 46,317 in seven camps in the East and South of the country. These are Bandajuma — 5,979; Gerihun- 6,640; Gondama- 7,362; Jembe- 6,703; Jimmi Bagbo- 6,467; Largo- 5,633; Taiama- 7,534. UNAMSIL is providing trucks to transport them to camps in Kenema and Bo. A total of about 335 deserters from the Liberian conflict have been interned in Mapeh Camp. UNAMSIL is also playing a deterrent role by helping to police the border and protecting the Mapeh Camp. On various occasions it has had to provide protection in the camps and in some communities,

PRESIDENTIAL LODGE

HILL STATION

FREETOWN

11 MARCH 2003



677

SPECIAL COURT FOR SIERRA LEONE

1A SCAN DRIVE • OFF SPUR ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7100 or +39 0831 257100 or +232 22 236527
FAX: Extension: 174 6998 or +39 0831 236998 or +232 22 295998

DECLARATION

I Keith Biddle, Inspector-General of the Sierra Leone Police of Spur Road, Freetown in Western Area of the Republic of Sierra Leone declare:

1. That in my position as Inspector General of the Sierra Leone Police and member of the National Security Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries.
2. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. This situation poses a real threat to the security of victims and potential witnesses. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation.
3. The contents of this declaration are true to the best of my knowledge, information, and belief.

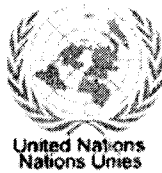
Done in Freetown, Sierra Leone
On the 29th April 2003

Keith Biddle
Inspector-General of the Sierra Leone Police

INDEX OF AUTHORITIES

Index of Authorities

1. *Prosecutor v. Emmanuel Rukundo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, ICTR- 2001-70-I, 24 October 2002, paragraph 22
2. *Prosecutor v. Clement Kayishema*, ICTR 95-1-T, 6 November 1996
3. *Prosecutor v. Hassan Ngeze*, ICTR 97-27-T, 23 November 1999
4. *Prosecutor v. Joseph Kanyabashi*, ICTR 96-15-T, 6 March 1997
5. *Prosecutor v. Anatole Nsengiyumva*, ICTR 96-12-T, 26 June 1997
6. *Prosecutor v. Andre Ntagerura*, ICTR 96-10A-I, 27 June 1997
7. *Prosecutor v. Ferdinand Nahimana*, ICTR 96-10A-I, 27 June 1997
8. *Prosecutor v. Nsabimana and Nteziryayo*, ICTR 97-29-I, 21 May 1999
9. *Prosecutor v. Mathieu Ngirumpatse*, ICTR 98-44-I, 6 July 2000
10. *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR 99-50-I, 7 July 2000
11. *Prosecutor v. Prosper Mugiraneza*, ICTR 99-50-T, 12 July 2000
12. *Prosecutor v. Justin Mugenzi*, ICTR 99-50-I, 12 July 2000
13. *Prosecutor v. Jerome Clement Bicamumpaka*, ICTR 99-50-I, 12 July 2000
14. *Prosecutor v. Eliezer Niyitegeka*, ICTR 96-14-I, 12 July 2000
15. *Prosecutor v. Casimir Bizimungu*, ICTR 99-50-T, 22 September 2000
16. *Prosecutor v. Andre Rwamakuba*, ICTR 98-44-I, 22 September 2000
17. *Prosecutor v. Samuel Musabyimana*, ICTR 2001-62-I, 19 February 2002
18. *Prosecutor v. Hormisdas Nsengimana*, ICTR 2001-69-T, 2 September 2002
19. *Prosecutor v. Mika Muhima*, ICTR 95-1B-I, 9 March 2000
20. *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, ICTR 97-34-I, 19 May 2000
21. *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, ICTR 96-17-T, 22 August 2000
22. *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, ICTR 97-21-T, 27 March 2001
23. *Prosecutor v. Protais Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003
24. *Prosecutor v. Tadic*, ICTY, IT-94-1-T, Trial Chamber Judgement, 7 May 1997
25. *Prosecutor v. Kovacevic*, ICTY, IT-97-24, Decision on Prosecution Motion to Protect Victims and Witnesses, 12 May 1998
26. *Prosecutor v. Delalic et al*, ICTY, IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

680

ORIGIN. English

TRIAL CHAMBER III

Before:

Judge Lloyd George Williams, Q.C., Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 24 October 2002

THE PROSECUTOR
V.
EMMANUEL RUKUNDO

CASE NO. ICTR-2001-70-I

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

Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend

Defence Counsel

Philippe Moriceau

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "TRIBUNAL")

SITTING as Trial Chamber III, composed of Judges Lloyd George Williams, Q.C., Presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

BEING SEISED of the Prosecutor's "Motion for Protective Measures for Victims and Witnesses" filed 11 December 2001 (the "Motion"), the "Additional Authority in Support of the Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 21 May 2002, and the "Addendum to Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 10 September 2002;

681

CONSIDERING the "Mémoire en Réponse à la Requête du Procureur du 11 décembre 2001" filed 30 May 2002 (the "Response");

NOW CONSIDERS the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

Prosecutor's Submissions

1. The Prosecutor submits that the persons for whom protection is sought fall into three different categories, all of which require protective measures:

(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 rights 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. For all these three categories of persons, the Prosecutor requests the following orders:

a) An Order requiring that the names, relations, addresses, whereabouts and other identifying information described hereinafter, be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses, as well as any other additional witnesses, bear pseudonyms which will be used during the course of the trial;

b) An Order that the names, relations, addresses, whereabouts and other identifying information described in paragraph 2(a), be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with the established procedure and only in order to implement protection measures for these individuals;

c) An order requiring that any names, relations, addresses, whereabouts and any other identifying information concerning such victims and potential Prosecution witnesses contained in existing records of the Tribunal be placed under seal;

d) An Order prohibiting the disclosure to the public or the media of the names, relations, addresses, whereabouts 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) 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 1, with or to any person or entity other than the Accused, assigned Counsel or other persons the Registry designates as working on the Defence team;

f) An Order requiring the Defence to provide to the Trial Chamber and the Prosecutor a

682

designation of all persons working for the Defence who will, pursuant to the Motion, have access to any information referred to in paragraphs 2(a) through 2(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of the Defence 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 1 above.

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, addresses, relations, whereabouts and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any such information in the supporting material on file with the Registry, until twenty-one (21) days before the witness testifies 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, 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 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) An Order prohibiting any person working for the Defence 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 person working for the Defence 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 is 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 Defence Counsel, and instructing the United Nations Detention Facility authorities to ensure compliance with the prohibition set out in this paragraph.

3. In support of her request, the Prosecutor submits an Affidavit by Alfred Kwende, the Commander of Investigations in the Office of the Prosecutor in Kigali, dated 7 December 2001 and other documents annexed to the Brief to demonstrate that there is a substantial threat to the lives of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed.

Defence Response

4. The Defence submits that, due to delays in translation of the Prosecutor's documents, it has been unable to prepare its response, and requests an extension of time to respond to the Motion.

683

5. Addressing nevertheless the substance of the Motion, the Defence submits that under Rule 69 (A), exceptional circumstances must exist before protection is granted to victims and witnesses. Consequently, such protection must not be used as a pretext to undermine the rights of the Defence. Further, the Defence stresses that Article 21 of the Statute provides for equal protection for all victims and witnesses, whether they are for the Defence or the Prosecution.
6. The Defence alleges that it was served with witness statements which were overly redacted, making them impossible to comprehend. Further, the Defence submits that witnesses cannot be completely anonymous as this would affect their credibility. In the absence of identification and reference to other identifying data of the witness, the Defence would not be able to prepare its case effectively.
7. The Defence submits that the protective measures sought by the Prosecutor should not be applied to all the witnesses, since it is up to the Chamber to assess the appropriate measures to be afforded to each witness on a case by case basis.
8. The Defence opposes the Prosecution's request to reduce to twenty-one (21) days the period of disclosure of the identity of witnesses, as it would be contrary to the Rules and this short period of time would not suffice for the Defence to carry out its investigations properly. Moreover, granting the Prosecution prayer in this respect would render the process inequitable and violate Article 21 of the Statute. The Defence requests the Chamber to maintain the period of disclosure of 60 days prior to the trial, in accordance with Rule 66 (A) (ii).
9. The Defence requests the Chamber to deny the Motion for lack of relevant information which would enable the Chamber to order protective measures adequate for each witness.

DELIBERATIONS

Defence Request for Extension of Time

10. The Chamber notes that the Defence request of 27 May 2002 for extension of time to file its response to the Prosecutor's Motion was granted by the President of the Tribunal prior to the assignment of this case to Trial Chamber III. The Defence was then required to file its response by 10 June 2002 [1]. To date no such response has been filed. Moreover, since the Defence has been able to fully argue the substance of the Motion in its submissions wherein it was seeking a delay, there is no need to keep the proceedings on hold awaiting further Defence submissions.

Substance of the Motion

11. The Chamber recalls that Article 21 of the Statute, supplemented by Rule 69, provides for the protection of victims and witnesses when the circumstances so require. The Chamber is also mindful of Article 20 of the Statute which affords the accused the right to have adequate time and facilities to fully prepare his or her defence. Rule 75(A) states 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 Victims and Witnesses Support Unit, 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".

12. The Chamber is sensitive to the need to safeguard both the rights of the Accused and the security and privacy of victims and witnesses who may be in danger or at risk. It is with this in mind that the Chamber considers the Motion.

654

13. In assessing the fear or the safety of witnesses, which constitutes the basis for the protection sought in the instant case, the Chamber adopts the reasoning of the ICTY [2] and other Chambers of this Tribunal [3] requiring an objective basis for the fear which can be expressed by persons other than the witness.

14. To determine the appropriateness of the protective measures sought, the Chamber has evaluated the security situation affecting the concerned witnesses in light of information annexed to the Prosecutor's Brief. Having considered the objections of the Defence, the Chamber has reviewed the afore-mentioned Affidavit of Alfred Kwende, dated 7 December 2001, which tends to demonstrate the complexity of the security situation in Gitarama Préfecture. The Affidavit emphasises the level of threat in Gitarama and other regions in Rwanda due to the presence and activities of armed infiltrators, composed mainly of elements of *ex-Forces Armées Rwandaises* (EX-FAR) and Interahamwe Militia (in July 2001). As a consequence, potential witnesses experience fear for their lives and have expressed unwillingness to testify, unless appropriate protection measures are put in place by the Tribunal.

15. The Chamber is satisfied that, on the basis of this Affidavit and the other additional information annexed to the Brief, a volatile security situation exists in Rwanda and in neighbouring countries, which could endanger the lives of victims and potential Prosecution witnesses who may be called to testify at trial. The Chamber concludes therefore, that as far as the victims and witnesses living in Rwanda and in neighbouring countries are concerned, there are exceptional circumstances which warrant non-disclosure orders.

16. In relation to witnesses not residing in Rwanda or in neighbouring countries, the Chamber considers that the Prosecutor has not provided evidence of threats to their lives nor has she proposed any explanation whatsoever to justify their protection even under the wide scope of Rule 75. The Chamber is therefore constrained to deny the Prosecutor's request for protection of victims and witnesses not living in Rwanda or in neighbouring countries due to lack of sufficient grounds.

17. Dealing now with the orders sought by the Prosecutor in paragraphs (a), (b), (c), (d), and (i) of the Motion, the Chamber considers that these are normal protective measures which do not affect the rights of the Accused and which accordingly, may be granted as they stand. The Chamber grants also the orders sought in paragraphs (e) and (k), with the understanding that they are not meant to prevent the Defence from carrying out normal investigations to prepare its case, in so far as the investigations are not intentionally designed to reveal the identity of witnesses known to be protected.

18. In relation to paragraph (j), the Chamber takes the view that this request is already covered by the prayer in paragraph (a) which has been granted with the assumption that the pseudonyms are to be applied throughout the Tribunal proceedings. There is therefore no need to grant this order separately.

19. Regarding the Prosecutor's request in paragraph (f) of the Motion, the Chamber finds it to be more suitable if notice of the relevant information is given to the Registry rather than to the Chamber or the Prosecutor, as proposed by the Prosecution. The Chamber therefore, grants this order in an amended form as follows: An order requiring the Defence to provide to the Registry a designation of all persons working on the immediate Defence team who will have access to any information which identifies, or could lead to the identification of any Protected Person and to advise the Registry in writing of any change in the composition of this team. [4] Additionally, the Chamber amends, in the latter half of paragraph (f), the term "all documents and information" to be remitted by any member leaving the Defence team, replacing it with "all materials", because the term "information" can be interpreted to include intangibles, which cannot of course be remitted.

685

20. In relation to paragraph (g), the Chamber finds the formulation of this measure to be so broad that it would make it difficult to enforce as worded. Consequently, the Chamber grants this measure in an amended form as follows: An order prohibiting the photographing, audio and video recording, or sketching of any Prosecution witness in connection with his or her participation in Tribunal investigations or proceedings, at any time or place without leave of the Trial Chamber.

21. In respect of rolling disclosure requested by the Prosecutor, the Chamber notes the need to strike the balance between the protection of victims and witnesses and the rights of the Accused for a full and unfettered defence. The Chamber recalls that the Defence, pursuant to Rule 66(A)(ii), has already or will receive from the Prosecutor a copy of the statements of witnesses intended to be called, at least 60 days prior to the date set for trial. Only the identifying data of those witnesses will be redacted. The Defence will therefore already have some material on the basis of which to prepare, pending the disclosure of unredacted statements.

22. The Chamber also recalls that the recently amended Rule 69(C) now affords it the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper. There would therefore be no violation of the Rules in ordering a rolling disclosure of the identifying data of witnesses, contrary to the Defence contention. The Chamber does not however propose any time frame for the rolling disclosure at this point in time where the details of the trial are not yet known. Accordingly, the Chamber orders that: the names, addresses and other identifying information of the victims and witnesses, as well as their locations shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further order.

FOR THESE REASONS, THE TRIBUNAL:

For the victims and witnesses living in Rwanda and in neighbouring countries:

GRANTS the orders requested in paragraphs (a), (b), (c), (d), and (i) of the Motion as they stand;

GRANTS the orders requested in paragraphs (e) and (k) within the scope set out in paragraph 17 *in fine*;

GRANTS the orders sought in paragraphs (f), (g) and (h) as amended in paragraphs 19, 20 and 22 respectively;

DENIES the Motion in all other respects.

Arusha, 24 October 2002

Lloyd George Williams, Q.C.

Presiding Judge

Yakov Ostrovsky

Judge

Pavel Dolenc

Judge

Seal of the Tribunal

686

[1] On 27 June 2002, the Court Management Section informed Mr. Rukundo's Defence Counsel, through e-mail communication, that the Judge President had granted the Defence a time extension of 2 weeks, requiring him to file his response by 10 June 2002.

[2] *Prosecutor v. Tadic*, IT-94-I-T "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses" (10 August 1995)

[3] *Prosecutor v. Kajelijeli*, ICTR-98-44-I, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" (6 July 2000)

[4] The Chamber is relying on its decision in: *Prosecutor v. Gratién Kabiligi and Aloys Ntabakuze*, ICTR-97-34-I "Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses" (19 May 2000) p.3 at paragraph 2.

2012-2x-3-5

(9-7-243)

14-11-1996

687

UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda

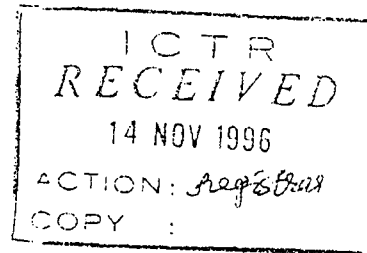
TRIAL CHAMBER I

OR : FR

Before: Judge Laity Kama, Presiding Judge
Judge Lennart Aspegren
Judge Yakov A. Ostrovsky

Registry: Ms. Prisca Nyambe
Ms. Cécile Aptel

Decision of: 6 November 1996



**THE PROSECUTOR
VERSUS
CLÉMENT KAYISHEMA**

Case No. ICTR-95-1-T

**DECISION ON THE MOTION
FILED BY THE PROSECUTOR ON THE PROTECTION
OF VICTIMS AND WITNESSES**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thorton
Mr. Cheickh Mara

The Counsel for the Accused:

Mr. André Ferran

THE TRIBUNAL,

Sitting as Trial Chamber 1, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Yakov A. Ostrovsky;

CONSIDERING the indictment issued by the Prosecutor against Clément Kayishema pursuant to Rule 47 of the Rules of Procedure and Evidence ("The Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed 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 Navanethem Pillay on 28 November 1995;

CONSIDERING the preliminary motion filed on 2 September 1996 by the Prosecutor seeking the issuance of an order for protection measures for victims of and witnesses to the crimes alleged in the indictment;

CONSIDERING the response to the aforementioned motion filed by the Defense on 23 October 1996;

HAVING THEN HEARD the parties at the hearing held on 5 November 1996;

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;

CONSIDERING the relevant decisions rendered by the Tribunal on 26 and 27 September 1996 respectively in cases ICTR-96-3-T and ICTR-96-4-T;

AFTER HAVING DELIBERATED:

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

WHEREAS in support of this motion, the Prosecutor has pointed out that, according to various concordant reports from human rights organizations, since January 1996, there has been a considerable increase in the number of violent acts directed against victims of and witnesses to the genocide and other serious violations of international humanitarian law committed in Rwanda in 1994, which in numerous cases have led to the death of the said persons;

WHEREAS, according to the Prosecutor, the threat is particularly serious in the Kibuye area, on the border with Zaire, where a large number of those who participated in the genocide and other serious violations of international humanitarian law committed in Rwanda in 1994 now reside;

689

WHEREAS, while invoking the provisions of Rule 69 (A) of the Rules, the Prosecutor requests that the Tribunal issue a temporary pre-trial order for the non-disclosure to the public and the Defense of the identity of all victims and witnesses for the prosecution, as well as all identifying information in their previous statements and in the supporting documentation which may reveal their identities;

A. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media

WHEREAS the non-disclosure of the identity of victims and witnesses to the public and the media is not only provided for by the general provisions of Rule 69(A) of the Rules, which, in any event, impose conditions which do not seem to have been fulfilled by the Prosecutor during the 15 July 1996 disclosure of supporting documentation to the indictment, and to which the Tribunal shall return herein, but also this non-disclosure is specifically provided for under Rule 75 of the Rules where it is explicitly mentioned in paragraph (B);

