

Case No. ICTR-95-1-T / 040h

ICTR-95-1-T
(648-642)
07-10-97

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER 2

OR:ENG

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

Registry: Ms. Prisca Nyambe

Decision of: 6 October 1997

THE PROSECUTOR
VERSUS
CLÉMENT KAYISHEMA AND
OBED RUZINDANA

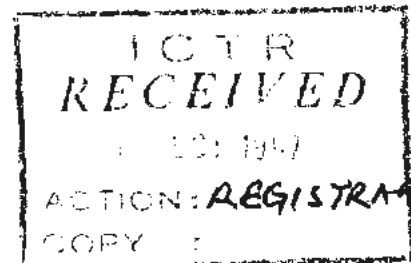


Case No. ICTR-95-1-T

DECISION ON THE MOTION FOR THE PROTECTION OF DEFENCE
WITNESSES

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton



Counsel for the Accused:

Mr. Philippe Morriceau (Clément Kayishema)
Mr. Pascal Besnier (Obed Ruzindana)

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The International Criminal Tribunal for Rwanda, (the “Tribunal”),

SITTING AS Trial Chamber 2 (“the Trial Chamber”), composed of Judge William H. Sekule Presiding Judge, Judge Yakov Ostrovsky and Judge Tafazzal Hossain Khan ;

CONSIDERING the indictment submitted by the Prosecutor on 22 November 1995 against Clément Kayishema and Obed Ruzindana and confirmed on 28 November 1995 by Judge Navanethem Pillay 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 they had 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 initial appearance of Obed Ruzindana which took place on 29 October 1996;

CONSIDERING ALSO THAT on 13 December 1996 the Prosecutor filed a motion before Trial Chamber 1 requesting the court to issue an order for protective measures in respect of the Prosecution witnesses against Obed Ruzindana which was granted by Trial Chamber 1 in its Decision of 4 March 1997;

BEING NOW SEIZED OF a Preliminary motion filed by the Defence Counsel on 9 July 1997, pursuant to Rule 75 of the Rules in which he generally seeks protective measures for potential witnesses for Obed Ruzindana but specifically seeks the non-disclosure of the identity of defence witnesses to the public and media;

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

CONSIDERING the Prosecutor’s written response to the Defence Counsel’s motion dated 29 September 1997;

HAVING HEARD the oral submissions by the parties on 30 September 1997;

AFTER HAVING DELIBERATED:

WHEREAS the Defence in its motion for the protection of potential witnesses for Obed Ruzindana has requested this Trial Chamber to order for the non-disclosure of the identities of the defence witnesses as well as for other related reliefs;

WHEREAS the Defence Counsel has requested for various protective measures for all of its witnesses scattered in several countries such as the Republics of Kenya, Rwanda and Tanzania;

WHEREAS the Defence Counsel submitted that most of the defence witnesses are Hutu by ethnicity and are unwilling to testify openly in favour of the accused or any person charged for crimes falling within the jurisdiction of the Tribunal owing to the fear of being implicated in the

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genocide which occurred in Rwanda in 1994 and of possible reprisals against the witnesses upon their return to Rwanda after having testified;

WHEREAS, in support of this motion, the Defence Counsel has relied upon and has invited the Trial Chamber to consider the Report of the U.N. on the Human Rights Situation in Rwanda No. E/CN/4/1997/61 of January 1997 as submitted by the U.N. Human Rights Commission's Special Rapporteur, Mr René Degni-Ségui as well as an article entitled "The Security in Rwanda" reported in a bi-monthly magazine called " DIALOGUE ' No. 195 for the month of May to June 1997, p. 103 both of which illustrate that the security situation in Rwanda is unstable and dangerous;

WHEREAS ALSO the Defence Counsel relied upon a document filed by the Office of The Prosecutor (the "OTP") namely an Affidavit of Mr Oyvind Olsen, the Commander of Investigations in the OTP in Kigali dated 24 March 1997 in which it is stated that killings have occurred in Rwanda and in Kibuye Prefecture as a result of either party disputes or of revenge attacks directed at the returning refugees allegedly accused of having participated in genocide acts;

