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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I

OR : ENG

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

Registry: Mr. Antoine K. M. Mindua

Decision of: 5 November 1997

THE PROSECUTOR
versus
ANATOLE NSENGIYUMVA

Case No. ICTR-96-12-I

**DECISION ON PROTECTIVE MEASURES
FOR DEFENCE WITNESSES AND THEIR FAMILIES AND RELATIVES**

The Office of the Prosecutor:

Mr. Udo Gehring

Counsel for the Accused:

Mr. Kennedy N. Ogetto

Leg-96-12-Indictment/Dec/Acc.Mot/Wit.Protection.



Case No. ICTR-96-12-I

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

SITTING as Trial Chamber I of the Tribunal, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING the indictment filed on 22 July 1996 by the Prosecutor against Anatole Nsengiyumva (the "accused") pursuant to Article 17 of the Statute of the Tribunal (the "Statute") and Rule 47 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed direct and public incitement to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Yakov Ostrovsky on 12 July 1996;

CONSIDERING the initial appearance of the accused which took place on 19 February 1997;

CONSIDERING a first motion, filed by the Defence Counsel, Mr. Kennedy Ogetto, on 10 June 1997, seeking orders for protective measures for two defence witnesses, which appear under the pseudonyms A and B, their families and their relatives;

CONSIDERING the rejoinder and additional facts by the Defence, filed on 1 August 1997, consequent upon the Prosecutor's response, filed 25 June 1997, to the said Defence motion;

CONSIDERING an amended motion, filed by the Defence on 25 September 1997, pursuant to Article 21 of the Statute and to Rule 72 and Rule 75 of the Rules, requesting that measures be ordered for the protection not only of defence witnesses, but also of their families and relatives;

CONSIDERING the response of the Prosecutor, filed on 25 June 1997, to the first Defence motion, and the subsequent response, filed on 18 August 1997, to the additional brief of the Defence in support of the defence motion seeking orders for protective measures for defence witnesses;

HAVING HEARD the representatives of the Prosecutor and of the Defence during the audience of 29 September 1997;

TAKING INTO ACCOUNT Articles 20 and 21 of the Statute and Rule 75 of the Rules;

TAKING NOTE of the Decision rendered on 6 March 1997, by the Tribunal on the 'Extremely Urgent Request made by the Defence for the Taking of a Teleconference Deposition', in the case The Prosecutor versus Rutaganda (Case No. ICTR-96-3-T) and the Decision of 8 September 1997 ordering measures for the protection of Defence witnesses in the case of The Prosecutor versus Ndayambaje (Case No. ICTR-96-8-T);

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AFTER HAVING DELIBERATED,**Leave to Amend the Motion**

1. In his amended motion filed on 25 September 1997 seeking measures for the protection of defence witnesses and their families and relatives, the Defence Counsel specifically requests the following thirteen measures:

- “1. Leave be granted to the defence to amend the measures requested for in the motion filed on 10.06.1996 for protection of defence witnesses and their families.
2. That the Trial Chamber do issue an order requiring the United Nations High Commission for Refugees (UNHCR) to grant potential witnesses A & B, and all other potential witnesses in this case, refugee status or other status, that would facilitate their uninterrupted stay in the host country Kenya or other country of their choice until such time that the Witness Protection Unit of the International Criminal Tribunal for Rwanda puts in place adequate mechanisms for their protection.
3. That names and identities of the affected potential witnesses be forwarded by the Defence to the Witness Protection Unit only in confidence, and they be not disclosed to the media, public or prosecution.
4. That the Witness Protection Unit be ordered not to reveal the names and identities of these witnesses either to the prosecution, media, public or any Government without the express consent of the Defence.
5. That in cases where the names and identities of the affected defence witnesses appear in the Tribunal’s public records, this information be expunged from the Tribunal’s public records.
6. That the names and identities of the defence witnesses contained in the supporting materials of the defence be not disclosed to the public or media.
7. That the public and the media not to take photographs, make audio and video recordings or sketching of the defence witnesses who are under the protection of the Tribunal without its authority.
8. That the defence 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.
9. That the Trial Chamber do request the Government of Kenya or any other government where these potential witnesses are staying or wish to stay to accord them asylum or such other status that would be compatible with their safe stay in those countries.
10. That the Registrar and the Witness Protection Unit be ordered to co-ordinate these decisions of the Trial Chamber.
11. That the affected potential witnesses be considered, for all intents and purposes, under the protection of the International Criminal Tribunal for Rwanda.
12. That these protective measures above be extended to the potential witnesses’ relatives and family members.
13. That the defence be at liberty to apply to the Chamber for amendment or modification of these measures or for other related or additional measures.”