THE TRIBUNAL is consequently of the opinion that, regarding the non-disclosure to the public and the media of the identity of the victims and witnesses, it is appropriate to grant the measures requested by the Prosecutor to which, in any case, the Defense is not opposed; that these measures are even more comprehensible in light of the many concordant reports issued by various sources which describe the particularly worrisome situation in Rwanda and the neighboring countries where those persons who may have, in one way or another, borne witness to the events of 1994 are found today;

B. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the Defense

WHEREAS Rule 69 (A) of the Rules, invoked by the Prosecutor in requesting the non-disclosure of the identity of victims and witnesses to the Defense, although, given its general nature, no distinction is made between non-disclosure to the public, to the media and to the Defense, nevertheless provides specific pre-conditions for such a measure to be applied;

WHEREAS Rule 69 (A) of the Rules requires that the Prosecutor first request a Trial Chamber to order such measures and that the request be made under exceptional circumstances;

WHEREAS, in this case, the Tribunal notes *ex officio* that the Prosecutor independently decided not to disclose the identity of victims and witnesses to the Defense, without first requesting an order from a Trial Chamber as required under Rule 69(A) of the Rules, after demonstrating the existence of exceptional circumstances;

WHEREAS the Prosecutor wrongfully submitted to the Defense versions in which identifying information on victims and witnesses were redacted, even if, contrary to what the Defense has moved, the Prosecutor would have had the legal right to do so, had she first obtained an order to that effect;

WHEREAS, in any event, the Trial Chamber does not have the power to nullify the documents submitted to the Defense, since the Rules do not provide for such a sanction;

WHEREAS, in this regard, the Tribunal draws attention to the differences that exist between the Rules and the various national legislations, which provide for the possibility of sanctioning the procedural errors with textual or substantive annulments, when, in the latter case, there is a prejudice to the very substance of a right or a legislative or regulatory text; and that this should not be surprising, given the particular character of the Tribunal, composed of Judges representing the principal legal systems of the world, in application of Article 12(3)(c) of the Statute of the Tribunal, who bore in mind the need to maintain a perfect balance between, on the one hand the rights of the accused to a fair trial and, on the other hand the rights of the victims and witnesses, as well as the interest of the international community that justice be done in the most diligent manner possible;

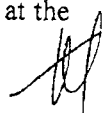
FOR ALL THE ABOVE STATED REASONS, the Tribunal considers that there is cause to grant the Prosecutor's request for measures but however reminds the latter that, in any case and in accordance with the provisions of Rule 69(C) of the Rules, the identity of the victims and witnesses shall be disclosed before the commencement of trial and within a time frame which will allow for the Defense to prepare;

FOR THESE REASONS,

THE TRIBUNAL

DECIDES the following measures:

- (1) The names and addresses of persons for whom pseudonyms were used in the indictment and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public nor to the media.
- (2) The public and the media shall not take photographs or video recordings, nor make sketches of victims or witnesses when the latter enter the Tribunal, are present therein, or exit therefrom, without the authorization of the Trial Chamber and the parties.
- (3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.

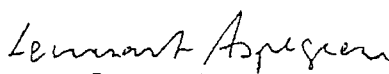


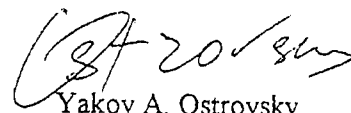
691

- (4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from said files.
- (5) The pseudonyms given to the victims and witnesses in the indictment and the supporting documentation shall be used each time reference is made to said victims and witnesses in court, in the proceedings of the Tribunal, or during discussions between the parties.
- (6) The names, addresses and other identifying information of the victims or witnesses, as well as their locations, shall not be disclosed to the Defense so long as the said victims or witnesses are not under the protection of the Tribunal. On this point, the attention of the Registrar is drawn to the need to establish adequate protection measures, if it had not already been done.
- (7) Subject to the provisions of Rules 69 and 75 of the Rules, the Prosecutor, in any case, shall disclose to the Defense the names of victims, witnesses, and their unredacted statements, in order to allow the Defense a sufficient amount of time to prepare for trial.

Arusha, 6 November 1996


Laity Kama
Presiding Judge


Lennart Aspegren
Judge


Yakov A. Ostrovsky
Judge

(Seal of the Tribunal)



692

UNITED NATIONS  NATIONS UNIES
 International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Navanethem Pillay, Presiding
 Judge Asoka de Zoysa Gunawardana
 Judge Erik Møse

Registry: Ms. Marianne Ben Salimo

Decision of: 23 November 1999

1999
 COURT MGMT.
 RECEIVED
 A 10:38

THE PROSECUTOR
 v.
 HASSAN NGEZE

Case No. ICTR-97-27-I

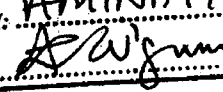
DECISION ON THE PROSECUTOR'S MOTION
 FOR WITNESS PROTECTION

The Office of the Prosecutor:
 William T. Egbe

Counsel for Mr. Ngeze:
 Patricia Mongo

International Criminal Tribunal for Rwanda
 Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
 COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS

NAME / NOM: AMINATTA L.R. N'GUM
 SIGNATURE:  DATE: 24/11/99.



THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the 'TRIBUNAL'),

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Asoka de Zoysa Gunawardana and Judge Eric Møse;

CONSIDERING the motion, filed on 22 October 1998, by the Prosecution, for orders for protective measures for victims and witnesses to crimes alleged in the Indictment, along with an Affidavit of Charles Mengalle, and the annexes attached thereto;

CONSIDERING, the Defence brief in reply to the Prosecution's request for orders for protective measures for victims and witnesses to crimes alleged in the Indictment, filed on 19 October 1999;

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

CONSIDERING the submissions of the Parties on this matter, heard on 18 October 1999;

HEREBY DECIDES the said Defence motion.

The Legal Basis

1. The Prosecution motion is based on Article 21 of the Statute and Rules 69 and 75 of the Rules.
2. Article 21 of the Statute obliges the Tribunal to provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim's identity. To this end, Rule 75 of the Rules provides, *inter alia*, that a Judge or a Chamber may *proprio motu*, or at the request of either party, or of the victims or witnesses concerned, or of the Tribunals Victims and Witnesses Support Unit, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.
3. The Tribunal, being mindful at all times of guaranteeing the full respect of the rights of the accused, shall order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of victims and witnesses so as to ensure a fair determination of the matter before it. However, this is subject to the proviso that, in accordance with Rule 69(C), the identity of the victims and witnesses shall be disclosed in sufficient time prior to the trial, in order to allow adequate time for preparation of the Prosecution and the Defence cases.

694

4. Measures for the protection of witnesses are granted on a case by case basis, and take effect once the particulars and locations of the witnesses have been forwarded to the Witnesses and Victims Support Unit. In order to determine the appropriateness of such protective measures, the Tribunal shall evaluate the general security situation affecting the witnesses concerned.

5. In this case, the attachments presented by the Prosecution in support of its motion, demonstrate the particularly volatile security situation in Rwanda and in neighbouring countries, at the present time. This volatile security situation, risks to endanger the lives of those persons who may be called as witnesses at trial.

6. The Prosecution motion is well founded and the Trial Chamber considers that there are good grounds for protective measures for Prosecution witnesses.

The non-disclosure of the identity of witnesses

7. The Prosecution requests for the non-disclosure of the identity of prosecution witnesses.

8. Pursuant to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise. However, this is subject to Rule 69(C) whereby the identity of the witness shall be disclosed in sufficient time prior to trial in order to allow adequate time for the preparation of the defence.

9. In relation to the non-disclosure of witness identity, the Trial Chamber concurs with the reasoning of the International Criminal Tribunal for the Former Yugoslavia in its Decision of 10 August 1995 on the Prosecutors motion for protective measures for victims and witnesses, in *The Prosecutor versus Tadić* (IT-94-I-T). In that case, the Trial Chamber held that for a witness to qualify for the protection of his identity from disclosure to the public and media, there must be real fear for the safety of the witness or her or his family, and that there must always be an objective basis to underscore this fear. It further held, that the judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.

10. In the present case, the Trial Chamber finds that there exist exceptional circumstances warranting the non-disclosure of the identity of witnesses.

4

695

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

HEREBY ORDERS that:

1. The names, addresses, whereabouts, and other identifying information concerning prosecution witnesses, be sealed by the Registry and not included in any Tribunal records.
2. The names and identities of the prosecution witnesses shall be forwarded by the Prosecution to the Registrar in confidence, and they shall not be disclosed to the Defence, until such time as the said witnesses are under the protection of the Tribunal.
3. In cases where the names, addresses, locations and other identifying information of the prosecution witnesses appear in the Tribunal's public records, this information shall be expunged from the said records.
4. The names, addresses, locations and other identifying information of the prosecution witnesses contained in the supporting materials of the Prosecution, shall not be disclosed to the public or to the media.
5. The public and the media shall not make audio or video recordings or broadcastings and shall not take photographs or make sketches of the prosecution witnesses who are protected witnesses, without leave of the Trial chamber.
6. The Prosecution shall be permitted to designate pseudonyms for each of its witnesses for use in the proceedings of the Tribunal, during discussions between the Parties in proceedings.
7. The Defence Counsel and any representative acting on his behalf, shall notify the Prosecution prior to any contact with any of the prosecution witnesses, and the Prosecution shall make arrangements for such contacts.
8. The Prosecution is authorised to withhold disclosure to the Defence, of the identity of the witness and to temporarily redact their names, addresses, locations and other identifying information from the supporting material on file with the Registry, until such time as the said witnesses are under the protection of the Tribunal.

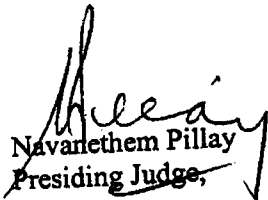
4

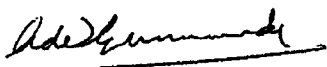
696

Case No. ICTR-97-27-I

9. The identity of the witnesses shall be disclosed by the Prosecution to the Defence, in sufficient time prior to the trial in order to allow adequate time for the preparation of the defence, pursuant to Rule 69(c) of the Rules.

Arusha, 23 November 1999


Navanethem Pillay
Presiding Judge,


Asoka de Zoysa Gunawardana
Judge


Erik Møse
Judge



Seal of the Tribunal

ICTR-96-15-T
(312-308)
14.04.1997

697 K...

Case No. ICTR-96-15-T



UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 2

OR:FR

Before: Judge Laity Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Frederik Harhoff
Mr. Jean-Pelé Fomété

Decision of: 6 March 1997

THE PROSECUTOR
VERSUS
JOSEPH KANYABASHI

Case No. ICTR-96-15-T

DECISION ON THE PROSECUTOR'S MOTION FOR THE
PROTECTION OF VICTIMS AND WITNESSES

ICTR
RECEIVED
14 APR 1997
ACTION: REGISTRATION
COPY: 8.40 AM

The Office of the Prosecutor:

Mr. Yacob Haile-Mariam
Mr. Pierre-Richard Prosper

The Counsel for the Accused:

Mr. Evans Monari

Witp1Kan.eng

1
LK/LA

Case No. ICTR-96-15-T

THE TRIBUNAL,

SITTING AS Trial Chamber 2, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING the indictment issued by the Prosecutor against Joseph Kanyabashi pursuant to Rule 47 of the Rules of Procedure and Evidence (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed 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 Yakov A. Ostrovsky on 15 July 1996;

CONSIDERING the preliminary motion filed on 18 December 1996 by the Prosecutor seeking an order for protective measures for victims of and witnesses to the crimes alleged in the indictment;

CONSIDERING the response to the aforementioned motion filed by the Defence on 16 January 1997, by which the Defence Counsel requests, firstly, that the Tribunal dismiss the Prosecutor's motion and, secondly, that an order be issued for the immediate revelation of the identities of the Prosecution witnesses in the statements already produced and for full disclosure of all testimonies not yet provided;

HAVING HEARD the parties at the hearing held on 7 February 1997;

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 has, for the protection of victims and witnesses, 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 human rights organizations and numerous media reports, since November 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 and, most recently, also of UN staff members in Rwanda;

699

Case No. ICTR-96-15-T

WHEREAS, while invoking the provisions of Rule 69(A) of the Rules and relying on the deterioration of the security situation throughout Rwanda, the Prosecutor applies to the Tribunal for the issue of an order for the non-disclosure to the public and the media, and temporarily also to the Defence until such time as the witnesses have been afforded complete measures of protection, of the identity of all victims and witnesses for the prosecution, as well as all identifying information in their previous statements or in the supporting documentation which may reveal their identities;

WHEREAS the Defence Counsel, in his written and oral submissions, has opposed the Prosecutor's request on the grounds that each case must be assessed on its own merits and that the Prosecutor has not shown the existence of exceptional circumstances justifying special protection for the witnesses in the present case, since violence against or intimidation of victims and witnesses has not been reported in the Ngoma and Butare areas, where the accused, Joseph Kanyabashi, is alleged to have committed the crimes for which he is charged;

WHEREAS, furthermore, the Defence Counsel has argued that delays in the submissions to the Defence of the names and identities of the prosecution's witnesses, as requested by the Prosecutor, may frustrate the fair administration of Justice by creating an imbalance in the equality between the parties to the proceedings and thereby constituting a violation of the right of the accused to a fair trial and of the international human rights standards that the Tribunal must also respect;

A. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media

WHEREAS measures for the non-disclosure of the identity of victims and witnesses to the public and the media are provided for by the general provisions of Rule 69(A) of the Rules, and also more specifically by Rule 75(B) of the Rules;

WHEREAS in the present situation these measures are even more warranted by the many concordant reports, issued by various sources, which describe the particularly volatile situation at present in Rwanda and in the neighbouring countries where those persons who may have, in one way or another, borne witness to the events of 1994, are found today;

THE TRIBUNAL is therefore of the opinion that, regarding the non-disclosure to the public and the media of the identity of the victims and witnesses, it is appropriate to grant the measures requested by the Prosecutor;

LK/LA

700

Case No. ICTR-96-15-T

B. On the matter of the request for the temporary non-disclosure of the identity of prosecution victims and witnesses to the Defence until such time as they are under the protection of the Tribunal

WHEREAS Rule 69(A) of the Rules, which is invoked by the Prosecutor in requesting the non-disclosure of the identity of prosecution victims and witnesses to the Defence, is of a general nature and does not distinguish between non-disclosure to the public, to the media and to the Defence, nevertheless provides specific pre-conditions for such a measure to be applied;

WHEREAS Rule 69(A) of the Rules, thus, requires that the Prosecutor ask a Trial Chamber to order such measures, and that the request be made under exceptional circumstances only;

WHEREAS, in this case, the Tribunal notes that the Prosecutor independently decided not to disclose the identity of victims and witnesses to the Defence, without first requesting an order from a Trial Chamber as required under Rule 69(A) of the Rules;

WHEREAS the Prosecutor wrongfully submitted to the Defence versions in which identifying information on victims and witnesses were redacted, even if the Prosecutor would have had the legal right to do so, had she first obtained an order to that effect;

WHEREAS Rule 69(C) of the Rules provides that, subject to Rule 75 of the Rules, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow for preparation of the defence;

WHEREAS, in the light of the reports and submissions made with regard to the security situation in Rwanda and the neighbouring countries, the Chamber is of the opinion that exceptional circumstances exist to warrant the temporary non-disclosure to the Defence of the identity of prosecution victims and witnesses and temporary redaction of their names and addresses in the written statements, until such time as the said witnesses have been brought under the protection of the Tribunal, but however reminds the Prosecutor that, in any case and in accordance with the provisions of Rule 69(C) of the Rules, the identity of the victims and witnesses shall be disclosed to the Defence well in advance of the trial and within a time frame which will allow sufficient opportunity for the preparation of the defence;

LK/ LA

701

FOR THESE REASONS,

THE TRIBUNAL

DECIDES the following measures:

- (1) The names and addresses of persons for whom pseudonyms were used in the indictment and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public or to the media.
- (2) The public and the media shall not make video or audio recordings or broadcastings and shall not take photographs or make sketches of victims or witnesses under the protection of the Tribunal, without the authorization of the Trial Chamber.
- (3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.
- (4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from the said files.
- (5) The pseudonyms given to the victims and witnesses in the indictment and the supporting documentation shall be used each time reference is made to the said victims and witnesses in the proceedings of the Tribunal or during discussions between the parties.
- (6) The Prosecutor is authorised to withhold disclosure to the Defence of the identity of the victims and witnesses and to temporarily redact their names and addresses in the written statements, until such time as the said victims or witnesses are brought under the protection of the Tribunal. On this point, the Registrar is directed to install adequate protection measures immediately for victims and witnesses before, during and after their testimonies, if it has not already been so done.

LC/LA


702


Case No. ICTR-96-15-T

- (7) Subject to the provisions in Rules 69 and 75 of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the identity of the said protected victims and witnesses as well as their non-redacted statements within thirty days prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself.

Arusha, 6 March 1997


Lairy Kama
Presiding Judge


Lennart Aspegren
Judge


Navanethem Pillay
Judge



(Seal of the Tribunal)

LK/LA

ICTR-96-12-I
3.12.1997
()

703

Case No. ICTR-96-12-T

ICTR
CRIMINAL REGISTRY
RECEIVED

UNITED NATION NATIONS UNIES

1997 DEC -3 A 11: 27

International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR:FRE.

Before: Judge Laity Kama ,Presiding
Judge Tafazzal Hossain Khan
Judge William H.Sekule

Registry: Mr.Antoine Mindua.

Decision of: 26 June 1997

THE PROSECUTOR
VERSUS
ANATOLE NSENGIYUMVA

Case No. ICTR-96-12-T

DECISION ON THE PROSECUTOR'S MOTION FOR THE
PROTECTION OF VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Udo Gehring.
Mr. Graigh McConaghy
Ms. Josee D'Aoust

Counsel for the Accused: Mr. Kennedy Ogetto

704

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the ' TRIBUNAL ')

SITTING AS Trial Chamber I, composed of Judge Laity Kama Presiding, Judge Tafazzal Hossain Khan and Judge William H. Sekule;

CONSIDERING the indictment issued by the Prosecutor against Anatole Nsengiyumva pursuant to Rule 47 of the Rules of Procedure and Evidence (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed 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 Yakov A. Ostrovsky on 12 July 1996;

CONSIDERING the preliminary motion filed on 24 March, 1997 by the Prosecutor pursuant to Article 21 of the Statute and Rules 69 and 75 of the Rules seeking an order for protective measures for witnesses and victims;

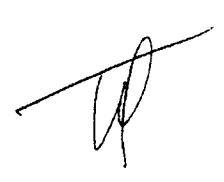
CONSIDERING the defence counsel's response to the aforementioned motion filed on 10 April 1997.