WHEREAS FURTHER Commander Olsen in the above mentioned affidavit states that Kibuye Prefecture has been designated by the U.N. as being in phase IV indicating that visits are only possible for U.N. staff members under armed escorts by the Rwandan Patriotic Army;

CONSIDERING THAT the Defence Counsel cited the case of The Prosecutor Vs. Elie Ndayambaje ICTR-96-8-T in which Mr Tchoungang, the Defence Counsel in that case supported his motion for protective measures for the defence witnesses by referring to the NAKI Operation where potential defence witnesses located in the Republic of Kenya were faced by threats of deportation to Rwanda thereby putting their lives in danger;

CONSIDERING ALSO THAT, in further substantiation of his motion, the Defence Counsel has submitted that potential defence witnesses would be difficult to trace and has cited an article in the 'Guardian' newspaper published in Tanzania dated 22 September 1997 showing that the Government of the Republic of Tanzania plans to resettle all refugees, who were living outside established settlements, in one place;

WHEREAS the Prosecutor contended that the Trial Chamber could not exercise its discretion to grant the measures sought by the defence in paragraph 15 of the defence motion without proof of genuine fear of personal safety of specific witnesses;

GIVEN THE FACT THAT the Prosecutor in her response specifically opposed the measure mentioned in paragraph 18 due to its vagueness and its unspecific nature;

WHEREAS FURTHER the Prosecution, while objecting to the Defence Counsel's submission that witnesses for the defence may be fearful of being charged for complicity in the crimes for which the accused is charged, submitted that pursuant to Rule 75 of the Rules protective measures are limited to physical and material security and not to the fear of being prosecuted;

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CONSIDERING THAT the Prosecution agreed with the Defence Counsel's submission on non-disclosure of witnesses but implored the Trial Chamber not to grant the request in totality but instead to limit the disclosure to the mentioning of the fact that an individual is a witness which measure should also be extended to Prosecution witnesses; and furthermore, that such limitation should exclude the immediate team of the Prosecutor, some designated Counsels and some members of the public to enable it to collect information to contradict any accusations that may be raised by the defence;

WHEREAS the Defence Counsel while responding to the preceding argument contended that it was untenable because the issue of being an individual *per se* and that of being a witness are so interlinked that they cannot be separated and that furthermore, the Trial Chamber has never ordered such a measure for the Prosecution;

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

WHEREAS measures for the non-disclosure of the identity of witnesses to the public and the media are provided for in Rule 75(B);

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;

MINDFUL OF Security Council Resolution 955 (1994) establishing the Tribunal and Article 28 of the Statute under which the Trial Chamber can request the cooperation and assistance of relevant Governments which in this case are the Governments of the Republics of Kenya, Tanzania and Rwanda;

CONSIDERING similar motions in the cases of The Prosecutor versus Georges Anderson Rutaganda ICTR-96-3-T, decided on 6 March 1997 and The Prosecutor versus Elie Ndayambaje ICTR-96-8-T decided on 8 September 1997, in which the Trial Chamber solicited the cooperation of States, UN organisations including the United Nations High Commissioner for Refugees (the "UNHCR") and any other organisation;

The Trial Chamber is therefore of the opinion that, regarding the non-disclosure of the identity of the defence witnesses, it is appropriate to grant the reliefs requested by the Defence as indicated below;

B. On the issue of the request for the temporary non-disclosure of the identity of defence witnesses to the Prosecution until such time as they are under the protection of the Tribunal and on the issue of fear of reprisals on return to Rwanda

WHEREAS reports and submissions on the security situation in Rwanda and the neighbouring countries have been produced with regard to the security situation in Rwanda;

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The Trial Chamber observes that a situation such as the one referred to above would pose a risk to potential defence witnesses and substantially prejudice the rights of the accused to conduct a proper defence;