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2. The Tribunal notes that in measure 1 the Defence requested that its motion of 10 June 1996 be amended. However, the Tribunal is of the opinion that this date so stated is obviously incorrect and that the Defence intended the date to be 10 June 1997. Therefore, as a point of order and for all intents and purposes, the date of the motion referred to in the above cited measure should be read as 10 June 1997 (and not 1996) hereinafter.
3. The Defence submitted in the statement presented in support of the amendments to the motion filed on 10 June 1997 for protective measures for defence witnesses, that due to the recent arrests of a number of its potential witnesses in Kenya and the probability of there being further such arrests it was now important that the defence motion be wide enough to cover all potential witnesses to be found in Kenya.
4. Furthermore, the Defence Counsel submitted in the said statement that it was necessary to amend the earlier motion on the ground that certain annexures of the rejoinder it had filed on 1 August 1997 inadvertently disclosed the names of certain witnesses. Consequently, the Defence sought to have these names expunged from the Tribunal's records.
5. Although the Prosecutor did raise several arguments in response to the above submissions of the Defence, she did not expressly oppose the amendments being brought to the motion.
6. The Tribunal, taking note that the Prosecutor didn't object to the amendment, accepts that the substance of the said motion has remained unchanged, and therefore grants leave for it to be amended.

The Basis of the Motion

The Legal Basis

7. The Defence Counsel brought his motion before the Tribunal based on the provisions of Article 21 of the Statute and Rule 75 of the Rules.
8. The said 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. Thereupon, Rule 75 of the Rules provides, *inter alia*, that a Judge or a Chamber may *propriu motu* or at the request of either party, or of the victims or witnesses concerned, or of the Tribunal's Victims and Witnesses 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.
9. The Tribunal wishes to reiterate that, in accordance with Article 20(4)(e) of the Statute, the accused has the right to examine, or have examined, the Prosecutor's witnesses. The accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.



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10. Thus, the Tribunal, being mindful at all times of guaranteeing the full respect of the rights of the accused, shall therefore 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.

The Arguments

11. The Defence, by its motion filed on 25 September 1997, sought protective measures for defence witnesses, their families and relatives. The request for these measures is motivated, *inter alia*, by the threat of arrest in Kenya and the imminent forced repatriation back to Rwanda of potential defence witnesses. The Defence Counsel submitted, in support of these motivations, that:

- several of its potential witnesses have been arrested by the authorities in Kenya;
- other potential witnesses are seriously threatened with arrest; and
- some potential and actual witnesses have cases pending before the Kenyan judicial authorities.

12. As a consequence of the above, the Defence Counsel asserts that, given the present political climate in Rwanda, the arrest and repatriation of the potential witnesses would greatly prejudice the defence of the accused. Indeed, the Defence Counsel affirmed that the said affected witnesses are most unlikely to turn up for trial if so arrested and repatriated to Rwanda.


13. Furthermore, the Defence Counsel alleges in his arguments that one of the defence's key witnesses and a number of potential defence witnesses and their families have been killed on their return to Rwanda.

14. The Prosecutor contended, in her response of 25 June 1997 and during the hearing, that the motion of the defence does not give sufficient factual grounds to allow the Tribunal to make any finding on the merit of the request put forward by the Defence.