HAVING HEARD the parties on 26 June 1997 when, save for prayers in paragraph 6 and 7 of the prosecutor's motion, the defence raised no objection to orders sought by the prosecutor in paragraph 1, 2, 3, 4, 5, 8 and 9.

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;

THE ARGUMENTS

(i) The Prosecution has, for the protection of their victims and witnesses, filed a motion before the Tribunal for a non-disclosure order of their identities as well as for other related relief. In support of this motion, the Prosecutor has submitted that, according to various concordant reports from UN institutions and human rights organizations and numerous media reports, since November 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 ;



705

Case No. ICTR-96-12-T

(ii) Invoking the provisions of Rule 69(A), 72 and 75 of the Rules and Article 21 of the Statute and relying on the deterioration of the security situation throughout Rwanda, the Prosecutor applies to the Tribunal for the issue of an order for the non-disclosure to the public and the media and temporarily also to the Defence until such time as the witnesses and victims have been afforded complete measures of protection of their identity as well as all identifying information in their previous statements or in the supporting documentation which may reveal their identities;

(iii) the Defence Counsel, in his written and oral submissions made on 26 June, 1997, has no objection to the Prosecutor's requests save for prayers sought in paragraph 6 and 7 of the prosecutors motion.

(iv) the Defence further argues that the prosecutor has not shown, as required by Rule 69 of the Rules, the existence of exceptional circumstances justifying special protection for the witnesses in the present case, since violence against or intimidation of victims and witnesses has not been reported in Gisenye prefecture, where the accused, Anotole Nsengiyumva is alleged to have committed the crimes for which he is charged and further that, going by the affidavit of the commander of investigations for the International Criminal Tribunal for Rwanda, the killings are precipitated by property disputes or revenge directed at returnees.

(v) furthermore, the Defence Counsel has argued that delays in the submissions to the Defence of the names and identities of the prosecution's witnesses, as requested by the Prosecutor, may frustrate the fair administration of Justice by creating an imbalance in the equality between the parties to the proceedings and thereby constituting a violation of the right of the accused to a fair trial especially that the accused cannot prepare his defence without first knowing the prosecution witnesses.

DELIBERATIONS

A. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media

Measures for the non-disclosure of the identity of victims and witnesses to the public and the media as provided for by the general provisions of Rule 69(A) of the Rules, and also more specifically by Rule 75(B) of the Rules have not been objected to by the Defence and these measures are even more warranted by the many concordant reports, issued by various sources, which describe the particularly volatile situation at present in Rwanda and in the neighbouring countries where those persons who may have, in one way or another, borne witness to the events of 1994, are found today;

The Tribunal is therefore of the opinion that, regarding the non-disclosure to the public and the media of the identity of the victims and witnesses, it is appropriate to grant the measures requested by the Prosecutor;

B. On the matter of the request for the temporary non-disclosure of the identity of prosecution victims and witnesses to the Defence until such time as they are under the protection of the Tribunal

In the light of Rule 69(C) of the Rules which provides that, subject to Rule 75 of the Rules, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow for preparation of the defence;

In view of the reports and submissions made with regard to the security situation in Rwanda and the neighbouring countries, the Chamber is of the opinion that exceptional circumstances exist to warrant the temporary non-disclosure to the Defence of the identity of prosecution victims and witnesses and temporary redaction of their names and addresses in the written statements, until such time as the said witnesses have been brought under the protection of the Tribunal, but however reminds the Prosecutor that, in any case and in accordance with the provisions of Rule 69(C) of the Rules, the identity of the victims and witnesses shall be disclosed to the Defence well in advance of the trial and within a time frame which will allow sufficient opportunity for the preparation of the defence;

FOR THESE REASONS,

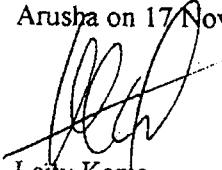
THE TRIAL CHAMBER

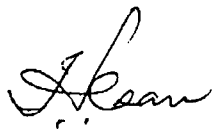
DECIDES that:


- (1) The names and addresses of persons for whom pseudonyms were used in supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public or to the media.
- (2) The public and the media shall not make video or audio recordings or broadcastings and shall not take photographs or make sketches of victims or witnesses under the protection of the Tribunal, without the authorization of the Trial Chamber.
- (3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.
- (4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from the said files.

- (5) The pseudonyms given to the victims and witnesses in the indictment and the supporting documentation shall be used each time reference is made to the said victims and witnesses in the proceedings of the Tribunal or during discussions between the parties.
- (6) The Prosecutor is authorised to withhold disclosure to the Defence of the identity of the victims and witnesses and to temporarily redact their names and addresses in the written statements, until such time as the said victims or witnesses are brought under the protection of the Tribunal.
- (7) Subject to the provisions in Rules 69(A) and 69(C) of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the identity of the said protected victims and witnesses as well as their non-redacted statements within sufficient time prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself.

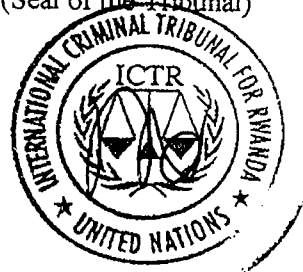
Rendered orally on 26 June 1997, and done in Arusha on 17 November 1997.


 Laity Kama
 Presiding Judge


 Tafazzal Hossain Khan
 Judge


 William H. Sekule
 Judge

(Seal of the Tribunal)





ICTR-96-10A-1
(261-198)
3.12.1997

708

Case No. ICTR-96-10A-I

ICTR
CRIMINAL REGISTRY
RECEIVED

UNITED NATIONS NATIONS UNIES

1997 DEC -3 P 3 34

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 2

OR:ENG:

Before: Judge William H. Sekule, Presiding
Judge Laity Kama
Judge Tafazzal Hossain Khan.

Registry Mr. Antonie Mindua

Decision of: 27 June 1997

THE PROSECUTOR
VERSUS
ANDRE NTAGERURA

Case No. ICTR-96-10A-I

**DECISION ON THE PROSECUTOR'S MOTION FOR THE PROTECTION
OF VICTIMS AND WITNESSES**

The Office of the Prosecutor:

Mr. Frederic Ossogo
Ms. Velentina Tsoneva

The Counsel for the Accused:
Fakhy N'Fa Kaba KONATE

709

Case No. ICTR-96-10A-I

THE TRIBUNAL,

SITTING AS Trial Chamber 2, composed of Judge William H. Sekule Presiding , Judge Laity Kama and Judge Tafazzal Hossain Khan;

CONSIDERING the indictment issued by the Prosecutor on 09 august 1996 against Andre Ntagerura pursuant to Rule 47 of the Rules of Procedure and Evidence the ("Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed 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 the indictment, signed by Judge Lennart Aspegren on 10 August 1996;

HAVING NOW BEEN SEIZED of a preliminary motion filed on 24 March 1997 by the Prosecutor pursuant to the provisions of Article 21 of the statute and rule 69 and 75 of the "Rules" seeking an order for protective measures for victims of and witnesses to the crimes alleged in the indictment;

CONSIDERING the response to the aforementioned motion filed by the Defence on 15 July 1997, by which the Defence Counsel requests, firstly, that the measures sought by the prosecution should be considered in the light of Article 20 of the Statute and rule 66 of the Rules in that, they should not violate the rights of the accused provided under the said Article and rule.

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;

HAVING HEARD the parties on 27 th June 1997;

ARGUMENT BY THE PARTIES:

WHEREAS the Prosecutor has, for the protection of victims and witnesses, filed a motion before the Tribunal seeking for an order for the non-disclosure of the witnesses and victims identities as well as for other related reliefs on the grounds appearing in both her oral and written submissions;

- (i) that according to various concordant reports from UN institutions and human rights organizations and numerous media reports, since November 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 and, most recently, also of UN staff members in Rwanda;

710

Case No. ICTR-96-10A-I

(ii) That these attacks have been committed specifically in changugu prefecture which is an area in which the facts charged against the accused Andre Ntagerura are located, in particular within kalengera commune.

(iii) That relying on the deterioration of the security situation throughout Rwanda, an order should be issued for the non-disclosure to the public and the media, and temporarily also to the Defence until such time as the witnesses and victims have been afforded complete measures for the protection of their identity, as well as all identifying information in their previous statements or in the supporting documentation which may reveal their identities;

The Defence Counsel, in his written and oral submissions, has opposed the Prosecutor's request on the grounds appearing hereunder ;

(i) That WHEREAS generally, measures for the non-disclosure of the identity of victims and witnesses to the public and the media as provided for by the general provisions of Rule 69(A) of the Rules, and also more specifically by Rule 75(B) of the Rules are not objected to by the defence, each case must be assessed on its own merits and that the Prosecutor has not shown the existence of exceptional circumstances justifying special protection for the witnesses in the present case;

(ii) That delays in the submissions to the Defence of the names and identities of the prosecution's witnesses, as requested by the Prosecutor, may frustrate the fair administration of Justice by creating an imbalance in the equality between the parties to the proceedings and thereby constituting a violation of the right of the accused to a fair trial as provided under Article 20 of the statute and Rule 66 of the Rules.

DELIBERATIONS

A. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media

The trial chamber takes note of the provisions of Rule 69(A) of the rules and the present security situation in Rwanda as appearing in many concordant reports, issued by various sources, which describe the particularly volatile situation at present in Rwanda and in the neighbouring countries where those persons who may have, in one way or another, borne witness to the events of 1994, are found today;

The chamber is therefore of the opinion that, regarding the non-disclosure to the public and the media of the identity of the victims and witnesses, it is appropriate to grant the measures requested by the Prosecutor;

B. On the matter of the request for the temporary non-disclosure of the identity of prosecution victims and witnesses to the Defence until such time as they are under the protection of the Tribunal

The trial Chamber takes note that Rule 69(A) of the Rules, which is invoked by the Prosecutor in requesting the non-disclosure of the identity of prosecution victims and witnesses to the Defence is of a general nature and does not distinguish between non-disclosure to the public, to the media and to the Defence, nevertheless provides specific pre-conditions for such a measure to be applied;

Rule 69(A) of the Rules, requires that the Prosecutor ask a Trial Chamber to order such measures, and that the request be made under exceptional circumstances only;

Rule 69(C) of the Rules provides that, subject to rule 75 of the Rules, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow for preparation of the defence and that in so doing Rule 69(A) and Rule 75 do not violate Article 20 of the statute and Rule 66 of the Rules.

In the light of the reports and submissions made with regard to the security situation in Rwanda and Changugu commune in particular and the neighbouring countries, the Chamber is of the opinion that, exceptional circumstances exist to warrant the temporary non-disclosure to the Defence of the identity of prosecution victims and witnesses and temporary redaction of their names and addresses in the written statements, until such time as the said witnesses have been brought under the protection of the Tribunal, but however reminds the Prosecutor that, in any case and in accordance with the provisions of Rule 69(C) of the Rules, the identity of the victims and witnesses shall be disclosed to the Defence well in advance of the trial and within a time frame which will allow sufficient opportunity for the preparation of the defence;

FOR THESE REASONS,

**THE TRIAL CHAMBER
DECIDES as follows:**

- (1) The names and addresses of persons for whom pseudonyms were used in the indictment and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public or to the media.
- (2) The public and the media shall not make video or audio recordings or broadcastings and shall not take photographs or make sketches of victims or witnesses under the protection of the Tribunal, without the authorization of the Trial Chamber.

- (3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.
- (4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from the said files.
- (5) The pseudonyms given to the victims and witnesses in the indictment and the supporting documentation shall be used each time when reference is made to the said victims and witnesses in the proceedings of the Tribunal or during discussions between the parties.
- (6) The Prosecutor is authorised to withhold disclosure to the Defence of the identity of the victims and witnesses and to temporarily redact their names and addresses in the written statements, until such time as the said victims or witnesses are brought under the protection of the Tribunal.
- (7) Subject to the provisions in Rules 69 and 75 of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the identity of the said protected victims and witnesses as well as their non-redacted statements prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself.
- (8) In the spirit of rule 69 of the rules and for record purposes, in future, the prosecutor is instructed to be much more precise in giving or explaining the exceptional circumstances justifying the granting of the protective measures sought.

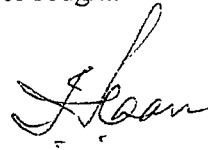
Arusha, 27 th June 1997



William H. Sekule
Presiding Judge



Laity Kama
Judge



Tafazzal Hossain Khan
Judge



I CIR-96-11-T
15-7-98
(255-251)

713

Case No. ICTR-96-11-T

ICTR
CRIMINAL REGISTRY
RECEIVED

UNITED NATIONS



NATIONS UNIES

1998 JUL 15 P 2:23

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: FR

6 July 1997

Before: Judge Laity Kama, Presiding
Judge Tafazzal H. Khan
Judge William H. Sekule

Registry: Dr. Kesia, Mbe, Mindua

**THE PROSECUTOR
VERSUS
FERDINAND NAHIMANA**

Case No. ICTR-96-11-T

**DECISION ON THE PROSECUTOR'S MOTION FOR THE PROTECTION
OF VICTIMS AND WITNESSES**

The Office of the Prosecutor:

Mr. James Stewart
Mr. Gregory Gordon
Mr. Craig Mc Conaghy

The Counsel for the Accused:

Mr Jean -Marie Biju -Duval

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS	
NAME / NOM: PRISCA M. NYAMBE	
SIGNATURE: <i>[Signature]</i>	DATE: 15-7-98

714

Case No. ICTR-96-11-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA(the "TRIBUNAL")

SITTING AS Trial Chamber I, composed of Judge Laity Kama, Presiding , Judge Tafazzal H. Khan and Judge William H. Sekule;

CONSIDERING the indictment issued by the Prosecutor against Ferdinand Nahimana pursuant to Rule 47 of the Rules of Procedure and Evidence (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed 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 the indictment, signed by Judge Yakov A. Ostrovsky on 12 July 1996;

CONSIDERING the preliminary motion filed by the Prosecutor seeking an order for protective measures for victims of and witnesses to the crimes alleged in the indictment;

CONSIDERING the response to the aforementioned motion filed by the Defence in which, the Defence requests that an order be issued for the immediate revelation of the identities of the Prosecution witnesses in the statements already produced and for full disclosure of all testimonies not yet provided;

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;

HAVING HEARD the parties on 26 June 1997;

ARGUMENTS OF THE PROSECUTOR;

WHEREAS the Prosecutor has, for the protection of victims and witnesses, filed a motion before the Tribunal requesting that the Trial Chamber issue orders:-

- (1) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all prosecution witnesses, be sealed by the Registry and not included in any Tribunal records;
- (2) Requiring that any names, addresses, whereabouts of, and other identifying information, concerning potential prosecution witnesses contained in existing Tribunal or public records, be expunged from those documents;
- (3) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of the Prosecution witnesses ;
- (4) Prohibiting the Defense 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 is prohibited from being disclosed to the public, to anyone other than assigned counsel or others working on the

immediate defense team designated by the assigned counsel or the accused;

- (5) Prohibiting the photographing, audio and video recording, or sketching of any witness at any time or place without leave of the Trial Chamber and parties.
- (6) That in order to comply with Art. 66 of the Statute, the Prosecution will submit a written request to the Trial Chamber, or a Judge thereof, to lift the protective measures in respect of certain witnesses should those measures no longer appear to be necessary after appropriate verification and investigation and, at the direction of the Trial Chamber or a Judge thereof, notice will be given to the Witness Protection Unit where protective measures has been lifted.
- (7) That the accused or his defense counsel shall make a written request, on reasonable notice to the Prosecution, the Trial Chamber, or a Judge thereof, of its wish to contact any protected Prosecution witnesses, and the Prosecution shall undertake to facilitate such contact.
- (8) At the direction of the Trial Chamber, or a Judge thereof, and with the consent of the witness or his relative, to be interviewed by the Defense, and the Prosecution shall undertake the necessary arrangements to facilitate such contact.
- (9) Requiring that the Prosecutor designates pseudonym for each Prosecution witness which will be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties to the Trial, and the public.
- (10) The Prosecutor reserves the right to apply to the Chamber to amend the protective measures or for additional protective measures, if necessary.

ARGUMENTS OF THE DEFENCE:

WHEREAS the Defence Counsel, in his written and oral submissions, generally opposed the Prosecutor's request on the grounds that each case must be assessed on its own merits and that the Prosecutor has not shown the existence of exceptional circumstances justifying special protection for the witnesses in the present case;

TAKING INTO ACCOUNT the fact that, except for measures 4, 6 and 8 of the Prosecutors' written motion, the Defence did not raise any serious objection to other measures sought for and having regard to the rights of the accused and that of the witnesses who come forth to give testimony;

WHEREAS, furthermore, the Defence Counsel has argued that delays in the submissions to the Defence of the names and identities of the prosecution witnesses, as requested by the Prosecutor, may frustrate the fair administration of Justice by creating an imbalance in the equality between the parties to the proceedings and thereby constituting a violation of the right of the accused to a fair trial and of the international human rights standards that the Tribunal must also respect.

DELIBERATIONS:

WHEREAS in support of this motion, the Prosecutor has submitted that, according to various concordant reports

716

Case No. ICTR-96-11-T

from UN institutions and human rights organizations and numerous media reports, there has been a considerable increase in the number of violent acts directed against the victims of and the witnesses to the serious violations of international humanitarian law committed in Rwanda in 1994;

WHEREAS, while invoking the provisions of Rule 69(A) of the Rules and citing previous decisions of this Tribunal on witness protection and the deterioration of the security situation throughout Rwanda, the Prosecutor applies to the Tribunal for the issue of orders specified above;

(A) On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media;

WHEREAS measures for the non-disclosure of the identity of victims and witnesses to the public and the media are provided for by the general provisions of Rule 69(A) of the Rules, and also more specifically by Rule 75(B) of the Rules;

WHEREAS Rule 69(A) of the Rules, requires that the Prosecutor should ask a Trial Chamber to order such measures, and that, the request be made where exceptional circumstances exist ;

WHEREAS Rule 69(C) of the Rules provides that, subject to Rule 75 of the Rules, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow for preparation of the defence;

FOR THESE REASONS, THE TRIAL CHAMBER

GRANTS THE PROTECTIVE MEASURES SOUGHT BY THE PROSECUTOR:

PROVIDED THAT, the protective measures granted shall not prejudice the defence right to disclosure by seeing to it that;


- (1) The names and addresses of persons for whom pseudonyms were used in the indictment and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public or to the media.
- (2) The public and the media shall not make video or audio recordings or broadcastings and shall not take photographs or make sketches of victims or witnesses under the protection of the Tribunal, without the authorization of the Trial Chamber.
- (3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.
- (4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from the said files.


