

ICTR-96-8-T
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Case No. ICTR-96-8-T



UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

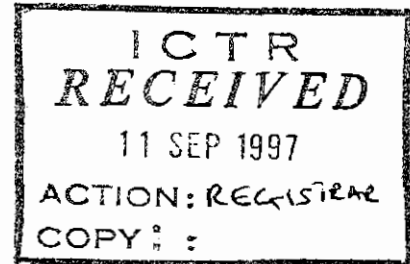
TRIAL CHAMBER 2

OR:ENG

Before: Judge William Sekule, Presiding Judge
 Judge Yakov Ostrovsky
 Judge Navanethem Pillay

Registry: Ms. Prisca Nyambe
 Mr. Frederik Harhoff

Decision of: 8 September 1997



**THE PROSECUTOR
VERSUS
ÉLIE NDAYAMBAJE**

Case No. ICTR-96-8-T

**DECISION ON THE DEFENCE MOTION FOR THE PROTECTION OF
ITS WITNESSES**

The Office of the Prosecutor:

Mr. James Stewart

Counsel for the Accused:

Mr. Charles Tchoungang

Case No. ICTR-96-8-T

THE TRIBUNAL,

SITTING AS Trial Chamber 2 (“the Trial Chamber”), composed of Judge William Sekule, Presiding Judge, Judge Yakov Ostrovsky and Judge Navanethem Pillay;

CONSIDERING the indictment filed on 17 June 1996 by the Prosecutor against Élie Ndayambaje 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 T. H. Khan on 21 June 1996;

CONSIDERING the initial appearance of the accused which took place on 29 November 1996;

CONSIDERING the order of the Tribunal dated 10 March 1997 granting protective measures for the Prosecution witnesses upon the request of the Prosecutor;

CONSIDERING that the Defence Counsel filed a motion on 27 January 1997, seeking fourteen protective measures for its witnesses;

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 written response by the Prosecutor dated 2 September 1997 to the Defence Counsel’s motion;

HAVING HEARD the parties at the hearing held on 5 September 1997;

AFTER HAVING DELIBERATED:

WHEREAS the Defence Counsel has applied for protective measures for twenty Rwandese-citizens, presently in the Republic of Kenya, whom the Defence Counsel has identified and interviewed as potential witnesses;

WHEREAS the Defence Counsel submits that as result of operation NAKI conducted by the Office of the Prosecutor on 18 July 1997 in the Republic of Kenya; a raid carried out in which three hundred Rwandese had been arrested in the Republic of Kenya and faced transfer to Rwanda; and the situation prevailing in refugee camps in the Democratic Republic of Congo, the defence witnesses fear for arrest, deportation and threat for their lives.

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WHEREAS in further substantiation of its motion, the Defence Counsel also mentioned the death of two potential witnesses in the Tingi-Tingi camp in the Democratic Republic of Congo, as a result of persecution of refugees, one of whom was named Stanislas Ndayisaba;

WHEREAS the Defence Counsel asserts that the arrest, repatriation or deportation of any of these potential defence witnesses to Rwanda would substantially prejudice the rights of the accused to conduct a proper defence;

WHEREAS the Defence Counsel has invoked Article 21 of the Statute, which obliges the Tribunal to take necessary measures for the protection of witnesses;

WHEREAS 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 victim or witnesses concerned, or the Victims and Witnesses Unit (the "VWU"), order appropriate measures for the protection of victims and witnesses, provided that these measures are consistent with the rights of the accused;

WHEREAS the Prosecutor in her written response while conceding some of the reliefs claimed, asserted that the measures requested by the Defence Counsel were vague, and further that the Defence Counsel had not laid a basis in support of his request.

WHEREAS the Trial Chamber is of the opinion that the Defence Counsel in his oral submissions has provided such a basis in support of his request;

WHEREAS the Trial Chamber takes note of a similar motion in the case of The Prosecutor versus Georges Anderson Rutaganda (ICTR-96-3-T), decided on 6 March 1997, in which it solicited the cooperation of States, UN organisations including the United Nations High Commissioner for Refugees (the "UNHCR") and any other organisation, *inter alia*, that every effort be made to assist the Defence Counsel in locating sixteen witnesses, all of whom had been refugees in the Tingi-Tingi camp in the Democratic Republic of Congo, then Zaire. The Trial Chamber further directed that these witnesses be placed under its protection when located and isolated from the refugees;

WHEREAS the Trial Chamber is of the opinion that, in view of the power vested in it by Rule 75 of the Rules and to ensure a fair trial to the accused, it is necessary to provide appropriate and possible measures for the protection of the defence witnesses;

