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International Criminal Tribunal for Rwanda **ICTR
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TRIAL CHAMBER II

1998 MAR 11 P 5 06

OR:ENG.

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

Registry: Mr. Abraham L. Koshopa

Decision of: 23 February 1998

**THE PROSECUTOR
VERSUS
CLEMENT KAYISHEMA**

Case No. ICTR-95-1-T.

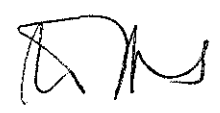
**DECISION ON THE DEFENCE PRELIMINARY MOTION FOR
PROTECTIVE MEASURES FOR WITNESSES**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton

The Counsel for the Accused:

Mr. Phillipe Moriceau (Clément Kayishema)



I. The International Criminal Tribunal for Rwanda (“the Tribunal”)

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

CONSIDERING that the initial appearance of the accused persons namely Clément Kayishema and Obed Ruzindana took place on 31 May and 29 October 1996, respectively and the hearing of the case commenced on 11 April 1997;

BEING SEIZED of the Defence motion filed on 29 September 1997, pursuant to rule 75 of the Rules of Procedure and Evidence (“the Rules”), seeking general protective measures for witnesses who may testify on behalf of Mr. Kayishema;

CONSIDERING the Prosecution’s written response to the Defence motion dated 28 October 1997;

HAVING HEARD the oral submission of the parties on 11 February 1998, in open session;

TAKING NOTE of the Defence Counsel’s oral amendment, requesting that in addition to witnesses from Rwanda, Kenya and Tanzania, witness who reside in Zambia also be extended protection of the Tribunal;

II. The Parties’ Arguments

WHEREAS, the Defence, invoking the provisions of rule 75 of the Rules, on the protection of victims and witnesses, submitted that the Chamber should render an order for the protection of the Defence witnesses, in the interest of justice;

CONSIDERING that the Defence Counsel submitted that potential witnesses testifying on behalf of the accused are Hutu by ethnicity and are unwilling to testify openly owing to a fear of reprisals and/or prosecution for allegedly participating in the 1994 Rwandan genocide;

WHEREAS in support of both oral and written submissions, the Defence relied on the affidavit of Mr. Oyvind Olsen, the ICTR commander of investigations, which was previously filed by the Office of The Prosecutor, that suggested the security situation in Rwanda and in Kibuye Prefecture, in particular, is volatile;

FURTHER CONSIDERING that the Defence orally made mention of United Nations reports, expressing that hostilities in the region had not subsided without providing any further supporting documentation;

WHEREAS the Trial Chamber had previously taken judicial notice of these reports in its decision of 6 October 1997 in *The Prosecutor v. Obed Ruzindana*, case number ICTR-95-1-T, on the Motion for the Protection of Defence Witnesses;

NOTING that the Prosecutor essentially did not object to the motion filed by the Defence, with the exception of prayers made in paragraphs 3, 8, and 14, advancing that although the situation in

Rwanda is eruptive, there is no evidence of indiscriminate prosecution of Hutus who have or may in the future testify in favour of accused persons;

AND WHEREAS the Prosecutor specified that other investigative situations may arise where the identification of witness must be used in limited circumstances;

III. After having deliberated

the matter of the requests for: the protection and non-disclosure of the identity of witnesses to the public and the media; the non-disclosure of the identity of Defence witnesses by the Prosecution; the prohibition of photographing, video recording or sketching of witnesses; the use of pseudonyms; the similar treatment of Prosecution and Defence witnesses; and for sealing the Tribunal's records; the Trial Chamber will now consider these points in turn.

(i) In light of reports and submissions made about the security situation, for potential witnesses residing in various countries, the Chamber notes that the security outlook may be volatile, posing a risk to those who may testify on behalf of the accused. Moreover, the Trial Chamber observes that, if protective measures for witnesses and victims are not followed, the rights of the parties to produce witnesses will be substantially impaired.

(ii) In accordance with article 21 of the Tribunal's Statute and rules 69 and 75 of the Rules and in order to ensure a fair trial for the accused, the Trial Chamber is obliged to take steps to provide for all appropriate and possible measures to protect the victims and witnesses provided that, the measures sought will not hinder the rights of the opposing party -- in this instance the Prosecutor -- to present her case.

(iii) Rule 53(A) provides that ". . . a Judge or Trial Chamber may, in the interest of justice, order the non-disclosure to the public [or the media] of any documents or information until further order." Moreover, rule 75(B) states that a witness' identity may not be disclosed to the public, should the Trial Chamber deem it necessary. We are of the opinion that, regarding the non-disclosure of the identity of the witnesses to the press and the public, it is appropriate to grant the relief requested.