717

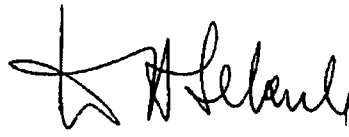
Case No. ICTR-96-11-T

- (5) The pseudonyms given to the victims and witnesses in the indictment and the supporting documentation shall be used each time when reference is made to the said victims and witnesses in the proceedings of the Tribunal or during discussions between the parties.
- (6) The Prosecutor is authorised to withhold disclosure to the Defence of the identity of the victims and witnesses and to temporarily redact their names and addresses in the written statements, until such time as the said victims or witnesses are brought under the protection of the Tribunal.
- (7) Subject to the provisions of rules 69 and 75 of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the identity of the said protected victims and witnesses as well as their non-redacted statements prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself.

Oral decision rendered on 26 June 1997 in the presence of both parties
Written decision signed this 08 July 1998.


Laly Kama
Presiding Judge


Tafazzal H. Khan
Judge


William H. Sekule
Judge

SEAL OF THE TRIBUNAL



718

ICTR UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
CRIMINAL REGISTRY RECEIVED
1999 JUN 17 A 10:21
NATIONS UNIES

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

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

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

[Handwritten signature]

719

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;

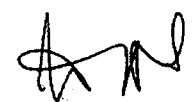
AFTER HAVING DELIBERATED,

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

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

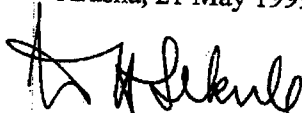
GRANTS the measures requested in paragraphs (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l) of the Prosecution motion;

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)



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-1
6/7/2000
(308-302)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

723

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

2000 JUL -6 P 5:25
ICTR
COURT REGISTRY
RECEIVED

**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 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 Ndirumpatse* (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 Ndirumpatse 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 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 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;
- 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):

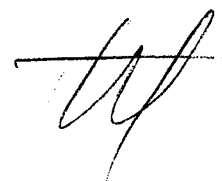
4. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective 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.



728

ICTR-98-44-I

FOR THESE REASONS, THE TRIBUNAL:

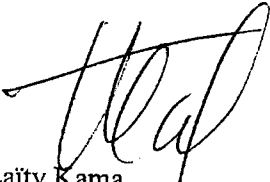
GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;


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

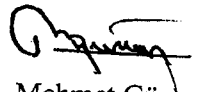
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

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


Laity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)



ICTR-99-50-1
10/7/2000
(63-58)

729



UNITED NATIONS
NATIONS UNIES

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: 7 July 2000

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

ICTR-99-50-1

2000 JUL 10 A 11: 05
ICTR
COURT REGISTRY
RECEIVED

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

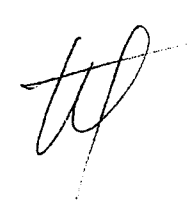
Counsel for the Prosecutor:

Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :

Ms Aicha Condé

- 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 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 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;
- 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.



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.

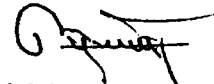
Arusha, 7 July 2000



Laity Kama
Presiding Judge

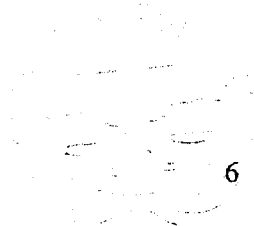


William H. Sekule
Judge



Mehmet Güney
Judge

(Seal of the Tribunal)





UNITED NATIONS
NATIONS UNIES

ICTR-99-50-1
12/7/2000
(1150-1144)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

733

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

JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

2000 JUL 12 P 3 43

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

u

734

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;

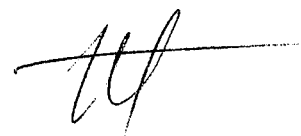
CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 8 March 2000;

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

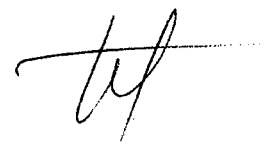


736

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.

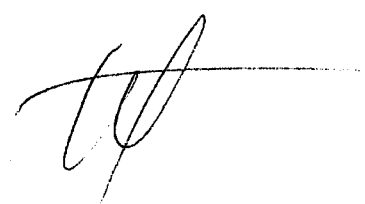
HAVING DELIBERATED,

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.

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.



737

738

ICTR-99-50-T

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";

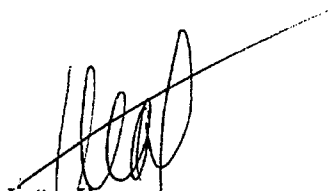
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;



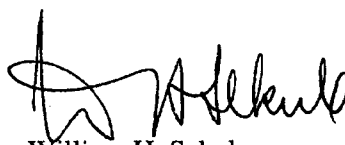
739

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.

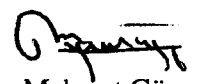
Arusha, 12 July 2000



Laity Kama
Presiding Judge

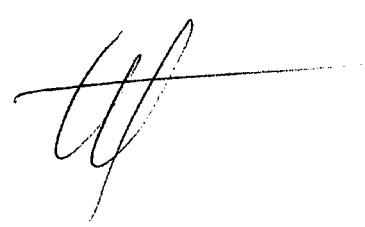


William H. Sekule
Judge



Mehmet Güney
Judge

(Seal of the Tribunal)





UNITED NATIONS
NATIONS UNIES

ICTR-99-50-1
12/7/2000
(1137 - 1131)

740

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

JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

2000 JUL 12 P 3 43

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

741

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;

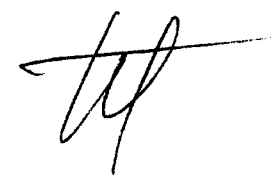
SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in *Prosecutor v. Justin Mugenzi* (the "Motion"), submitted on 9 March 2000;

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");

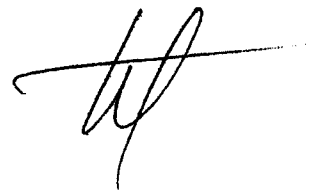
ARGUMENTS OF THE PROSECUTION

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;



7/12

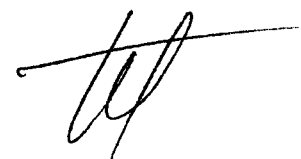
- 3.e) Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity 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 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.



743

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 3 (f).
8. Furthermore, Defence for Mugenzi objects to paragraph 3 (h) for three reasons:
 - (i) First, Defence for Mugenzi submits that the disclosure of identity seven days before a witness testifies is not a reasonable time limit to investigate the witnesses considering that the Defence is restricted in making inquiries in Rwanda.
 - (ii) Second, Defence for Mugenzi contends, *inter alia*, that the non-disclosure measures of paragraph 3 (h), if ordered, would prejudice the right of the accused to an adequate defence by hampering investigations and by preventing the Defence from having full knowledge of the Prosecutor's case. Defence for Mugenzi argues that, during trial, the Defence team will be paralyzed in Arusha, while the Prosecutor's numerous investigators will have free hands to conduct all inquiries. In addition, it is argued that this unequal position violates the Rule 69 (C) of the Rules whereby the identity of the witness shall be disclosed in sufficient time prior to trial.
 - (iii) Third, Defence for Mugenzi argues that the Prosecutor failed to demonstrate that withholding the identity of the witnesses is fair, reasonable and in the interests of justice. He contends that under Rule 69 (A) of the Rules, withholding the identity of the cases is justified only in exceptional circumstances. The Defence requests that, in absence of such showing, the present motion be dismissed.

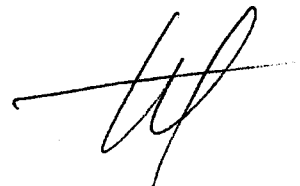


HAVING DELIBERATED,***On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):***

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

On point 3(f) of the Motion

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



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

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

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

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

FOR THESE REASONS, THE TRIBUNAL:

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


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

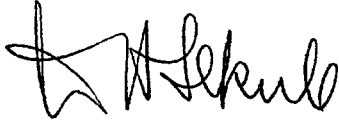
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

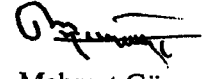
MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial,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

746

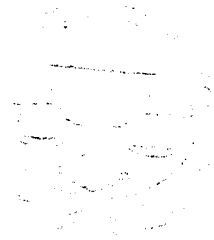
Arusha, 12 July 2000


Laly Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)



ICTR-99-50-1
12/2/2000
(1143-1138)

747



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

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

JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

2000 JUL 12 1 P 3 42

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;

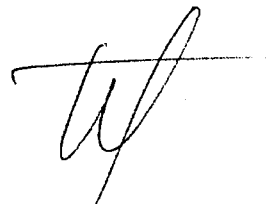
CONSIDERING the brief in support of the Prosecutor’s Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

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”);

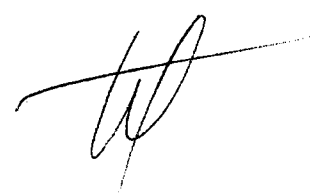
ARGUMENTS OF THE PROSECUTION

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;



749

- 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 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 Bicomumpaka 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 Bicomumpaka submits that these measures should only be exceptional according to Rule 69.

Defence for Bicomumpaka 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 Bicomumpaka 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);).



752

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;

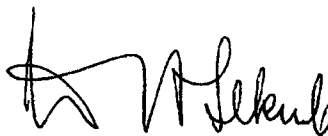
MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";

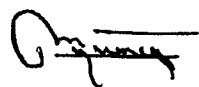
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

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

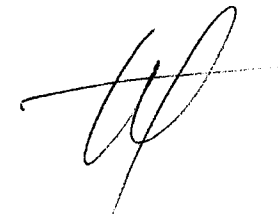

Laity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)





ICTR-96-14-1
12.17/2000
(976-971)

753



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

JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

2000 JUL 12 1 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

754

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;



755

- 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.

RESPONSE OF THE DEFENCE

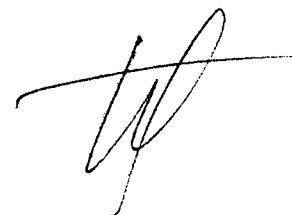
5. Counsel for Niyitegeka objects to point 3(f) of the Motion whereby she should have to disclose the members of her team that were appointed by the Registrar ;
6. Counsel for Niyitegeka contends that point 3(f) violates Rule 69 (c) by limiting the right of the Accused to know the identity of those who 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.



757

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);).



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

758

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.

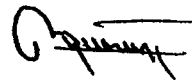
Arusha, 12 July 2000



Laity Kama
Presiding Judge



William H. Sekule
Judge



Mehmet Güney
Judge

(Seal of the Tribunal)



ICTR-99-50-1
22-9-2000
(1177-1172)



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

759

TRIAL CHAMBER II

Original : English

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

Registry: John Kiyeyu

Decision of: 22 September 2000

JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

2000 SEP 22 P 1:521

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU

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 Judith Bourne

22.09.2000

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;

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;



761

- 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.

762

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):

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-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);).

76H

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:

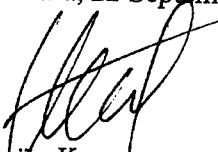
GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;


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

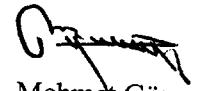
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

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


Lity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)





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.
ANDRÉ RWAMAKUBA
ICTR-98-44-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 David Hooper

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. André Rwamakuba* (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;

766

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;

WHEREAS the Defence's Reply and Brief in Support of the Reply to the Prosecutor's Motion for the Protection of Witnesses was filed on 5 June 2000;

CONSIDERING that in the interest of justice and in the particular circumstances of the case, the Chamber, *proprio motu*, has decided to consider the Defence's Reply and Brief in Support;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69, 75 and Rule 72 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

767

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 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.

Reply by the Defence

5. Defence for Rwamakuba submits, *inter alia*, that the Prosecutor has not sufficiently identified the "potential witnesses" for which protective measures are sought, nor has she sufficiently and precisely demonstrated that protection is necessary in respect of each witness considering that protection is granted only in exceptional circumstances according to Rule 69.

6. Defence for Rwamakuba specifically objects to the measures provided for in paragraphs 3(e) and 3(f) of the Motion as they restrain unwarrantedly the Defence.

7. As to the order sought in paragraph 3(h), the seven days period to reveal the identity of the witness before the witness is called to testify at trial is not sufficient enough for the Defence to prepare its case. Considering the problems particular to Rwanda, a period longer than 30 days should apply to the disclosure obligation.

8. Defence concedes that the orders sought in paragraphs 3(a), 3(b), 3(c), 3(d), 3(g), 3(i) and 3(j) are appropriate if the circumstances so justify them.

768

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

10. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses on 20 November 1998) quoting the findings of The Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in the *Prosecutor v. Tadic*, IT-94-I-T (Decision on the Prosecutor's Motion 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.

11. After having examined the information contained in the various documents and reports that the Prosecutor has annexed to in his brief to support the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation prevalent in Rwanda and neighboring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Consequently, the Chamber deems justified the measures required by the Prosecution of Paragraphs 3(a), 3(c), 3(d), 3(e) of the Motion. The Chamber is not of the view that the measure sought in paragraph 3(e) could prevent the reasonable and necessary preparation of the Defence.

On point 3(f) of the Motion

12. The Chamber takes note of the Defence's submissions. The Chamber grants 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. ***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.***

769

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 its case would be impaired by a seven days disclosure period, the Chamber considers that the period sought 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 the case, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

16. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (*Prosecutor v. Semanza*, ICTR-97-21-I, (10 December 1998); *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000); *Prosecutor v. Nsabimana and Nteziryayo*, ICTR, (21 May 1999);).

17. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in *Prosecutor v. Muhimana*, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

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

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

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

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

Arusha, 22 September 2000

Laïty Kama
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)

770



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

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

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");

- 77
- (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;

772

- (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;

773

(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.

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

775

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, *propriu 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

776

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

777

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]

718



OR: ENG

TRIAL CHAMBER II

Before:

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

Registrar: Adama Dieng

Date: 2 September 2002

The PROSECUTOR
v.
Hormisdas NSENGIMANA

Case No. ICTR-2001-69-T

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

The Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Gregory Townsend
Adesola Adeboyejo
Faria Rekkas

Duty Counsel for Nsengimana:

Bharat Chadha

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

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

BEING SEIZED of:

- (i) the "Prosecutor's Motion for Protective Measures for Victims and Witnesses,"

of 15 May 2002 to which are attached fourteen (14) annexes (the "Motion");

(ii) the "Reply to the Prosecutor's Motion for Protective Measures for Victims and Witnesses", of 14 June 2002 (the "Defence Response");

(iii) The "Prosecutor's Response to Nsengimana's Reply to the Prosecutor's Motion for Protective Measures" filed on 20 June 2002 (the "Prosecutor's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), particularly Article 21 and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69, 75 and 79 of the Rules;

CONSIDERING that the Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Prosecutor's Submissions

1. The Prosecution seeks protective measures for its potential witnesses before they testify because there is real and substantial danger that victims and potential Prosecution witnesses will be threatened assaulted or killed if their identities are made known. The Prosecutor submits that the danger described threatens not only witnesses living in Rwanda, but also those living in other countries on the continent of Africa and outside of Africa. The Prosecution thus seeks protective measures for:

(i) Victims and potential prosecution witnesses who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;

(ii) 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

(iii) Victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures as was the case in *Prosecutor v. Musabyimana*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002.

2. In support of its request, the Prosecution relies upon the documents attached to its Motion, which outline the security situation for victims and potential Prosecution witnesses. In the Affidavit of Commander Samuel Akorimo, dated 9 May 2002, the affiant attests that, "[w]itnesses [being residents of Butare Province and its environs] who have been selected to testify in the ICTR case of the *Prosecutor v. Hormidas Nsengimana* experience and continue to experience fear of reprisals for their impending testimony." On 25 March 2002, *Hirondelle* Press reported that three witnesses who testified in the trial of *Prosecutor v. Kajelijeli* have received death threats causing them to seek refuge in Kigali where they have no homes, close relatives or means of survival. In a BBC News Online report of 2 March 1999, it is reported that, "[c]lose to five years on, the Interahamwe militia are still fighting their own war, sometimes inside Rwanda but now more often just across the border."

3. In order to provide protection for these victims and potential prosecution witnesses, the Prosecutor requests the Trial Chamber to issue the following twelve (12) orders:

780

[a] An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described herein after be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses bear the pseudonyms: **CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH** 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 prosecution witnesses described in measure [a] above, be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with established procedure and only in order to implement protective measures for these individuals;

[c] An order requiring that any names, relations, addresses, whereabouts of and any other identifying information concerning such victims and potential prosecution witnesses contained in existing records of the Tribunal be placed under seal;

[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 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 and any appeal;

[e] An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or information contained in any documents, or any other information which could reveal or lead to the identification of any individuals specified in measure [a] above, to any person or entity other than the Accused, assigned Counsel or other persons the Registry designates as working on the Defence team;

[f] An order requiring the Defence to provide to the Chamber and the Prosecutor a designation of all persons working for the Defence who, pursuant to measure [a] above have access to any information referred to in measures [a] through [d] above and requiring the Defence to advise the Chamber in writing of any changes in the composition of the Defence team and requiring the Defence to ensure that any member departing the Defence team has remitted all materials that could lead to the identification of persons specified in measure [a] above;

[g] An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witnesses at any time or place without leave of the Chamber;

[h] An order prohibiting that disclosure to the Defence of the names, addresses, relations, 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 times as the Trial Chamber is assured that the witnesses are protected. Provided that protective measures are put in place, all redacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to 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;

781

[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 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] An order prohibiting any person working for the Defence 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 person working for the Defence from personally possessing any material which includes or might lead to discovery of the identity of any protected witness.

Defence's Submissions

4. The Defence objects to the Motion submitting that because the Accused is a Roman Catholic priest who is not affiliated with the military or the government, there is no real or substantial danger to victims and potential witnesses.

