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Case No. ICTR-96-3-T
CRIMINAL REGISTRY
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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: 30 June 1998

THE PROSECUTOR
versus
GEORGES ANDERSON NDERUBUMWE RUTAGANDA

Case No. ICTR-96-3-T

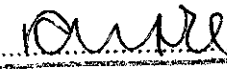
**DECISION ON PROTECTIVE MEASURES
FOR DEFENCE WITNESSES**

The Office of the Prosecutor:

Mr. James Stewart
Mr. Udo Gehring

Counsel for the Accused:

Ms Tiphaine Dickson

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: PRISCA M. NYAMBE	
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Case No. ICTR-96-3-T

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;

BEING SEIZED OF a motion dated 18 June 1998 from the Defence Counsel, Ms Tiphaine Dickson, requesting an order for protection measures for defence witnesses;

CONSIDERING the Prosecutor's response to the said motion filed on 22 June 1998;

CONSIDERING the Defence rejoinder dated 24 June 1998;

HAVING HEARD the representatives of the Prosecutor and of the Defence during the audience of 25 June 1998 held to that effect;

TAKING INTO ACCOUNT Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rule 75 of the Rules of Procedure and Evidence (the "Rules");

TAKING NOTE of the Decisions ordering protective measures for defence witnesses rendered by the Tribunal on 13 March 1998, in the case The Prosecutor versus Nyiramasuhuko (Case No. ICTR-97-21-T)(the "Nyiramasuhuko decision") and on 5 November 1997, in the case of The Prosecutor versus Nsengiyumva (Case No. ICTR-96-12-I)(the "Nsengiyumva decision");

AFTER HAVING DELIBERATED,

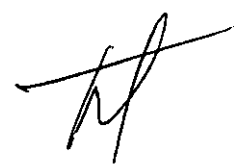
1. As a point of order, the Tribunal deems it appropriate to correct a misrepresentation made by the Defence Counsel: contrary to her submissions in paragraphs 6, 7, 8 and 9 of the motion, the defence motion of 23 May 1997 requested blanket witness protection measures and did not address any specific defence witnesses. Orders for the protection of witnesses are issued in conformity with a procedure established by the Rules, the Statute and as developed during proceedings, and pertain to specific witnesses whose particulars have been forwarded to the Tribunal. Further the protective measures provided are evaluated on a case by case basis, and are not granted as blanket measures. Consequently, the Tribunal recalls that the motion of 23 May 1997 by itself does not constitute an admissible motion requesting witness protection measures.

The Basis of the Motion

The Legal Basis

2. The Defence Counsel brought her motion before the Tribunal based on the provisions of Articles 20(e) and 21 of the Statute, and Rules 69 and 75 of the Rules.

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3. 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 *proprio 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.

4. 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.

5. 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.

6. The Defence Counsel also relied on Rule 69 of the Rules as a legal basis for her motion. Rule 69 applies to pre-trial proceedings. The trial of Georges Rutaganda having already commenced, the Tribunal finds that this Rule is no longer pertinent in the present matter.

The Arguments

7. The Defence is seeking protective measures for defence witnesses, their families and relatives. The Defence Counsel submitted that, following the massacres which occurred in Rwanda in 1994, many of her witnesses, fearing reprisals from the RPF, fled to the Democratic Republic of Congo. In support of such a submission, the Defence filed an Amnesty International Country Report, entitled 'Alarming resurgence of killings' and dated 12 August 1996. Due to the situation of insecurity in the Democratic Republic of Congo, these witnesses sought refuge in the Republic of Kenya.

8. The Defence further motivated her request for protective measures for her witnesses by alleging, *inter alia*, that Kenyan authorities have arrested many Rwandan refugees who did not have the requisite papers, these refugees only being freed after having paid the authorities, and specifically that:

- a number of its witnesses have been harassed by the authorities in Kenya as regards their residence permits;
- one witness was arrested, imprisoned for a few days, and finally released by the Kenyan authorities on 16 June 1998; and



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- these witnesses, as a result of not being entitled to take up residence in Kenya or in another country, fear being repatriated to Rwanda subsequent to their testimonies before the Tribunal.