15. On this point, it is the view of the Tribunal 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.

16. In this case, notice is taken of the United Nations High Commissioner for Human Rights Field Operation in Rwanda Status Report as at 28 August 1997 (HRFOR/STRPT/56/1/28 August 1997/E) and many other concordant reports, issued by various sources. All tend to describe a particularly volatile security situation at present in Rwanda and in neighbouring countries. This volatile security situation appears to be endangering the lives of those persons who may have, in one way or another, borne witness to the events of 1994 in Rwanda.

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17. The Tribunal sees the fears of the Defence Counsel as being well founded. Therefore, taking into account the representations of the parties and being aware of the present security situation affecting the potential witnesses, it considers there to be sufficient factual grounds for the protective measures sought by the Defence.

Measures 3, 4, 5, 6, 7 and 8

18. By measures 3, 4, 5, 6, 7 and 8 contained in its motion, the Defence seeks anonymity for its potential witnesses.

19. Pursuant to Rule 75(B) of the Rules, the Tribunal is empowered to order such measures.

20. The Prosecutor submitted, in response to the request of anonymity, *inter alia*, that the names of the defence witnesses should be disclosed within a reasonable time in order to prevent unnecessary delay that might jeopardize the rights of the accused or create a delay in the administration of Justice.


21. On the question of anonymity, the Tribunal takes note of the reasoning of the Trial Chamber of the International Tribunal for the Former Yugoslavia (the "ICTY") in its Decision of 10 August 1995 on the prosecutor's motion for protective measures for victims and witnesses, in the case The Prosecutor versus Tadić (IT-94-I-T) (the "Tadić case"). It was held therein that for a witness to qualify for 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. Furthermore, the ICTY in the Tadić case held that the judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.

22. In the present case, the Tribunal, following this reasoning, and considering the submissions of the Defence and the Prosecutor, is of the opinion that there is sufficient evidence to justify the non disclosure of the identities of the potential witnesses of the Defence. Consequently, it accedes to measures 3, 4, 5, 6, 7 and 8 requested in the motion of the Defence.

Measures 2 and 9

23. The Defence Counsel requested in measure 2 that the Tribunal do issue an order requiring the United Nations High Commission for Refugees (the "UNHCR") to grant potential witnesses A and B, and all other potential witnesses in this case, refugee status that would facilitate their uninterrupted stay in the host country Kenya or other country of their choice. This status would be maintained until such time as the Tribunal's Witness Protection Unit puts in place adequate mechanisms for their protection.

24. Similarly, by measure 9, the Defence seeks that the Tribunal do request the Government of Kenya, or any other government where these potential witnesses are staying or wish to stay, to accord them such status that would be compatible with their safe stay in those countries.

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25. The Prosecutor has submitted that the Tribunal does not have jurisdiction under Rule 75 of the Rules to request the UNHCR and Contracting States to accord potential witnesses the necessary asylum that would facilitate their stay in those countries. She further contended that the granting of refugee status is beyond the scope of Article 21 of the Statute and Rule 75 of the Rules and is a matter that falls within State sovereignty.

26. The Prosecutor is of the view that measures for the protection of witnesses are limited to those that are necessary to enable the witnesses to testify before the Tribunal and to protect them against the specific risks caused by their testimonies. Thereupon she noted that these measures should be within the same scope as those practised to get witnesses living in Rwanda to testify before the Tribunal in Arusha, with the assistance of the Rwandan Government.

27. The Defence, recalling that the Tribunal is mandated to prosecute persons allegedly responsible for serious violations of international humanitarian law, stressed that, in guaranteeing a fair trial, the Tribunal must at all times respect the rights of the accused as enunciated in Article 20 of the Statute, and provide, in accordance with Article 21 of the Statute for the protection of witnesses and victims.

28. The Tribunal is aware that it is not empowered to order the UNHCR or any State to grant refugee status to a witness. However, taking into account its decisions in the cases of The Prosecutor versus Rutaganda (Case No. ICTR-96-3-T), and of The Prosecutor versus Ndayambaje (Case No. ICTR-96-8-T), the Tribunal is of the opinion that it is mandated to solicit the co-operation of States and the UNHCR in the implementation of protective measures for witnesses.