5. The Defence notes that the witnesses listed for whom the Prosecutor seeks protective measures all reside in Rwanda. The Defence submits that the material adduced by the Prosecution to support the volatile security situation is outdated insofar as it pertains to the period between 1997 and 2001. Other documents dated 2002 such as the 25 March 2002 *Hirondelle* Press article entitled "Survivors Accuse 14 Defence Investigators of Genocide Crimes" mentions people who occupied high positions in government, and the Accused is not mentioned among them. Similarly, the affidavit of Commander Samuel Akorimo does not give any description of the Butare region and the allegations of fear described therein are vague and without basis.

6. The Defence further submits that because the Accused has not been assigned Counsel and is thus represented by Duty Counsel, measures [e], [f], [g], [h], [i], [j] and [k] are improper and premature, and any order passed in that respect will be unfair and unjust.

HAVING DELIBERATED

7. The Chamber notes that the Prosecutor brings the Motion pursuant to Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules.

8. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely in Rules 69 and 75 of the Rules. Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber *proprio motu* or at the request of either party or of the victims or witnesses concerned or of the Tribunal's Witness and

Victims Support Section (the "WVSS"), may order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

9. Rule 69 of the Rules *inter alia* provides that, in 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.

10. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute, shall therefore order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

11. In order to establish the exceptional circumstances, the Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses" rendered on 13 July 1998 (the "Rutaganda Decision"), at para. 9, that, "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses." The Chamber further recalls its findings in *Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-T, "Decision on the Defence Motion for Protective Measures for Witnesses" of 18 September 2001, that to determine the appropriateness of each protective measure, the Chamber must be satisfied that, "[a]n objective situation exists whereby the security of the said witness is or may be at stake."

12. In this case, the Chamber takes note of the annexes to the Motion, which the Prosecutor uses to describe a particularly volatile security situation at present for victims and potential witnesses who may have, in one way or another, witnessed the events of 1994 in Rwanda. The Prosecutor submits that this situation affects victims and potential witnesses who reside in Rwanda, neighbouring countries such as Uganda, Burundi and the Democratic Republic of Congo (the "DRC"), other parts of Africa and outside of Africa. The Chamber notes that although the Defence maintains that documents attached in support of the Motion date between 1997 and 2001, nonetheless, the documents dating 2002 indicate that there is currently great risk. In particular the Affidavit of Commander Samuel Akorimo states in connection with this case that "[in] the provinces of Gisenyi, Ruhengeri, Kibuye, and Cyangugu [...] ICTR prosecution witnesses who reside in [those] provinces and ICTR prosecution witnesses who reside in other provinces of the Republic of Rwanda face a very high potential of reprisals [...] in the form of death threats and actual physical harm [...] for their participation in ICTR processes."

13. On the basis of the aforementioned affidavit, the Chamber considers that the Prosecutor has indeed demonstrated the volatile situation, which could affect victims and potential witnesses residing in Rwanda. [1] Similarly, the Chamber, after noting the attachments to the Motion, in particular the article of 7 June 2001 on the Rwandan Government's Official website entitled "Interahamwe Killers Launch New Attacks on Rwanda," is of the opinion that this volatile situation could also affect those victims and potential witnesses who reside in the neighbouring countries such as Uganda, Burundi and the DRC.

14. Regarding victims and potential witnesses residing in other parts of Africa and outside of Africa, the Chamber notes that the Prosecutor has not provided substantive evidence of threats to their lives. However, the Chamber reiterates its reasoning in a number of its Decisions and holds that, although the Prosecutor has not demonstrated the existence of threats or fears in regard to victims and potential witnesses residing in other parts of Africa and outside of Africa, the present security situation would affect any victim or potential witness even if residing outside the region. [2]

783

15. Bearing in mind the aforesaid, the Chamber shall consider the merits of the specific protective measures sought for victims and potential witnesses as requested in the Motion.

16. As a preliminary matter, the Chamber notes the Defence's specific objections to measures [e], [f], [g], [h] and [i] as being unfair because the Accused has yet to be assigned Defence Counsel. On this issue, the Chamber notes that the Defence has not demonstrated how, if at all, the granting of such measures would be in violation of the rights of an Accused who, though he has not yet been assigned Defence Counsel, has been assigned Duty Counsel. The Chamber thus dismisses the Defence objections to the granting of the above-mentioned measures on that basis specifically.

Regarding measures [a], [b], [c], [d], [e], [f] and [g] for anonymity of the victims and potential witnesses

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as those requested in the Motion in measures [a], [b], [c], [d], [e], [f] and [g].

18. On the issue of anonymity, the Chamber recalls the reasoning in *Prosecutor v. Nsabimana*, Case No. ICTR-97-29-I, "Decision on the Defence Motion to Obtain Protective Measures for the Witnesses of the Defence", rendered on 15 February 2000, (the "Nsabimana" Decision). In the said Decision, the Chamber highlights *inter alia* that, in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear." In the present case, the Chamber, following this reasoning, and considering the submissions of the Prosecutor, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed.

19. The Chamber notes that under measure [a] the Prosecutor seeks the Chamber's order to provide the pseudonyms "CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH [and that] any other additional witnesses should also be assigned pseudonyms, which will be used during the course of the trial." Considering the Chamber's opinion at para. 18 above that there is sufficient showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed, the Chamber finds it proper to grant the Prosecutor's further request to provide the above-mentioned pseudonyms to prosecution witnesses and any other additional witnesses.

20. Consequently the Chamber grants measures [a], [b], [c], [d], [e], [f] and [g], as requested.

Regarding measure [h] on disclosure of the identity of the victims and potential witnesses

21. In regard to measure [h], the Chamber notes that the Prosecutor requests that disclosure of identifying data, which would reveal *inter alia* the identity of potential witnesses, be prohibited to the Defence. However, the Prosecutor further submits "[p]rovided that protective measure are put in place all the redacted statements and identities of witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of trial and no later than 21 days before the testimony of the witness to allow adequate time for preparation of the Defence."

22. The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and conditioned to the implementation of protective measures, as has been some of the jurisprudence of the Tribunal on the timing of disclosure. [3] The Chamber further notes that the Prosecution submits that "21 days before the testimony" is adequate time for the preparation of the

784

Defence.

23. In light of the necessity to strike a balance between the rights of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily withhold identifying information concerning its witnesses and grants the order sought under measure [h].

Regarding measure [i] on the notification to the Prosecution of any contact between Defence and a victim or potential witness

24. As regards measure [i], the Chamber notes the Tribunal's jurisprudence, [4] notably in *Prosecutor v. Nahimana*, "Decision on Defence's Motion for Witness Protection" of 25 February 2000, and grants the said measure requiring the Defence and its representatives who are acting under its instructions to notify the Prosecutor of any request to contact the victims and potential Prosecution witnesses, and that the Prosecutor shall make arrangements for such contacts. Nevertheless, the Chamber finds that it is not necessary for the Defence to notify the Trial Chamber when requesting to contact victims or potential witnesses.

25. Accordingly, the Chamber grants the said request but modifies it by deleting the words, "[t]o the Trial Chamber or a Judge thereof."

Regarding measure [j] on assignment of pseudonyms to victims and potential witnesses

26. As regards measure [j], the Chamber recalls that such a request has been made under measure [a]. The Chamber therefore denies this measure as it has already been requested and granted.

Regarding measure [k] on prohibiting the Defence and the Accused from making a determination of the identity of a victim or potential witness

27. As regards the requests made in measure [k], the Chamber recalls its jurisprudence [5], to the effect that granting the said measure will not in any way lessen either party's ethical obligations. The Chamber, therefore, grants the order stipulated in measure [k].

Regarding measure [l] on prohibiting the Accused from possessing material which might lead to the discovery of the identity of a victim or potential witness

28. As regards the request made in measure [l], the Chamber notes that this measure conflicts with measure [e]. Measure [e] assumes that the Accused and the Defence have in their possession documents or information which could reveal the identity of victims or potential witnesses and prohibits their sharing these documents with anyone other than members of the Defence and the Accused. Measure [l], however, prohibits the Accused and the Defence from possessing documents that reveal the identity of victims and potential witnesses. The Chamber notes that measure [l] does not specify what should be done by the Accused and the Defence once they have in their possession the documents. Accordingly, the Chamber denies the request made in measure [l].

As to When the Requested Protective Measures Take Effect

29. The Chamber decides, in conformity with the Tribunal's well-established jurisprudence, that such protective measures are to be granted on a case by case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded to the WVSS. The Chamber adds that

75

the Prosecutor shall provide the WVSS with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Prosecutor's requests and orders that:

I Measures [a], [b], [c], [d], [e], [f], [g], [h] and [k] of the Motion be made for victims and potential prosecution witnesses.

IV **MODIFIES** measure [i] as follows, "An order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, 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."

DENIES the orders sought in measures [j] and [l].

Arusha, 2 September 2002

William H. Sekule

Winston C. Matanzima Maqutu

Arlette Ramaroson

Presiding Judge

Judge

Judge

(Seal of the Tribunal)

[1] See Para 11 of the Affidavit of Commander Samuel Akorimo, which specifies the following witnesses as deserving protective measures under the Rules; "CAN, AO, CAP, CAQ, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG and CBH being residents of Butare province and its environs."

[2] See "Decision on Pauline Nyiramasuhuko's Motion for Protective measures for Defence Witnesses and Family members," of 20 March 2001 in the case of *the Prosecutor v. Nyiramasuhuko, et al* (the "Nyiramasuhuko Decision"); "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002 in the case of *the Prosecutor v. Musabyimana* (the "Musabyimana Decision").

[3] See *Kamuhanda*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 7 July 2000; *Kajelijeli*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 6 July 2000; the Nyiramasuhuko Decision; *Nzirorera*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 12 July 2000; the Musabyimana Decision.

[4] See also the Rutaganda Decision and the Nyiramasuhuko Decision.

[5] See "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 17 June 1999 in the *Prosecutor v. Nsabimana and Nteziryayo*; the Nyiramasuhuko Decision; the Musabyimana Decision.



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-95-1B-I
9-MARCH-2000
(619-614)
TRIAL CHAMBER III

786

EX

ORIG: Eng.

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 9 March 2000

ICTR
COHEN / JUDGE
IN CHARGE
10 MAR - 9 PM 14: 29

THE PROSECUTOR
versus
MIKA MUHIMANA

Case No. ICTR-95-1B-I

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

Counsel for the Prosecutor:
Mr. Charles Adeogun-Phillips
Mr. Wallace Kapaya
Ms. Boi-Tia Stevens

Counsel for Mika Muhimana:
Prof. Nyabirungu mwene Songa

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: JEAN-PELE FOMBE
SIGNATURE: [Signature] DATE: 9.3.2000

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

SITTING as Trial Chamber III, composed of Presiding Judge Lloyd George Williams, Judge Yakov Ostrovsky, and Judge Pavel Dolenc (the "Trial Chamber" or the "Chamber");

NOTING the Indictment dated and filed on 22 November 1995 against Mika Muhimana (the "Accused") and confirmed on 28 November 1995 by Judge Navanethem Pillay;

BEING NOW SEIZED of a Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 13 December 1999 (the "Motion");

HAVING HEARD the arguments of the parties on 2 March 2000.

PLEADINGS BY THE PARTIES

Prosecutor's Submissions

1. The Prosecutor submitted that the persons for whom protection is sought fall into three categories: victims and potential prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential prosecution witnesses who reside outside Rwanda in other African countries and who have not affirmatively waived their right to protective measures; and victims and potential prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.
2. For the victims and potential prosecution witnesses who fall into these categories, the Prosecutor, in the Motion, requested the following orders:
 - a. An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses falling into the categories specified in paragraph 2 of the Motion (paragraph 1 above) be sealed by the Registry and not included in any records of the Tribunal.
 - b. An order that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses falling into the categories specified in paragraph 2 of the Motion (paragraph 1 above) 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. An order requiring, to the extent that any names, addresses, whereabouts of, and 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 those documents.

- d. An order prohibiting the disclosure to the public or the media, of the names, addresses, whereabouts of, and 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. An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any document or any information contained in any document, or any other information which could reveal or lead to the identification of any individual falling into the categories specified in paragraph 2 of the Motion (paragraph 1 above) to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, as 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) of the Motion (paragraph 2(e) above), have access to any information referred to in paragraphs 3(a) through 3(d) of the Motion (paragraphs 2(a) through 2(d) above) and requiring Defence Counsel to advise the Chamber in writing of any change 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 falling into the categories specified in paragraph 2 of the Motion (paragraph 1 above).
- 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, 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 material 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 unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.
- 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 witness 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 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 until such time that the witness decides otherwise.
3. At the hearing, the Prosecutor modified her request made in paragraph 3(f) of the Motion (paragraph 2(f) above) to require Defence to provide a designation of all persons working on the immediate Defence team with access to certain information to the Registrar rather than to the Prosecutor and the Trial Chamber.
4. Additionally, the Prosecutor modified her request set out in paragraph 3(h) of the Motion (paragraph 2(h) above) so that the Prosecutor would not be required to reveal the identifying data to the Defence sooner than twenty-one (21) days, rather than seven (7) days, before the witness is to testify at trial.

Defence Response

1. The Defence objected only to the seven (7) day period proposed in the Prosecutor's request for an order for non-disclosure of identifying data, made in paragraph 3(h) of the Motion (paragraph 2(h) of the Prosecutor's Submissions above). Once the Prosecutor agreed to modify the seven day period to twenty-one (21) days, the Defence raised no objections to the protective measures sought by the Prosecutor.

DELIBERATIONS

1. Article 21 of the Statute of the Tribunal (the "Statute") and Rules 69 and 75 of the Rules of Procedure and Evidence of the Tribunal (the "Rules") provide for protection of victims and witnesses. Rule 75(A) of the Rules establishes that a Trial Chamber may "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." Article 20 of the Statute sets out the rights of the accused, including, *inter alia*, the right "[t]o have adequate time and facilities for the preparation of his or her defence..." (Art. 20(4)(b)) and the right "[t]o examine, or have examined, the witnesses against him or her..." (Art. 20(4)(e)). The Trial Chamber is sensitive to the need to safeguard both, the rights of the accused and the security and privacy of victims and witnesses. It is with this in mind that the Chamber considers the Prosecutor's present requests.
2. The Trial Chamber notes that the Defence does not object to the granting of the protective measures proposed by the Prosecutor. Therefore, the Chamber will only discuss certain modifications that it will make to the sought orders.
3. The Chamber will grant the Prosecutor's request made in the latter part of paragraph 3(f) of the Motion, namely that "Defence Counsel [be required] to ensure that any member

790

departing from the Defence team has remitted all documents and information that could lead to the identification of [the protected] persons....” However, the Chamber modifies the proposed order so that the words “all documents and information” are replaced with the words “all materials”. This modification is made in recognition of the fact that the term “information” could be understood to include intangibles that, naturally, cannot be remitted.

4. While the Defence did not object to the order sought by the Prosecutor in paragraph 3(j) of the Motion, the Chamber cannot accept that it would be the witness who could have the ultimate control over how long a pseudonym is to be used. Were that the case, the witness could insist on the use of the pseudonym even after the Tribunal would consider it appropriate to cease its use. For this reason, the Chamber modifies the order proposed in paragraph 3(j) of the Motion by deleting the words “...until such time that the witness decides otherwise” and replacing them with the words “until such time as the Tribunal orders otherwise.”

FOR THESE REASONS, THE TRIBUNAL

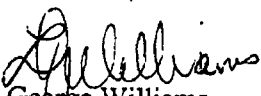
1. **GRANTS** the measures sought by the Prosecutor in paragraphs 3(a) through 3(e), 3(g), and 3(i) of the Motion.
2. **GRANTS**, the Prosecutor’s requests made in paragraph 3(f) of the Motion, as modified at the hearing and by the Trial Chamber above, so that the order reads: “The Defence is required to provide to the Registrar a designation of all persons working on the immediate Defence team who will, pursuant to paragraph 3(e) of the Motion, have access to any information referred to in paragraphs 3(a) through 3(d) of the Motion and to advise the Registrar in writing of any change in the composition of this team, and the Defence Counsel is further required 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 of the Motion.”
3. **GRANTS**, with the modifications made at the hearing and by the Chamber, the Prosecutor’s request made in paragraph 3(h) of the Motion for an order prohibiting the disclosure, in advance, to the Defence of the names, addresses, whereabouts of, and any other identifying data, including any information in the supporting material on file with the Registry, which would reveal the identities of victims or potential prosecution witnesses, and requiring the Prosecutor to make such a disclosure, including of any material provided to the Defence in a redacted form, not later than twenty-one (21) days before the witness is to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.
4. **GRANTS**, the Prosecutor’s request made in paragraph 3(j) of the Motion, as modified above, for an order requiring the Prosecutor to 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,

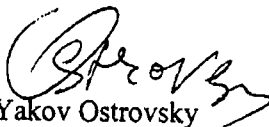
Case No. ICTR-95-1B-I

791

and the public until such time as the Tribunal orders otherwise.

Arusha, 9 March 2000.


Lloyd George Williams
Presiding Judge


Yakov Ostrovsky
Judge

Pavel Dolenc
Judge



(Seal of the Tribunal)





International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

792

TRIAL CHAMBER III

ORIG: Eng.

Before: Judge Yakov Ostrovsky, designated by Trial Chamber III from among its members pursuant to Rule 73(A) of the Rules of Procedure and Evidence

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 19 May 2000

ICTR
COURT REGISTRY
RECEIVED
2000 MAY 19 A 11:44

THE PROSECUTOR
versus
GRATIEN KABILIGI
and
ALOYS NTABAKUZE

Case No. ICTR-97-34-I

DECISION ON MOTION BY THE OFFICE OF THE PROSECUTOR FOR ORDERS
FOR PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

Counsel for the Prosecutor:
Mr. Chile Eboe-Osuji
Mr. Frederic Ossogo
Ms. Holo Makwaia

Counsel for the Accused:
Mr. Jean Yaovi Degli
Mr. Clemente Monterosso

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

SITTING in the person of Judge Yakov Ostrovsky, designated by Trial Chamber III from among its members pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules");

BEING SEIZED of a Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, dated and filed on 12 July 1999 (the "Motion");

HAVING HEARD the parties on 17 May 2000.