WHEREAS The Trial Chamber notes that the Defence Counsel during the oral hearings, withdrew measure (4) regarding the Republic of Gabon, for which reason the Chamber will not consider this matter any further;

WHEREAS during the oral hearing, the Prosecution accepted that for a fair and equitable trial, defence witnesses are entitled to protection similar to that granted for the Prosecution witnesses, and expressed no objections to the grant of requests (7), (8), (9) and (10) but opposed the grant of measure (6) and (11);

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WHEREAS with respect to measures (1) and (2), the Trial Chamber is of the view that by virtue of Security Council Resolution 955/94 and Article 28 of the Statute, it can authorise the Registrar to request the assistance of the Republic of Kenya and the UNHCR in the matter;

WHEREAS the Trial Chamber directs that the Defence Counsel furnish particulars of the witnesses to the VWU, thereby enabling the VWU to initiate appropriate steps to implement the protective measures, so that witnesses' presence, testimony and safety is ensured at the time of trial;

WHEREAS the Trial Chamber is of the view that the Defence Counsel's requests for measures (6) to (10) and (13) are appropriate and are within the scope of the Rules and therefore should be acceded;

WHEREAS the Trial Chamber is of the opinion that measure (11) relating to non-disclosure of identity of defence witnesses to the Prosecution requested by the Defence Counsel, is premature at this stage because various elements forming part of this measure ought to be raised at the trial stage;

WHEREAS on measure (12) requested by the Defence Counsel with respect to the establishment of a mechanism for confidential contacting of defence witnesses by the Prosecution, the Trial Chamber is of the opinion that the Prosecution may contact the defence witnesses upon prior notification to the defence who shall then make appropriate arrangements;

WHEREAS with regard to measure (14) in which the Defence Counsel requests that it be allowed amend or to add to the protective measures granted by the Trial Chamber, it is noted that under Rule 75, a party may request a Judge or Chamber to amend or add to any of the aforesaid measures, and therefore does not need to give a specific ruling regarding thereto;

FOR THESE REASONS,

THE TRIBUNAL


Decides as following:

- (I) That the Defence Counsel shall furnish the VWU with the particulars pertaining to its witnesses, and the VWU shall then take appropriate protective measures as laid down below.
- (ii) That pursuant to Security Council Resolution 955/94 and Article 28 of the Statute, the Tribunal authorises the Registrar to solicit the assistance of the Republic of Kenya and the UNHCR, in this regard.

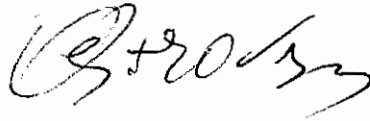
- (iii) That the Registrar after receiving the information concerning the witnesses from the Defence Counsel, shall take all possible measures to ensure their availability to the Tribunal in cooperation with the Government of the Republic of Kenya.
- (iv) That the names, addresses, locations and other identifying information of the Defence witnesses, shall not be disclosed to the Prosecution, until further order.
- (v) That the names, addresses, locations and other identifying information of the defence witnesses shall be kept under the seal of the Tribunal and not included in any of the public records of the Tribunal.
- (vi) That in cases where such names, addresses, locations and other identifying information about the defence witnesses appear in the Tribunal's public records, this information shall be expunged from the Tribunal's public records.
- (vii) That the names, addresses, locations and other identifying information of the defence witnesses contained in the supporting materials of the defence shall not be disclosed to the public and the media.
- (viii) That the public and the media shall not take photographs, make audio and video recordings or sketching of the defence witnesses who are under the protection of the Tribunal, without its authorisation.
- (ix) That measure (11) requested by the Defence Counsel in his motion is premature, and the defence is at liberty to raise it at a later stage during the Trial.
- (x) That the Prosecution and its representatives who are acting pursuant to their instructions shall notify the defence counsel of any request for contacting the defence witnesses, and the defence counsel shall make arrangements for such contacts.
- (xi) That the Defence 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 public and official proceedings.
- (xii) That pursuant to Rule 75 of the Rules, the defence may at any time request a Judge or Trial Chamber to amend or add to any of the abovementioned protective measures for the defence witnesses.

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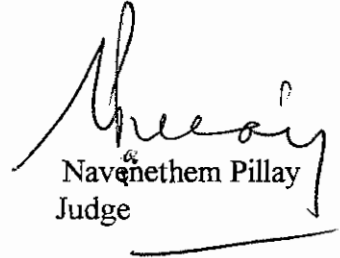
Arusha, 8 September 1997



William Sekule,
Presiding Judge



Yakov Ostrovsky
Judge



Navanethem Pillay
Judge

(Seal of the Tribunal)