29. Therefore, in light thereof, the Tribunal accedes to measures 2 and 9 inasmuch as the assistance of the Government of Kenya and the UNHCR be sought in implementing measures of protection for defence witnesses so as to guarantee the right of the accused, pursuant to Article 20(4)(e) of the Statute, to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him.

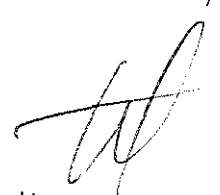
Measures 10, 11, 12 and 13

30. The Tribunal is of the view that measures 10 and 11, as sought by the Defence, are appropriate and within the scope of the Rules, and should be granted.

31. The Defence Counsel, by measure 12, requested that the protective measures ordered be extended to the potential witnesses' relatives and family. During the hearing, having been invited by the Tribunal to furnish further specifics, the said counsel indicated that he intended for this measure to apply only to the potential witnesses' immediate family, i.e., spouse and children. Consequently, the Tribunal, pursuant to Rule 75 of the Rules grants measure 12 of the motion.

32. *In fine*, the Defence Counsel requests in measure 13 that it be at liberty to apply to the Tribunal for amendment or modification of the requested measures or for other related or additional measures. Thereupon, the Tribunal reminds the Defence Counsel that under Rule 75

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of the Rules a party may request a Judge or a Chamber to amend or add to any of the aforesaid measures, and therefore does not need to give a specific ruling thereto.

FOR ALL THE ABOVE REASONS,

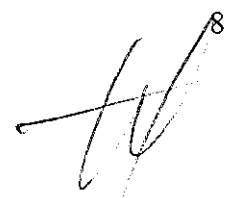
THE TRIBUNAL,

GRANTS the Defence request for amendment to its motion of 10 June 1997;

HEREBY DECIDES the following:

1. The Defence Counsel shall furnish the Registrar with all the particulars pertaining to its witnesses, and that appropriate measures as set forth below be taken;
2. The Registrar, after receiving the information concerning the witnesses from the Defence Counsel, shall take all possible measures to ensure the availability of the said witnesses to the Tribunal;
3. The co-operation of the Government of the Republic of Kenya, the United Nations Organization, including the United Nations High Commission for Refugees, and any other organization that could be of help in the matter is solicited;
4. The names and identities of the affected potential witnesses shall be forwarded by the Defence to the Registrar only in confidence, and they shall not be disclosed to the media, the public or the Prosecutor until such time as the said witnesses are under the protection of the Tribunal;
5. The Registrar shall not reveal the names and identities of these witnesses either to the Prosecutor, or to any Government, or the media, or the public without the express consent of the Defence;
6. In cases where the names, addresses, locations and other identifying information of the affected defence witnesses appear in the Tribunal's public records, this information shall be expunged from the said records;
7. 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 or media;
8. The public and the media shall not make audio or video recordings or broadcastings and shall not take photographs or make sketches of the defence witnesses who are under the protection of the Tribunal, without its authorisation;

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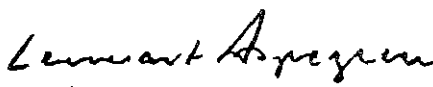
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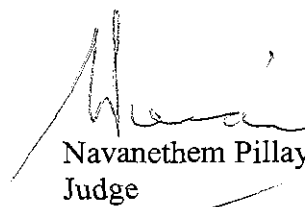
9. The Defence shall be permitted to designate pseudonyms for each of its witnesses for use in the proceedings of the Tribunal, during discussions between the parties, in public and official proceedings;
10. The affected potential witnesses whose particulars have been forwarded by the Defence to the Registrar shall be considered, for all intents and purposes, under the protection of the Tribunal;
11. These protective measures above be extended to the potential witnesses' immediate family members (spouse and children only);

DIRECTS the Registrar to execute this decision immediately and to report back to the Tribunal on its implementation.

Arusha, 5 November 1997


Laity Kama
Presiding Judge


Lennart Aspegren
Judge


Navanethem Pillay
Judge