PLEADINGS BY THE PARTIES

Prosecutor's Submissions

1. The Prosecutor submitted that the persons for whom protection is sought fall into three categories: victims and potential prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential prosecution witnesses who reside outside Rwanda in other African countries and who have not affirmatively waived their right to protective measures; and victims and potential prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.
2. For the victims and potential prosecution witnesses who fall into these categories (the "Protected Persons"), the Prosecutor, in the Motion, requested the following orders:
 - a. An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all Protected Persons be sealed by the Registry and not included in any records of the Tribunal, and an order that such identifying information be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedures and only in order to implement protection measures for these individuals.
 - b. An order requiring that any names, addresses, whereabouts of, and any other identifying information concerning the Protected Persons that are contained in the records of the Tribunal, that such identifying information be expunged from those documents.
 - c. An order prohibiting the disclosure to the public or the media of any data in the supporting material, or any other information on file with the Registry which would reveal the identity of the Protected Persons, and this order shall remain in effect after the termination of this trial.
 - d. An order prohibiting the photographing, audio and/or video recording, or

7/11/11

sketching of any Protected Person at any time or place without the leave of the Trial Chamber and the parties;

- e. An order requiring that the Prosecutor designate a pseudonym for each Protected Person, which will be used whenever referring to each such person in Tribunal proceedings, communications and discussions between the parties to the trial, and the public.
- 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 have access to any information which identifies, or could lead to the identification of, any Protected Person and requiring Defence Counsel to advise the Trial Chamber and the Prosecutor in writing of any change in the composition of this team, and further 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 the Protected Persons.
- g. An order prohibiting the immediate Defence team and the Accused (Gratien Kabiligi and Aloys Ntabakuze) from sharing, discussing or revealing, directly or indirectly, any document or any information contained in any document, or any other information which could lead to the identification of any Protected Person to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, as designated by the assigned Counsel or the Accused.
- h. An order prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of the Protected Persons, and any other information on file with the Registry, until such time as the Trial Chamber is assured that the Protected Persons have been afforded an adequate mechanism for protection and permitting the Prosecutor to disclose any material provided to the Defence in a redacted form until further orders of the Trial Chamber.
- 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 Person 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 prohibiting any member of the immediate Defence team from attempting to make an independent determination of the identity of any Protected Person or encouraging or otherwise facilitating any person to attempt to determine the identity of any such person.

795

- k. An order prohibiting the Accused from personally possessing any material which includes or might lead to discovery of the identity of any protected witness, including but not limited to any copy of a statement of a witness even if the statement is in a redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and further, instructing the Detention Center authorities to ensure compliance with the prohibition set out in this paragraph.

Defence Response

1. The Counsel for the Accused Kabiligi did not oppose the requested protective measures with the exception of the measure sought in paragraph 3(k) of the Motion which the Counsel requested the Chamber not to grant.
2. The Counsel for the Accused Ntabakuze submitted that in order to prepare an effective defence, it is necessary to have the identities of Prosecution witnesses well in advance (perhaps six months) of the trial.

FINDINGS

1. Article 21 of the Statute of the Tribunal (the "Statute") and Rules 69 and 75 of the Rules provide for protection of victims and witnesses. Rule 75(A) of the Rules establishes that a Judge may "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." Article 20 of the Statute sets out the rights of the accused, including, *inter alia*, the right "[t]o have adequate time and facilities for the preparation of his or her defence..." (Art. 20(4)(b)) and the right "[t]o examine, or have examined, the witnesses against him or her..." (Art. 20(4)(e)). The Tribunal is sensitive to the need to safeguard both, the rights of the accused and the security and privacy of victims and witnesses. It is with this in mind that the Prosecutor's present requests are considered.
2. The order for disclosure to the Prosecutor of the identities of all members of the Defence team sought in paragraph 3(f) of the Motion is unnecessarily restrictive and its grant cannot be justified in the absence of further evidence. The requested order will be modified and granted in the following form: an order requiring the Defence to provide to the Registrar a designation of all persons working on the immediate Defence team who will have access to any information which identifies, or could lead to the identification of, any Protected Person and to advise the Registrar in writing of any change in the composition of this team
3. The Prosecutor's request made in the latter part of paragraph 3(f) of the Motion, namely that "Defence Counsel [be required] to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the

796

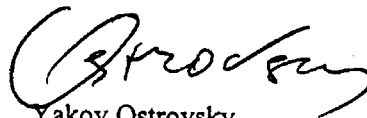
identification of' the Protected Persons has merit. This requested order will be granted with the modification that the words "all documents and information" are replaced with the words "all materials". This change is made in recognition of the fact that the term "information" could be understood to include intangibles that, naturally, cannot be remitted.

4. The order sought by the Prosecutor in paragraph 3(h) of the Motion will be granted in the following form: an order prohibiting the disclosure, in advance, to the Defence of the names, addresses, whereabouts of, and any other identifying data, including any information in the supporting material on file with the Registry, which would reveal the identities of the Protected Persons, and requiring the Prosecutor to make such a disclosure, including of any material provided earlier to the Defence in a redacted form, not later than twenty-one (21) days before the protected witness is to testify at trial, unless the Trial Chamber decides otherwise pursuant to Rule 69(A) of the Rules. The order in such form will respect the rights of the Accused and will keep the identifying data from the Defence only so long as necessary for the protection of victims and witnesses.
5. An order prohibiting the Accused from possessing any material that includes or might lead to discovery of the identity of any protected witness is unnecessary since the order sought in paragraph 3(g) of the Motion already provides sufficient protection in this regard. Consequently, the Prosecutor's request made in paragraph 3(k) of the Motion will be denied.

FOR THESE REASONS, THE TRIBUNAL

1. **GRANTS** the measures sought by the Prosecutor in paragraphs 3(a) through 3(e), 3(g), and 3(i) through 3(j) of the Motion.
2. **GRANTS** the Prosecutor's requests made in paragraphs 3(f) and 3(h) of the Motion, as modified above.
3. **DENIES** the Prosecutor's request made in paragraph 3(k) of the Motion.

Arusha, 19 May 2000.


Yakov Ostrovsky
Judge

[Seal of the Tribunal]



ICTR-96-10-1
(896-893)

797

UNITED NATIONS  NATIONS UNIES
International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Erik Møse
Registry: Ms Aminatta N'Gum
Decision of: 22 August 2000

ICTR
JUDICIAL RECORDS/PROCESSES
RECEIVED

2000 AUG 22 P 12:17

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA AND GERARD NTAKIRUTIMANA
(ICTR-96-17-T)

DECISION ON WITNESS PROTECTION

The Office of the Prosecutor:
Wallace Kapaya
Charles Adeogun-Phillips

Counsel for Elizaphan Ntakirutimana:
Mr Ramsey Clark

Counsel for Gerard Ntakirutimana:
Mr Edward Medvene

6.1

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the 'TRIBUNAL'),

SITTING as Trial Chamber I, composed of Judge Erik Møse, pursuant to Rule 75 (A) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the motion, filed on 6 April 2000, by the Prosecution, for orders for protective measures for victims and witnesses to crimes alleged in the Indictment, and the brief in support;

CONSIDERING the Defence brief in response to the Prosecution's request for orders for protective measures, filed on 14 July 2000, and the Defence request in response that protection of witnesses sought therein be co-extensive with Defence witnesses;

CONSIDERING the letter dated 21 August 2000, from the Prosecution to the Trial Chamber;

CONSIDERING Articles 20 and 21 of the Statute (the "Statute") and Rules 66, 69 and 75 of the Rules;

HEREBY DECIDES the Prosecution motion and Defence request on the basis of the written briefs of the Parties.

The Motions

1. The Prosecution, on 6 April 2000, filed its motion for orders for protective measures for victims and witnesses to crimes alleged in the Indictment. In their joint response to the Prosecution motion, the Defence did not object to the protective measures requested by the Prosecution provided that the Defence witnesses be afforded the same protective measures as the Prosecution witnesses. Having been asked by the Chamber to comment on the Defence request, the Prosecution, in its letter of 21 August 2000, stated that it had no objection in principle. Therefore, the Trial Chamber will consider herein a request for protective measures for witnesses from both the Prosecution and the Defence teams.

The Legal Basis

2. The Parties' requests are based on Article 21 of the Statute and Rules 69 and 75 of the Rules. Article 21 of the Statute obliges the Tribunal to provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim's identity. To this end, Rule 75 of the Rules provides, *inter alia*, that a Judge or a Chamber may *proprio motu*, or at the request of either party, or of the victims or witnesses concerned, or of the Tribunal's Victims and Witnesses Support Unit, order appropriate measures for the privacy and protection of victims or witnesses, provided that these

P. M.

799

measures are consistent with the rights of the accused.

3. The Tribunal shall order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of victims and witnesses so as to ensure a fair determination of the matter before it. Measures for the protection of witnesses are granted on a case by case basis, and take effect once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Unit. In order to determine the appropriateness of such protective measures, the Tribunal shall evaluate the general security situation affecting the witnesses concerned.

4. In this case, the attachments presented by the Prosecution in support of its motion, demonstrate the particularly volatile security situation in Rwanda and in neighbouring countries, at the present time. This volatile security situation endangers the lives of those persons who may be called as witnesses at trial.

The Non-disclosure of the Identity of Witnesses

5. The Parties request the non-disclosure of the identity of their witnesses. Pursuant to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise. However, this is subject to Rule 69 (C) whereby the identity of the witness shall be disclosed in sufficient time prior to trial in order to allow adequate time for preparation of the Prosecution and Defence cases.

6. In relation to the non-disclosure of witness identity, it follows from established case law of the Tribunal, that for a witness to qualify for the protection of his or her 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 underscore this fear. Moreover, that the judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.

7. The Prosecution motion, and the Defence request for co-extensive protective measures, are well founded and the Trial Chamber holds that there are good grounds for protective measures for Prosecution and Defence witnesses. Furthermore, the Trial Chamber finds that there exist exceptional circumstances warranting the non-disclosure of the identity of witnesses.

8. The measures requested have been examined in light of the current practice of the Tribunal.

h.w.

**THE TRIBUNAL
HEREBY DECIDES that:**

1. The names, addresses and other identifying information concerning the Parties' witnesses shall be forwarded by the Parties, to the Victims and Witnesses Support Section of the Tribunal, in confidence, and shall be kept under seal by the Registry and not be included in any public records of the Tribunal.
2. Where the names, addresses, locations or other identifying information concerning the Parties' witnesses appear in the Tribunal's public records, this information shall be expunged from the records.
3. The names, addresses, locations and other identifying information of the Parties' witnesses contained in the Parties' trial materials, shall not be disclosed to the public or to the media.
4. The Parties shall not disclose, or reveal any document or information identifying the witnesses protected by this order, to anyone except members of the Parties' immediate team or the accused.
5. No photographs, audio or video recordings or broadcastings, or sketches of witnesses protected by this order may be taken, without leave of the Trial Chamber and the Party concerned.
6. The Parties shall be permitted to designate pseudonyms for each of their witnesses for use in the proceedings of the Tribunal and during discussions between the Parties.
7. Counsel for the Parties, and any representative acting on their behalf, shall notify the other Party prior to any contact with the witnesses of that other Party, and the other Party shall make arrangements for such contacts.
8. The Parties are authorised to withhold disclosure of the identity of the witness and to temporarily redact their names, addresses, locations and other identifying information from the supporting material and other disclosure on file with the Registry, until such time as the witnesses are under the protection of the Tribunal.

RECALLS that, pursuant to Rule 69 (C) of the Rules, the identity of the witnesses shall be disclosed to the other Party, in sufficient time prior to the trial in order to allow adequate time for the preparation of the case.

Arusha, 22 August 2000

Erik Møse
Erik Møse
Judge



801

ICTR
CRIMINAL REGISTRY
RECEIVED



UNITED NATIONS / NATIONS UNIES

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

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

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

A handwritten signature in black ink, appearing to be 'K. N. P.' or similar.

802

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



84

Case No. ICTR-97-29-I

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

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

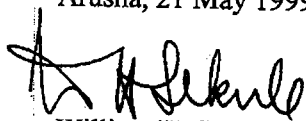
GRANTS the measures requested in paragraphs (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l) of the Prosecution motion;

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

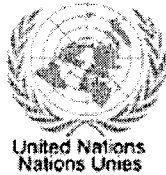


Yakov Ostrovsky
Judge



Tafazzal H. Khan
Judge

(Seal of the Tribunal)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

806

OR: ENG

TRIAL CHAMBER II

Before:

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

Registrar: Mr Adama Dieng

Date: 27 March 2001

The PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

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

The Office of the Prosecutor:

Japhet Mono
Ibukunolu Alao Babajide
Manuel Bouwknecht

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

Counsel for Ntahobali:

René Saint Léger
Michael Bailey

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

SITTING as Trial Chamber II (the "Chamber"), composed of Judges Laïty Kama, presiding, William H.

807

Sekule, and Mehmet Güney;

NOTING that the Prosecutor filed on 11 December 1997 a "Motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in the Indictment No. ICTR-97-21-I", but that a decision on the matter could not be found in the judicial record of the Tribunal;

NOTING that the Chamber was seized of a "Motion to re-file motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in Indictment No. ICTR-97-21-I", filed on 15 November 2000;

NOTING the "Decision on the Prosecutor's Motion to re-file motion to order protective measures for the victims and witnesses", dated 27 February 2001 (the "Decision of 27 February 2001");

BEING NOW SEIZED of the "Motion by the Prosecutor for protective measures for victims and witnesses", filed on 6 March 2000, (the "Motion");

CONSIDERING the "Brief in support of the Motion by the Prosecutor for protective measures for victims and witnesses" (the "Brief"), attached to the Motion;

WHEREAS, acting on the Chamber's instruction, Court Management Section advised the Parties on 15 March 2001 that the Motion would be reviewed on briefs only pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"), and informed Counsel for the Defence of a deadline of 21 March 2001 to reply to the Motion;

CONSIDERING the "Réponse à la requête du Procureur aux fins d'obtenir des mesures de protection pour les victimes et témoins dans le dossier de Pauline Nyiramasuhuko" filed on 20 March 2001;

NOTING that Counsel for Ntahobali did not file any reply to the Motion;

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

SUBMISSIONS OF THE PARTIES

The Prosecutor

1. The Prosecutor requests that the Chamber orders 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 Prosecutor requests in paragraph 4 of the Motion that these persons be provided protection

408

by the following orders:

(a) *That the names, addresses whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses described in Paragraph should 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.*

(b) *Requiring, to the extent that the names, whereabouts of, and other identifying information concerning such victims and potential prosecution witnesses is contained in existing records of the tribunal be expunged from those documents;*

(c) *Prohibiting publication on the Internet as well as 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. An order that this non-disclosure order shall remain in effect after the termination of this trial;*

(d) *Prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly any document or information contained in any documents or any other information (sic) which could reveal or lead to the identification of any individuals specified in Paragraph 3; 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;*

(e) *Requiring the Defence to provide to the Trial Chamber and the prosecutor a designation of all persons working on the immediate Defence team who pursuant to paragraph 4(d) above will have access to any information referred to in paragraphs 4(a) through 4(d) above.*

(f) *Requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of the Defence team and requiring Defence Counsel to ensure that any member departing from the team remits all documents and information that could lead to identification of persons specified in Paragraph 3 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 Trial Chamber and the Prosecutor;*

(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 Trial Chamber is assured that the witnesses have been afforded and adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the defence in a redacted form until such 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 (21) days before the victim or witness is to testify at trial; (sic)*

(i) *That the Accused or his Defence counsel shall make a written request, on reasonable*

809

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 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 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 a redacted form, unless the Accused is, at the time of the possession, in the presence of his assigned Counsel, and instructing the Registry authorities at UNDF to ensure compliance with the prohibition set out in the Paragraph.

3. The Prosecutor has submitted two Affidavits, respectively from Samuel Akorimo and Remi Abdulrahman, dated 6 March 2001, and informative material in Annex A to the Brief on attacks on Tutsi refugee camps in 1997 and 1998. By doing so, the Prosecutor intends to demonstrate that there is a substantial threat to the lives and properties of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed, and also, to all survivors of the genocide.

4. The Prosecutor alleges that these threats affect not only victims and potential witnesses residing in Rwanda but also those living in the rest of the African continent and even outside the continent, due to the presence in those areas of the former Rwandan Armed Forces (ex-FAR), *Interahamwe* groups and former civil servants from the Rwandan government.


5. More specifically, the Prosecutor relies on the risk of violence against victims and potential witnesses in Butare *préfecture*, where rebel infiltrators have freed genocide suspects from detention centres.

6. According to the Prosecutor, the situation in Butare *préfecture* is of an exceptional nature and renders almost impossible the separation between perpetrators and victims of the genocide, so the likelihood of risk and harm from perpetrators to victims is very high.

7. Finally, the Prosecutor recalls that these measures were earlier ordered in respect of the same witnesses that will appear in this joint trial and that it is in the interest of justice and for parity of treatment that these measures should be ordered.

The response by Nyiramasuhuko

8. The Defence reiterates her position as developed in her own Motion for protective measures for witnesses filed on 27 November 2000 that, all potential witnesses who did not waive their right to

protection should be granted protective measures, be they prosecution or defence witnesses. 

As to the Brief

9. Regarding the allegations contained in the Prosecutor's brief, the Defence alleges that victims and potential witnesses of the 1994 events in Rwanda also face threats from the current Rwandan government. She alleges that the Prosecutor did not bring evidence in support of the fact that victims and potential witnesses residing in Rwanda and outside Rwanda would face threats from members of the ex-FAR, *Interahamwe* or former civil servant of the Rwandan government as alleged at paragraphs 3 and 4 of the Brief. The Defence also contends that the allegations of violence against Tutsi refugees in camps are not confirmed by Annex A, lack geographical precision and date back to June 1998 despite the requirements of updated information pursuant to the Decision of 27 February 2001. Consequently, the Defence requests that the allegations contained at paragraphs 3, 4, and 6 of the Prosecutor's Brief be disregarded, if the Prosecutor does not provide supplementary elements.

As to the Affidavit by Samuel Akorimo

10. The Defence contends that this affidavit has already been used by the Prosecutor in the matter of *the Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T. It was then signed by Samuel Akorimo and dated 8 January 2001 whereas in the current Brief, the typed date reads 6 March 2001. Consequently, even if there are slight differences between the two affidavits, the Defence contends that the description of the security situation by the affiant refers to a situation dating back to January 2001, and not March 2001. Moreover, the Defence contends that an affidavit is null and void if not signed and dated by hand by the affiant.