This Trial Chamber is also of the considered opinion that once defence witnesses have been put under the protection of the Tribunal, the Defence should disclose the identity of its witness in sufficient time prior to the trial to allow the Prosecution to rebut any evidence that its witnesses may raise;

C. On fear of criminal prosecution

WHEREAS the Prosecution has emphasised the need for the Defence Counsel to substantiate the relief sought;

TAKING NOTE THAT by virtue of Article 21 of the Statute and in order to ensure a fair trial to the accused, the Trial Chamber is obliged to take steps to provide appropriate and possible measures to protect witnesses;

WHEREAS Rule 75 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 this Trial Chamber is conscious of the fact that protective measures for witnesses should not hinder due process or be used as a way of providing immunity to the witnesses against possible prosecution;

WHEREAS the Trial Chamber is of the opinion that the Defence Counsel in his oral submissions has provided the relevant base in support of his request;

The Trial Chamber, therefore, is inclined to hold that protective measures should not extend to providing immunity from criminal prosecution by any appropriate authority;

D. On the issue of being accorded measures similar to those granted to the Prosecution

WHEREAS the Defence Counsel has argued that measures similar to those granted to the Prosecution should be accorded to the defence;

WHEREAS the Prosecutor in her written and oral response cited Article 19 of the Statute, Rules 75 and 69 of the Rules as grounds for according the defence a fair and equitable trial by granting protective measures similar to those accorded to the Prosecution witnesses;

BEARING IN MIND THAT the Prosecution has partially supported the Defence's request and that the measures sought by the defence are pertinent for justice to be achieved, this Trial Chamber recognises that pursuant to Article 20 (1) of the Tribunal's Statute all parties are equal


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before the Tribunal;

MINDFUL OF its previous decisions on this issue as cited above, in which protective measures have been granted to the Prosecution witnesses, this Trial Chamber is of the view that, to the extent possible, defence witnesses should be accorded protective measures similar to those provided for Prosecution witnesses;

CONSIDERING THAT the Prosecution may need to contact any of the defence witnesses, the Trial Chamber is of the considered opinion that under Rule 75 it can *proprio motu* allow the Prosecution to make such contact upon prior notice to the defence;

NOW THEREFORE THE TRIAL CHAMBER ORDERS:-

- (I) that the Defence Counsel furnishes particulars of the witnesses to the VWU, thereby enabling it to initiate appropriate steps to implement the protective measures mentioned below so that the presence of the witnesses and their safety is ensured.
- (ii) that pursuant to Security Council Resolution 955 (1994) and Article 28 of the Statute, the Registrar should solicit the assistance and cooperation of the Governments of the Republics of Kenya, Tanzania, Rwanda as well as the UNHCR and should take all possible measures to ensure the availability of the witnesses to testify before the Tribunal. 
- (iii) the names, addresses, whereabouts of the defence witnesses and any other information identifying them shall not be disclosed to the Prosecution, until further order.
- (iv) the names, addresses, whereabouts of the defence witnesses and any other information identifying the witnesses shall be kept under the seal of the Tribunal and not included in any of the public records of the Tribunal.
- (v) the names, addresses, whereabouts of the defence witnesses and any other information identifying them shall not be disclosed to the public or the media.
- (vi) the Office of the Prosecutor shall not reveal to anyone except its immediate team, the names, addresses, whereabouts of the defence witnesses and any other information identifying them once such information has been revealed to it by the Defence.
- (vii) the public and the media shall not take photographs, make audio and video recordings or sketches of the defence witnesses who are under the protection of the Tribunal, without its authorisation.
- (viii) the Defence shall be permitted to designate pseudonyms for each of its witnesses for use during any communication *inter partes* and to the public as well as in the official proceedings of the Tribunal.

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- (ix) 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.
- (x) pursuant to Rule 75 of the Rules, the Defence is at liberty to request a Judge or Trial Chamber, at any time, to amend or add to any of the protective measures for its witnesses as abovementioned.

Arusha, 6 October 1997

William H. Sekule,
Presiding Judge

Yakov Ostrovsky
Judge

Tafazzal Hossain Khan
Judge