9. Considering the above, and given the present political climate in Rwanda, the Defence asserts that the defence witnesses fear for their lives and physical and mental integrity. The Defence Counsel therefore requests that witness protection measures be granted to the Defence, measures which would take effect once the Defence has transmitted the pertinent details to the witness and victim support unit of the Tribunal.

10. The Prosecutor objected only to measure (c) requested by the Defence, by submitting that to have to contact the Defence prior to the questioning of any defence witness, would conflict with her mandate under Article 15 of the Statute to investigate matters unrelated to the present case. Hence, an order restricting the contact with defence witnesses should be limited to contacts concerning this case.

The Findings of the Tribunal

11. As was held by the Tribunal in the Nsengiyumva decision and the Nyiramasuhuko decision, the Tribunal recalls 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.

12. In this case, notice is taken of the documents filed in support of its motion by the Defence and also 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.

13. The Tribunal sees the fears of the Defence Counsel as being well founded. However, the Tribunal finds that the Defence has limited itself to demonstrating fears which pertain to witnesses residing in Kenya and in Rwanda only and has not brought before the Tribunal evidence as regards defence witnesses residing elsewhere. Therefore, taking into account the representations of the parties and being aware of the present security situation affecting these witnesses, the Tribunal considers there to be sufficient factual grounds for the protective measures sought by the Defence with respect to those witnesses residing either in Kenya or Rwanda.

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Measures (a), (b), (d), (f), (g), (h) and (i)

14. By measures (a), (b), (d), (f), (g), (h) and (i) contained in its motion, the Defence seeks anonymity for its witnesses.

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

16. 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.

17. 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 (a), (b), (d), (f), (g), and (h) as requested in the motion of the Defence. However, measure (i) is at present not provided for by the Tribunal, and as such will not be granted.

Measure (j)

18. The Defence Counsel requested in measure (j) that the Tribunal issue an order requesting the cooperation of the United Nations High Commission for Refugees (the "UNHCR"), the Government of Kenya, or any other State or competent organization, in the regularization of the status of defence witnesses who are without lawful status, and in the relocation of these witnesses after their testimony.

19. Taking into account the Nsengiyumva decision and the Nyiramasuhuko decision 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. However, the Defence Counsel when expressing the fears of the witnesses, limited herself to those who had sought refuge in Kenya. Moreover, the issue of relocation of witnesses in safe States is a matter dealt with by the Victims and Witnesses Unit. During the audience of 28 May 1998 in the present case, the Victims and Witnesses Unit informed the Tribunal of the cooperation it was already receiving from a number of States in the relocation of witnesses under the protection of the Tribunal.

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20. Therefore, in light thereof, the Tribunal accedes to measure (j) inasmuch as the assistance of the Government of Kenya, the UNHCR, and any other competent organization, 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 (c) and (k)

21. Considering the arguments herein above, the Tribunal is of the view that measure (c), as sought by the Defence and as pertains to persons declared by the Defence as being witnesses in the present case, is appropriate and within the scope of the Rules, and should be granted.

22. The Defence Counsel, by measure (k), requested that the protective measures ordered be extended to the witnesses' fathers, mothers, spouse and children. However, considering the arguments raised by the Defence in support of this request which did not specifically address fears for the safety of the witnesses' fathers and mothers, the Tribunal, pursuant to Rule 75 of the Rules, grants measure (k) of the motion relevant to the spouse and children of the witnesses.

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FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

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 shall be solicited;
4. The names and identities of the affected 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 witnesses appear in the Tribunal's public records, this information shall be expunged from the said records;
7. 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 authorization;
8. 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;
9. Any attempt by the Prosecutor, or by one of her representatives, to contact a witness declared by the Defence, shall be preceded by a notification to the Defence;
10. These protective measures above be extended to the potential witnesses' immediate family members (spouse and children only);


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

Arusha, 30 June 1998,


Laity Kama
Presiding Judge


Lennart Aspegren
Judge


Navanethem Pillay
Judge

(Seal of Tribunal)