11. Furthermore, the Defence contends that the witnesses referred to in the Affidavit would testify in relation to allegations against her co-Accused Ntahobali, or those who will be tried jointly with her, such as Nsabimana and Kanyabashi, but not specifically in relation to allegations against the defendant herself.

As to measures (h) and (m)

12. The Defence contends that the names of all potential prosecution witnesses should be disclosed to the Defence at the latest during the pre-trial conference to be held on 19 April 2001, pursuant to Rule 67 (A)(i). The Defence submits that this practice was followed in the so called Media and Cyanguu cases.

13. The Defence opposes measure (m) and argues that it violates the Accused's rights set out in Articles 19(1) and 20(4)(b) and (e) of the Statute. The Defence contends that an Accused should have the right to individually possess copies of prosecution witness statements to prepare its defence.

AFTER HAVING DELIBERATED

Legal basis of the Motion

14. Pursuant to Article 21 of the Statute, the Tribunal shall provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, without being limited to, the conduct of in camera proceedings and the protection of the witness's identity. Rule 75 provides, *inter alia* that a Judge or the Trial Chamber may *proprio motu*, or at the request of either party, or of the victims or witnesses or of the Victims and Witnesses Support Section, order appropriate measures for their privacy and protection, provided that these measures are consistent with the rights of the Accused.

15. According to Rule 69, under exceptional circumstances, either of the Parties may apply to a Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise. 811

16. Article 20 of the Statute sets out the rights of the Accused including, *inter alia*, the 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 also recalls Rule 69(C) whereby the identity of a witness shall be disclosed in sufficient time prior to trial to allow adequate time for the preparation of the Defence.

17. Mindful of guaranteeing the full respect of the rights of the witnesses and those of the Accused, the Chamber shall order, pursuant to Rule 75, any appropriate measures for the protection of the victims and witnesses so as to ensure a fair determination of the matter before it. The Chamber shall decide on a case by case basis and the orders will take effect once the particulars and locations of witnesses have been forwarded to the Victims and Witnesses Support Unit.

18. To determine the appropriateness of such protective measures, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information contained in the supporting documents in the Brief. Having considered the Defence's objection, the Chamber has reviewed the Affidavit of Samuel Akorimo dated 6 March 2001 and signed by hand by the affiant, which tends to demonstrate the complexity of the security situation in Butare *préfecture*. The Chamber notes that it contains serious and detailed allegations of violence and threats against witnesses that could come to testify "in this present trial and other trials involving Butare *préfecture*". In that respect, the Chamber notes that the Motion is brought in the matter of *the Prosecutor v. Nyiramasuhuko and Ntahobali*, her co-accused, and that the Motion does not only concern Nyiramasuhuko. The Chamber rejects the Defence's contention that an Affidavit has also to be dated by the affiant to be valid as the signature by the affiant is sufficient and the date need not be hand written. Further, the Chamber notes that the affiant, in his capacity as Commander in charge of the Witness Management Unit of the OTP in Rwanda, stated that he was constantly monitoring security reports prepared by members of his unit. The Chamber is satisfied that in that capacity, the affiant can present an updated assessment of the security situation in Rwanda, and in Butare *préfecture* in particular. The second affidavit by Remi Abdulrahman emphasises the threat levels in several regions of Rwanda due to attacks by infiltrators from the DRC that can also spread in Butare *préfecture*. The Chamber is convinced, on the basis of these documents, that a volatile security situation exists in Rwanda and neighbouring countries, which could endanger the lives of the witnesses who may be called to testify at trial, and therefore justifies warranting protective measures.

19. In relation to documents in support of threats for witnesses residing outside Africa (third category of witnesses according to the Motion (c)), having taken note of the Defence's remarks in that respect, the Chamber considers that the Prosecutor has not provided evidence of threats to the lives of witnesses residing outside of that region. However, the Chamber concurs with its finding in the "Decision on Pauline Nyiramasuhuko's motion for protective measures for Defence witnesses and their family members" filed on 20 March 2001. In that instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears as regards 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".

20. In relation to the non disclosure of witnesses' identity, having reviewed the supporting documents, the Chamber holds that, in the present case, exceptional circumstances do warrant non-disclosure orders based on the fears expressed by these witnesses, and has reviewed the measures requested by the prosecutor in light of the current practice of the Tribunal.

812

21. Pursuant to Rule 75 (B) of the Rules, the Chamber therefore grants measures (a), (b), (d), (e), (i), (g), (j), (k) and (l).

22. The Chamber grants measure (c) but decides, *proprio motu*, to modify the order requesting an order prohibiting in particular "publication on the Internet". In order to prohibit all possible disclosures in any medium, measure (c) should read as follows:

"An order prohibiting the disclosure to the public or publication in the media, including the Internet, 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. An order that this non-disclosure order shall remain in effect after the termination of this trial;"

23. As to measure (h), the Chamber notes a discrepancy between the number of days in which the Prosecutor would be required to reveal the identity of a witness to the Defence prior, between the noun, i.e. "seven" and the number, i.e. "21" mentioned in the Motion. The Chamber concurs with the Tribunal's jurisprudence according to which the deadline for disclosure should be set at least twenty-one days prior to the day in which the witness is to testify at trial, and not in relation to a fixed date in time, considering that the schedule may vary for a variety of reasons (see "Decision on the Prosecutor's Motion for protective measures for witnesses", filed on 6 July 2000, in *the Prosecutor v. Karemera*). The Chamber also recalls that the same order was granted to the Defence for Nyiramasuhuko in its Decision of 20 March 2001. The Chamber therefore grants measure (h) but emphasises that it should read 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 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 and adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the defence in a redacted form until such 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;

24. As to measure (m) opposed by the Defence, the Chamber concurs with the finding of the "Decision on the Prosecutor's Motion for protective measures for victims and witnesses", in the *Prosecutor v. Nsabimana and Nteziryayo*, dated 21 May 1999, deciding that such a request "is overly broad and may impinge Article 20(4)(b) of the Statute". The Chamber therefore denies this measure.

25. Finally, the Chamber recalls that such protective measures are granted on a case by case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded under seal to the Victims and Witnesses Support Section by the Prosecutor

FOR THESE REASONS, THE TRIBUNAL:

GRANTS measures (a), (b), (d), (e), (f), (g), (i), (j), (k) and (l).

PROHIBITS the disclosure to the public or publication in the media including the Internet, 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 (measure c);

813

ORDERS that the identity of the witnesses be disclosed to the Defence twenty-one (21) days prior to the date they come to testify at trial, so as to allow adequate time for preparation of the Defence (measure h).

DENIES measure (m).

Arusha, 27 March 2001,

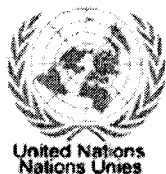
Laïty Kama
Judge, Presiding

William H. Sekule
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)

5/4



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or.: Eng.

TRIAL CHAMBER I

Before: Judge Andréia Vaz

Registrar: Adama Dieng

Date: 25 February 2003

THE PROSECUTOR
v.
PROTAIS ZIGIRANYIRAZO

Case No. ICTR-2001-73-I

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

The Prosecution

Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend
Adesola Adeboyejo

Defence Counsel

John Philpot

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

SITTING as Judge Andréia Vaz, designated by the Trial Chamber pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED, pursuant to Rules 73, 65 and 79 of the Rules of the following documents (the "Motion") a Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Brief in support thereof filed by the Prosecutor on 16 May 2002 and an Addendum to the Motion filed on 10 September 2002;

815

CONSIDERING the Defence Responses to the Motion filed on 28 May 2002 and 16 September 2002;

NOW CONSIDERS the matter solely on the basis of the briefs of the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

1. The Prosecutor requests the Chamber to grant protective measures for potential Prosecution witnesses as warranted by a real and substantial fear that they suffer being threatened, assaulted or killed if their identities are made known. In support of her request, the Prosecutor submits the following material:

i) An Affidavit by Mr Samuel Akorimo, Commander of the Investigations at the Office of the Prosecutor in Kigali, dated 9 May 2001, attributing fears expressed by potential witnesses to the general security situation in Rwanda and specifically in the prefectures of Gisenyi, Ruhengeri, Kibuye and Cyangugu.

ii) Press Releases, Newspapers Articles, Reports published by various Organisations between 1997 and August 2001.

These documents describe the volatile nature of the security situation in Rwanda following the events of 1994. They attribute it mainly to 'Hutu rebels' infiltrating the country in its Western prefectures from neighbouring countries. They describe these rebels as former members of the Rwandan Armed Forces and *Interahamwe* militia members who fled Rwanda after the events of 1994. Some of these documents further relate security concerns in respect of Rwandan witnesses appearing before the Tribunal.

iii) Press Releases, Newspapers Articles and Reports published by various Organisations between 1998 and June 2001.

These documents describe the volatile nature of the security situation in the Great Lakes Region since 1994. They pertain mainly to the war in the Democratic Republic of Congo, as fuelled by the participation of 'Hutu rebels' originating from Rwanda, as described above.

2. The Prosecutor submits that the persons who need protection, in light of the above, are:

i) The victims and potential Prosecution witnesses who presently reside in Rwanda and in other countries in Africa who have not affirmatively waived their right to protective measures;

ii) The victims and potential Prosecution witnesses who reside outside Africa and who have requested protective measures.

3. The Prosecutor requests 13 protective measures for them. Most of these pertain to the non-disclosure of their identity to the public and, until 21 days prior to their appearance at trial, to the Defence and the Accused. These measures will be reviewed in the deliberations.

4. The Defence responds:

(i) That the Prosecutor has not proved the existence of exceptional circumstances

S16

warranting the measures sought, for the following reasons:

- (a) The Chamber cannot rely on Mr Akorimo's Affidavit. Indeed, Mr Akorimo should testify in court pursuant to Rule 90 of the Rules, thus enabling the Defence to cross-examine him. On the other hand, his statement was not sworn before a person authorised to administer oaths. It therefore has no probative value.
- (b) The Affidavit is misleading: some of the witnesses whose pseudonyms are given do not reside in the prefectures of Gisenyi and Ruhengeri or in Kigali-Ville. The Defence believes that SGH is in fact Omar Serushago, a genocide convict currently serving his sentence rendered by the Tribunal in a prison in Mali, and that SGM is currently residing in Paris.
- (c) The other evidence submitted is insufficient and largely irrelevant to any specific danger currently facing Prosecution witnesses. Specifically, the supposedly volatile security situation in Rwanda, in the Great Lakes Region is too broad an argument in support of the specific security situation of the witnesses. It is not either documented by updated evidence.
- (ii) That the measures sought relating to non-disclosure of the witnesses' identity are not effective;
- (iii) That the measures sought should not automatically apply to all witnesses, as identified at paragraph 2 above, but only to those who have been identified at this stage;
- (iv) That the request for a full disclosure 21 days prior to the witnesses' testimony would affect their right to properly prepare themselves in a timely manner prior to the witnesses' appearance at trial.

APPLICABLE LAW

5. Pursuant to Article 21 of the Statute, the Tribunal "shall provide in its rules of procedure and evidence for the protection of victims and witnesses". The Accused's right to a public hearing, envisioned in Article 20 of the Statute, is conditional upon the latter disposition. In accordance with the Statute, Rule 69(A) of the Rules provides that, "in 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" while, pursuant to Rule 75(A) of the Rules, "[a] judge or a Chamber may ... 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."

DELIBERATIONS

6. In accordance with the applicable law above recalled, the Chamber shall bear in mind, in deciding this matter, both the need to safeguard the rights of the Accused and the security and the privacy of those victims and witnesses who are in danger or at risk.

7. In respect of the Defence objection to Mr Akorimo's statement, the Chamber notes that Rule 89(C) of the Rules allows for certain discretion in respect of the admission of evidence, subject to assessment of its probative value. This principle applies at the pre-trial stage. [1] According to the

817

statement, Mr Akorimo is Commander of the Investigations within the Office of the Prosecutor. These functions have not been disputed by the Defence. Mr Akorimo states that, among his duties, he is "required to monitor and assess security developments in the Republic of Rwanda and elsewhere as they may impact upon ICTR investigations and witness protection." [2] In light of the above, the Chamber finds that Mr Akorimo's statement has probative value and is admissible. This objection and the ancillary request for a hearing on the Motion are therefore dismissed.

8. The Chamber declares itself satisfied, on the basis of the material referred-to at Sub-paragraphs 1 (ii) and 1 (iii) above, that the security situation in Rwanda and the Great Lakes region has been volatile from 1994 up to August 2001. As contended by the Defence, however, this material is not relevant in respect of the current situation in Rwanda and the Great Lakes region.

9. The Chamber however derives from Mr Akorimo's statement (See Sub-paragraph 1 (i) above) the persistence of the volatile nature of the security situation affecting Rwanda. It is satisfied that this volatile security situation accounts for fears expressed by the witnesses. It further notes that according to Mr Akorimo, "witnesses who participate in ICTR investigation and prosecution processes face a very high potential for reprisals in the form of death threats and actual physical harm" and that this specifically applies to the witnesses in the present case. [3]

10. Contrary to the Defence objection summarised at paragraph 4 (iii) above, the Chamber declares itself satisfied, in the light of the above, that protective measures are warranted in respect of all the potential Prosecution witnesses presently residing in African countries who have not affirmatively waived their right to protective measures and to all other potential Prosecution witnesses, upon their request. These measures shall therefore not be restricted, as suggested by the Defence, to the potential witnesses identified at this stage by the Prosecutor.

11. Turning to the potential issues raised by the Defence at para. 4 (c) above and, specifically, to the Defence objection in respect of Omar Serushago, the Chamber agrees that the non-disclosure measures herein ordered should not extend to the latter, should he be, as the Defence suggests, a potential Prosecution witness in the present case.

12. The Chamber now turns to the measures sought by the Prosecutor.

13. The Defence generally objects to all measures pertaining to the non-disclosure of the witnesses' identities, on the grounds that such measures have supposedly proved ineffective. This objection lacks specificity. Besides, the Tribunal relies on all concerned parties for proper compliance with the orders rendered. This comprises municipal authorities and the Parties themselves who may seize the Chamber should any issue arise in respect of the execution of any non-disclosure orders herein granted. The Prosecution could further request, as the case may be, other protection measures, if warranted, pursuant to Rule 75 of the Rules. This objection is therefore dismissed.

14. Having reviewed the orders requested by the Prosecutor along with all other Defence objections to these measures, the Chamber decides to grant the Orders below which, in its view, conform to the practice of the Tribunal and strike proper balance between the rights of the Accused and the need to safeguard the protection of the witnesses.

15. The Chamber has dismissed proposed orders aiming at 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, including any copy of a witness prior statement even in redacted form, unless the Accused is, at the time of the possession, in the presence of his

518

Counsel. Such measures were deemed unnecessarily restrictive in respect of the rights of the Accused to have adequate facilities for the preparation of his defence and to be fully involved in his defence.

16. As in the *Mpambara* Case (No. ICTR-2001-65-I, Decision on the Prosecutor's Motion for Witness Protection Measures of 30 May 2002, para. 24) the Chamber however clarifies that the Defence is to personally ensure that the Accused does not disclose to anyone else, other than the immediate Defence team, any material comprising identifying information in respect of protected witnesses, or any such information.

17. Finally, contrary to the Defence objection summarized at para. 4(iv) above, the Chamber has accepted to order non-disclosure of the protected witnesses' identifying details until 21 days prior to their testimony. Indeed, pursuant to Rule 66(A)(ii) of the Rules, the Defence has already received or will receive, on a continuous basis, [4] a copy of the statements of the witnesses the Prosecutor intends to call at trial, subject to redactions aimed at protecting the identity of the witnesses hereby protected. By the time the Defence receives full disclosure, it will therefore already have material on the basis of which to prepare a defence. This is in conformity with Rule 69 (C) of the Rules.

FOR THESE REASONS,

THE TRIBUNAL

HEREBY GRANTS the following protective measures in respect of all victims and Prosecution witnesses or potential Prosecution witnesses presently residing in Africa who have not affirmatively waived their right to protective measures and to all other Prosecution witnesses and potential witnesses, upon their request:

- I. ORDERS** that the names, addresses, whereabouts of, and other identifying information concerning the persons hereby protected, wherever occurring in the records of the Tribunal, be placed under seal by the Registry;
- II. ORDERS** that the names, addresses, whereabouts of, and any other identifying information concerning all persons hereby protected be disclosed only to the Witness and Victims Support Section personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals;
- III. ORDERS** that any names, addresses, whereabouts of, and any other identifying information concerning all persons hereby protected contained in existing records of the Tribunal be placed under seal;
- IV. PROHIBITS** the disclosure to the public or the media of the names, addresses, whereabouts of, and any other information which would reveal the identity of any person hereby protected including, but not limited to, information comprised in the supporting material or otherwise on file with the Registry and **DECIDES** that this order shall remain in effect after the termination of this trial;
- V. PROHIBITS** 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 subject to the above non disclosure orders, to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, as specified in Order VI;
- VI. ORDERS** the Defence:

819

- (i) To provide the Witness and Victims Support Section of the Tribunal with a designation of all persons working on the immediate Defence team who will have access to any protected information pursuant to the non-disclosure Orders above,
- (ii) To advise that Section in writing of any change in the composition of this team and,
- (iii) To ensure that any member departing from the immediate Defence team has remitted all materials that could lead to the identification of any person hereby protected;

VII. PROHIBITS the public and media from making any audio or video recording, as well as taking photographs or making sketches of persons hereby protected, unless authorised to do so by the Chamber, or with the consent of the witness;

VIII. PROHIBITS the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of any of the witnesses or potential witnesses protected pursuant to this Decision, and any such information in the supporting material on file with the Registry, until twenty-one (21) days before the witness testifies at trial;

IX. ORDERS that the Accused or his Defence Counsel, notify the Prosecution in writing and on reasonable notice of their wish to contact any person hereby protected. Upon receipt of such request, the Prosecution shall immediately, with the prior consent of the person sought to be contacted, undertake the necessary arrangements to facilitate such contact. If the person sought to be contacted is under the age of 18, the Prosecution shall obtain the prior consent of a parent or legal guardian of that person, authorising such contact;

X. ORDERS the Prosecutor to designate a pseudonym for each person hereby protected, which will be used whenever referring to him or to her in Tribunal proceedings, communications and discussions between the parties to the trial, and the public;

XI. PROHIBITS any member of the immediate Defence team from attempting to make an independent determination of the identity of any person hereby protected or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

XII. CLARIFIES that Orders V and XI above shall not be construed as preventing the Defence from carrying out normal investigations, in so far as these are not intentionally aiming at unveiling the identity of witnesses known to be protected.