(iv) In reviewing the Defence request that the Prosecutor should not disclose information obtained about the relevant Defence witnesses, the Trial Chamber takes into consideration rule 53(C). This rule provides that "A Judge or Trial Chamber may . . . order that there be no disclosure of . . . any part of any document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, . . . or is otherwise in the interest of justice."

We are of the considered opinion that, to the extent possible, the Office of the Prosecutor, in conjunction with the Victims and Witnesses Unit, should keep the number of persons who have access to information about potential witness to a minimum.

(v) Witness protection measures are further detailed in rule 75. Rule 75(A) states that the Trial Chamber may order appropriate measures for the privacy and protection of the witness. It is from this rule which we generally derive our observation that we may prohibit visual and audio reproduction of the witnesses and their voices during testimony.

(vi) Additionally, rule 75(B)(i)(d) permits the use of pseudonyms in the course of witness protection. The Chamber considers this Rule in its deliberation on the request for the use of pseudonyms and it is of the opinion that for the protection of witnesses, this request shall also be granted.

(vii) Mindful of this Chamber's previous decision in *The Prosecutor v. Obed Ruzindana*, case number ICTR-95-1-T, dated 6 October 1997, where we noted that article 19 of the Tribunal's Statute and rules 75 and 69 of the Rules provide grounds for according the Defence a fair and equitable trial by granting protective measures similar to those accorded to the Prosecution. On the Motion for the Protection of Defence Witnesses, the Trial Chamber is of the view that, to the extent possible, similar protective measures in this motion should be granted to the Defence witnesses unless the witnesses waive the right to avail themselves of such measures.

Furthermore, pursuant to article 20(1) of the Tribunal's Statute all parties are equal before the Tribunal. We therefore hold that to the extent possible the Defence witnesses should be accorded protective measures similar to those provided for Prosecution witnesses.

(viii) The Prosecutor is generally agreeable to the Defence requests for protective measures of Defence witnesses, so long as the measures sought by the Defence are necessary for the interest of justice. The Prosecutor however, does not support the contention that Hutus, who may testify on behalf of the defendant necessarily will face prosecution upon their return to Rwanda, nor should they be immune from prosecution in this Tribunal.


As we have held previously in the *Ruzindana* case, *supra*, protective measures for witness should not hinder due process or be used as a means of providing immunity to the witnesses against possible prosecution.

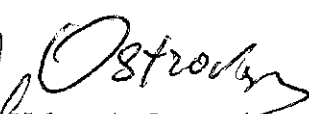
**NOW, FOR THE REASONS ENUMERATED ABOVE:
THE TRIAL CHAMBER DECIDES THAT:-**

- (i) The names, addresses, and whereabouts of the Defence witnesses and any other information identifying them shall not be included in any of the public records of the Tribunal.
- (ii) The names, addresses, whereabouts of the Defence witnesses and any other information identifying them shall not be disclosed to the public or the media.
- (iii) The Prosecutor and the Victims and Witnesses Unit shall keep the number of persons who have access to information about protected witnesses to an absolute minimum, once such information has been revealed to them by the Defence.
- (iv) The public and the media shall not take photographs, make audio and video recording or sketches of the witnesses who are under the protection of the Tribunal, without authorisation.
- (v) 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.

- (vi) The Prosecutor and her representatives, acting pursuant to her instructions, shall notify the Defence of any request for contacting the Defence witnesses, and the Defence shall make arrangement for such contacts.
- (vii) The Defence is at liberty to request a judge or the trial chamber, in cases where the names, addresses and other identifying information of victims and witnesses, as well as their locations appear in any existing files at the Tribunal, to have such information expunged from said files.
- (viii) The Trial Chamber instructs the Registrar to take necessary steps in order to ensure that the United Nations High Commissioner for Refugees, the Zambian authorities, as well as other countries mentioned in the *Ruzindana* decision, *supra*, cooperate with the Witnesses and Victims Unit in the implementation of the above mentioned witness protection measures.
- (ix) The names, addresses and other identifying information of witnesses, as well as their locations, shall be kept under the seal of the Tribunal.

Done, at Arusha, this 23rd day of February 1998.


 William H. Sekule
 Presiding Judge


 Yakov A. Ostrovsky
 Judge


 Tafazzal Hossain Khan
 Judge

(Seal of the Tribunal)