XIII. DISMISSES the Motion and related requests in all other respects.

Arusha, 25 February 2003,

Andrésia Vaz
Judge

(Seal of the Tribunal)

[1] *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-DP, Decision on the Prosecutor's Request for the Extension

of the Suspect's Detention, 4 November 2002, para. 9.

[2] Commander Akorimo's Statement, para. 3.

[3] Commander Akorimo's Statement, para. 8 & 9.

[4] See, in this respect, *The Prosecutor v. Pauline Nyiramasuhuko et Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Décision relative à la requête de la Défense en communication de preuves, para. 40 *in fine*.

820

821

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-94-1-T
Date: 7 May 1997
Original: English

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Opinion and Judgment of: 7 May 1997

PROSECUTOR

v.

DU[KO TADI] a/k/a/ "DULE"

OPINION AND JUDGMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. William Fenrick

Ms. Brenda Hollis
Mr. Michael Keegan

Mr. Alan Tieger

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orié

Mr. Steven Kay
Ms. Sylvia de Bertodano

Mr. Milan Vujin
Mr. Nikola Kostić

29. A Decision on the two Defence motions for protective measures for its witnesses was issued on 25 June 1996, providing for the issue of summonses for 24 Defence witnesses, approving the giving of evidence via video-conference link from Banja Luka in the Republic of Bosnia and Herzegovina for seven witnesses, subject to the necessary equipment and facilities being made available to the International Tribunal, and granting confidentiality to five Defence witnesses and safe conduct to a further four witnesses¹⁶. The Decision granted leave to the Defence to file supplementary affidavits and to amend its motion to request safe conduct instead of orders permitting testimony by video-conference link in respect of certain witnesses, which the Defence duly filed on 30 July 1996. A separate Decision was entered by the Trial Chamber on these amended requests on 16 August 1996, providing for the summoning of a further eight Defence witnesses, granting permission for video-conference link testimony to an additional six witnesses, granting confidentiality in respect of another five Defence witnesses and giving safe conduct to seven other Defence witnesses¹⁷.

30. Applications for protective measures for additional witnesses continued to be made by both parties throughout the proceedings. Orders for the shielding of witnesses from public view and for electronic distortion of the broadcast image of the witness were issued in respect of a further eight witnesses. In some cases, the decision was granted orally and the evidence heard prior to entry of a formal decision. The evidence of 17 witnesses, both Prosecution and Defence, was heard in closed session but in full view of the accused and counsel pursuant to specific orders. Of the four witnesses granted anonymity, two were not called to give evidence and one testified in open session without any protective measures. The remaining witness, Witness H, was also heard in closed session and was shielded from the view of the accused but not from Defence counsel. The written transcript of the testimony of all of these protected witnesses has subsequently been released by order of the Trial Chamber, after review by the party presenting the witness and by the Victims and Witnesses Unit of the International Tribunal and redaction of any material disclosing identity.

31. A third motion to protect Defence witnesses was filed on 12 September 1996 and a Decision issued on 20 September 1996 adding 14 witnesses to the list of those to be

¹⁵ Decision on the Prosecution Motion to Withdraw Counts 2 through 4 of the Indictment Without Prejudice, *Prosecutor v. Tadi*, Case No. IT-94-1, T.Ch. II, 25 Jun. 1996.

¹⁶ Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link, *Prosecutor v. Tadi*, Case No. IT-94-1, T.Ch. II, 25 Jun 1996.

3. Subparagraph 4.3 of the Indictment

452. This subparagraph concerns alleged incidents of transfer and unlawful confinement in the Trnopolje camp. As originally charged, it read as follows:

During the period between 25 May 1992 and 31 December 1992, Du[ko TADI] physically participated and otherwise assisted in the transfer to and unlawful confinement in Trnopolje camp of non-Serb persons from the Kozarac area. Additionally, during the period between September, 1992 and December, 1992, in Trnopolje camp or in the adjacent area, TADI] physically took part or otherwise participated in the killing of more than 30 detainees, including groups of male detainees executed near a white house adjacent to the camp and a group of male detainees executed in a plum orchard adjacent to the camp. TADI] also physically took part or otherwise participated in the torture of more than 12 female detainees, including several gang rapes, which occurred both in the camp and at a white house adjacent to the camp during the period between September, 1992 and December, 1992.

With the exception of the first sentence, the allegations contained in this paragraph were supported only by the testimony of Dragan Opaci}, who was originally given the pseudonym "L". During trial, aspects of his testimony were revealed which led the Prosecution to state in open court that it did not consider Dragan Opaci} a witness of truth and to submit a motion to withdraw these allegations. Thus the only remaining portion of this charge alleges: "During the period between 25 May 1992 and 31 December 1992, Du[ko Tadi] physically participated and otherwise assisted in the transfer to and unlawful confinement in Trnopolje camp of non-Serb persons from the Kozarac area." These remaining allegations are now subsumed in the charges in subparagraph 4.1, already discussed, which charges the accused in part with the "seizure, collection, segregation and forced transfer to detention centres" of non-Serbs in the Kozarac area. The Trial Chamber has already found beyond reasonable doubt that the accused participated in such acts.

(a) The role, if any, of the accused

453. The Trial Chamber has previously considered the testimony of witnesses relevant to this charge, including that of Armin Muj-i}, Azra Bla`evi}, Witness Q and Nasiha Klipi}. In addition, as noted in subparagraphs 4.2 and 4.4, numerous witnesses placed the accused at Trnopolje on several occasions.

92H

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Dorothee de Sampayo Garrido-Nijgh

Decision of: 12 May 1998

PROSECUTOR

v.

MILAN KOVACEVIC

DECISION ON PROSECUTION MOTION TO PROTECT VICTIMS AND WITNESSES

Office of the Prosecutor:

**Ms. Brenda Hollis
Ms. Ann Sutherland
Mr. Michael Keegan**

Counsel for the Accused:

**Mr. Dusan Vucicevic
Mr. Anthony D'Amato**

THE TRIAL CHAMBER

NOTING the Motion To Protect Victims And Witnesses filed by the Office of the Prosecutor ("Prosecution") on 20 April 1998 ("the Prosecution Motion") requesting protective measures for all victims and witnesses who might be called to appear during the trial, the Defence Reply to the Prosecution Motion filed on 1 May 1998 ("the Defence Reply") in which the Defence made various requests for relief, including: (a) a request for pre-trial interviews with Prosecution witnesses; (b) an order that the Prosecution reveal whether any Prosecution witness has received psychiatric or psychological treatment or counselling; and (c) disclosure of any interrogation, counselling, financial or other support provided to the Prosecution witnesses by state security and intelligence services or social and religious organizations; and the Reply To The Defence Reply and Response To Motion For Relief Contained In The Defence Reply, both filed by the Prosecution on 7 May 1998 with leave of the Trial Chamber,

825

NOITNG that the Prosecution has agreed to approach its witnesses and enquire as to their willingness to give pre-trial interviews to the Defence and to enquire as to whether they have received psychiatric or psychological treatment or counselling and to convey that information to the Defence,

HAVING HEARD the arguments of the parties on 11 May 1998 and having reserved its Decision on both the Prosecution Motion and the requests contained in the Defence Reply to a later date,

CONSIDERING the obligation on the Trial Chamber to provide for the protection of victims and witnesses mandated by Article 22 of the Statute of the International Tribunal ("Statute") and by Rule 75 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

CONSIDERING ALSO that in the case of *Prosecutor v. Delalic et al*, Case No. IT-96-21, in a decision of Trial Chamber II dated 18 March 1997, it was held that the Defence does not have any right to obtain information concerning Prosecution witnesses for the purpose of conducting pre-trial interviews, this Trial Chamber endorses that Decision, as there is no right to conduct such interviews: no such right is reflected in Article 21 of the Statute or in Article 14 of the International Covenant on Civil and Political Rights and, as such, the conduct of interviews in these circumstances does not form part of the practice of the International Tribunal, even when acceded to by the Prosecution,

CONSIDERING FURTHER that there is a danger that pre-trial interviews may add further to the distress of victims and witnesses,

PURSUANT to Article 22 of the Statute and to Rule 75 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY GRANTS THE PROSECUTION MOTION, REFUSES THE RELIEF SOUGHT IN THE DEFENCE REPLY, AND ORDERS as follows:

1. The Prosecutor, the accused, his counsel and their representatives shall not disclose to the public, to the media or to family members and associates the identity, whereabouts or any other identifying information of witnesses, except for reasons related to the preparation of their cases;
2. The Prosecutor, the accused, his counsel and their representatives shall not disclose to the public, to the media or to family members and associates the substance, in part or in whole, of the witness statements which the Prosecutor provides pursuant to discovery, except for reasons related to the preparation of their cases;
3. The Prosecutor and the Defence shall each maintain a log indicating the name, address and position of each person or entity which receives a copy of a witness statement, as well as the date of disclosure. If there is a perceived violation of the orders described herein, either the Prosecutor or the Defence shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as the duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure logs, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate;
4. The Prosecutor and the Defence shall instruct those persons who have received a copy of the statements not to reproduce them, under pain of sanction for contempt of the Tribunal, and to return the said documents as soon as they are no longer required;
5. The Prosecutor and the Defence shall verify that those individuals who have received a copy of the statements comply strictly with their obligations not to reproduce them, and to return them as soon as they are no longer required.

For the purposes of this Decision, the term "public" does not include those entities or persons who are

828

assisting the accused, his counsel or the Prosecutor in the preparation of their cases.

Done in English and French, the English text being authoritative.

Richard
May

Presiding
Judge

Dated this twelfth day of May 1998

At the Hague

The Netherlands

[Seal
of
the
Tribunal]

IN THE TRIAL CHAMBER

827

Before: Judge Adolphus Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 18 March 1997

PROSECUTOR

v.

**ZEJNIL DELALIC
ZDRAVKO MUCIC, also known as "Pavo"
HAZIM DELIC
ESAD LANDZO, also known as "Zenga"**

**DECISION ON THE DEFENCE MOTION TO COMPEL THE
DISCOVERY OF IDENTITY AND LOCATION OF WITNESSES**

The Office of the Prosecutor:

Mr. Eric Ostberg Mr. Giuliano Turone

Ms. Teresa McHenry Ms. Elles van Dusschoten

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Branislav Tapuskovic, Ms. Mira Tapuskovic, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. Mustafa Brackovic, Ms. Cynthia McMurrey, for Esad Landzo

828

I. INTRODUCTION

On 19 February 1997, a Defence Motion to Compel the Discovery of Identity and Location of Witnesses ("the Motion") was filed by the Defence for the accused Esad Landzo (Official Record at Registry Page ("RP") D2761-D2768) for consideration by this Trial Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. ("International Tribunal"). The Office of the Prosecutor ("the Prosecution") filed a Response to the Defence Motion ("the Response") on 20 February 1997. (RP D2770-D2768)

having considered the written submissions of the Defence and the Prosecution ("the parties"), and after hearing the parties in oral argument on 10 March 1997, the Trial Chamber delivered an oral decision on 11 March 1997 and reserved the written decision for a later date,

THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The following provisions of the Statute of the International Tribunal are relevant to the issue before the Trial Chamber:

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

....

Article 21

Rights of the accused

...

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

...

(b) to have adequate time and facilities for the preparation of his defence and to communicate with the counsel of his own choosing;

...

829

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

....

2. The following Rules of Procedure and Evidence ("the Rules") are also relevant to the issue:

Rule 67

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

....

Rule 69

Protection of Victims and Witnesses

...

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 75

Measures for the Protection of Victims and Witnesses

(A) 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 Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

....

B. Pleadings

1. The Defence

3. The Defence requests that the Trial Chamber compel the Prosecution to disclose the names and locations of the witnesses it intends to call at trial, for the purpose of conducting pre-trial interviews with those witnesses. It contends that this information has been withheld contrary to the Statute of the Tribunal and its Rules. The Defence asserts that it must have the opportunity to approach the Prosecution's witnesses outside of the Tribunal and "without the restrictive gaze of the

prosecution." (the Motion at RP 2759).

330

4. The Defence notes that the Prosecution has not filed for protective measures for its witnesses. It asserts that without such a request for protective measures and the granting of these by the Trial Chamber, the Prosecution has no right to withhold the addresses of the witnesses, thereby preventing the Defence from having access to them and interviewing them prior to trial.

5. The Defence contends that, after discussion with the Prosecution pursuant to the Trial Chamber's Order Disposing of Motions Filed by the Defence of 27 January 1997 (RP D2678-D2676), the two parties were unable to resolve the matter between themselves. The Defence therefore requests that the Prosecution be ordered to disclose the names and addresses of the witnesses which it intends to call at trial, the location of the witness, the count to which each witness will testify and the estimated length of their testimony.

6. Whilst speaking to the Motion before the Chamber, Defence Counsel further emphasised that the Defence is prejudiced by the fact that it is unable, without further information, to investigate the circumstances surrounding the witnesses, such as their reputation.

2. The Prosecution

7. The Prosecution maintains that the Defence was provided with the names of its witnesses several months prior to the present time.

8. It asserts that it is under no obligation to provide the addresses of the witnesses, under the Statute, the Rules or any Order of the Trial Chamber. It further asserts that the Rules envision that such addresses will **not** be provided. The Prosecution submits that, under Sub-rule 67(A)(ii), it is only the Defence which is under a duty to provide the names and addresses of the witnesses it intends to call to any special defence tendered. Therefore, it argues, the Rules do not contemplate, in the absence of similar specific mention of addresses as is contained in Sub-rule 67(A)(ii), that the Prosecution should provide the addresses of its witnesses.

9. During the oral argument on the Motion, the Prosecution took the position that the use of the word "identity" in Sub-rule 69(C) does not import the current addresses of the witnesses. The Prosecution was of the view that other information, such as birth date or place of origin of the witnesses could be considered part of their identity as required by that Rule.

10. The Prosecution submits that a witness is under no obligation to grant a pre-trial interview to the Defence, although he or she may choose to do so. To disclose the addresses of the witnesses to the Defence would, in the opinion of the Prosecution, violate assurances it has already made to the witnesses, create possible risks for the well-being of the witnesses and jeopardise the witnesses' right to privacy as well as their willingness to co-operate with the Tribunal.

11. The Prosecution nevertheless reports that, in an effort to accommodate the request of the Defence, it has contacted each of its witnesses in order to determine whether they would be willing to have their addresses given to the Defence or grant the Defence a pre-trial interview. However, the witnesses all expressed their unwillingness that such action should be taken.

12. Finally, the Prosecution declares that the absence of a request for protective measures for its

witnesses does not imply that the addresses of those witness should be disclosed to the Defence.

831

III. FINDINGS

13. In any criminal trial the testimony and examination of witnesses constitutes a crucial element of the case for both the Prosecution and the Defence. It cannot be over-emphasised that the final verdict on the guilt of the accused person or persons depends in large part upon this testimony and examination. Recognising the critical nature of witness testimony to the accused person, Article 21(4)(e) provides for witness examination as one of the minimum guarantees necessary for a fair trial.

14. The Judges of the International Tribunal, in drawing up the Rules to govern its operation, sought to ensure that the right of the accused to a fair trial always be respected. It is of fundamental importance to the fairness of a trial that the parties know the extent of and limitations to their rights and obligations pertaining to the disclosure of the identities of witnesses appearing before the Tribunal.

15. While the protection of victims and witnesses is the subject of several of the Rules, the provisions of Article 20(1) of the Statute strike the appropriate balance by stating that "full respect" must be given to the rights of the accused and "due regard" for the protection of victims and witnesses.

16. The arguments of the Prosecution fall into two categories. Firstly, that the Rules do not require disclosure of the addresses of witnesses and, secondly, that such disclosure would endanger the witnesses.

17. It is clear from Sub-rule 69(C) that the Defence has a right to know the identity of the witnesses which are to be called by the Prosecution in the presentation of its case. The use of the term "identity" has a significance which goes beyond the mere provision of the names of these witnesses. A name by itself is not sufficient to identify the person by whose testimony the charges against the accused are sought to be proven. To identify the witnesses, therefore, it is necessary for the Defence to know further particulars about them, this in turn to satisfy the right of the accused to an adequate preparation of his defence.

18. The provisions of Rule 75 are such that the privacy and protection of the witnesses may be taken into account by the Trial Chamber and weighed against the rights of the accused. Whilst the Prosecution may, under Rule 39(ii), take special measures to provide for the safety of potential witnesses, these measures relate to the investigative stage of a case. It is not for the Prosecution to provide assurances to witnesses once it has decided that these witnesses will be called to give testimony before the Tribunal. The granting of any necessary protective measures is solely a matter for determination by the Trial Chamber.

19. Furthermore, there is no opportunity for the Defence to examine the witnesses for the Prosecution in any real sense without a proper appreciation of those witnesses. The basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore envisages more than a blind confrontation in the courtroom. A proper in-court examination depends upon a prior out of court investigation. Sub-rule 69(C) reflects this by referring to a "sufficient time prior to the trial".

832

20. The term "identity" does not necessarily include the present addresses of the witnesses. The Trial Chamber rejects the submission of the Defence that it has a right to these addresses for the purposes of conducting pre-trial interviews as unsupported by any Rule or provision of the Statute. Substantial identifying information would appear to be the sex of each witness, his or her date of birth, the names of his or her parents, his or her place of origin and the town or village where he or she resided at the time relevant to the charges. Such information provides the Defence with adequate notice of who exactly it is that the Prosecution deems essential to the proof of its case against the accused so that the Defence can adequately conduct its own investigations.

IV. DISPOSITION

THE TRIAL CHAMBER,

FOR THE FOREGOING REASONS,

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES,

PURSUANT TO RULE 54,

HEREBY ORDERS that the Prosecution shall immediately provide to the Defence for each accused, should they not already have done so, the name, sex, date of birth, place of origin, names of parents and place of residence at the time relevant to the charges to which the witness will testify, of each of the witnesses it intends to call at trial,

HEREBY DENIES the Defence request that the current addresses of the witnesses referred to above be made available to the Defence.

Done in English and French, the English text being authoritative,

Adolphus
G.
Karibi
-
Whyte

Presiding
Judge

Dated this eighteenth day of March 1997

At the Hague

The Netherlands

[Seal
of