

ICTR-96-10A-I

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Case No. ICTR-96-10A-I

UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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CRIMINAL REGISTRY
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TRIAL CHAMBER II

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

Registry Mr. John M. Kiyeyu

THE PROSECUTOR
versus
ANDRÉ NTAGERURA

Case No. ICTR-96-10A-I

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

The Office of the Prosecutor:

Mr. Frederic Ossogo

Counsel for the Accused:

Fakhy N'Fa Kaba Konate
Benoit Henry

Case No. ICTR-96-10A-I

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)

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

CONSIDERING the indictment issued by the prosecutor on 9 August 1996 against André Ntagerura 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 the indictment, signed by Judge Lennart Aspegren on 10 August 1996;

HAVING NOW BEEN SEIZED of a preliminary motion filed by the defence on 21 November 1997 pursuant to the provisions of Article 21 of the Statute and rule 69 and 75 of the Rules seeking an order for protective measures for witnesses to the crimes alleged in the indictment;

CONSIDERING the response to the aforementioned motion by the Prosecutor filed on 15 July 1997, by which the Prosecutor argues that the measures sought should be considered in light of Article 20 of the Statute and rule 66 of the Rules in that, the rights of the parties provided under the said Article and rule should not be violated ;

TAKING INTO ACCOUNT the supplementary motion argued by the defence, which was granted by the Chamber after having not been objected to by the prosecutor;

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;

HAVING HEARD the parties on 13 May 1998;

THE DEFENCE ARGUED:

(A) That based on fears expressed by many potential and declared defence witnesses, most of whom are Hutu, the trial Chamber should grant protective measures sought hereunder to defence witnesses;

(B) That the defence witnesses fear that they may be accused of complicity in the crimes committed in Rwanda in 1994, unless they are protected before coming to testify,

(C) That, the protective measures sought are necessary to facilitate the procurement of travel documents for the witnesses who must travel to the seat of the Tribunal to give evidence ;

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(D) That witnesses fears are founded in light of information regarding the security situation in Rwanda as deposed by M.H. Olsen, a security officer attached to the Office of the Prosecutor (“the OTP”) in his affidavit dated 27 march 1997, which information compelled the Prosecutor to seek for similar protective measures for her witnesses in all on going cases before the Tribunal;

(E) That the Cyangugu area where most of the potential witnesses come from is known to be unsafe and is a high risk area classified as phase 4 by the United Nations;

(F) That, notwithstanding the above reasons which justify granting protective measures, Article 21 of the Statute and rule 75 of the Rules among others, recognise the necessity of the protective measures sought as evidenced in a number of decisions of this Tribunal and those of the International Criminal Tribunal For the Former Yugoslavia, making the granting of protective measures to witnesses a well established practice and a proven necessity;

(G) That in granting the order sought, the Chamber should have regard to Security Council Resolution 955 of 1994 which requires all states to cooperate with the International Criminal Tribunal for Rwanda in among other things, ensuring protection of witnesses;

For the Protection of Witnesses, the Defence Requests the trial Chamber to Specifically Order That;

(A) The names, addresses and other identifying information concerning defence witnesses, as well as their whereabouts shall be sealed and not be included in any Tribunal records;

(B) The names and addresses of defence witnesses as well as their whereabouts and all other identifying information concerning these witnesses shall not be disclosed to the media and or to the public;

(C) There shall be no photographing, audio or video recording or sketching of witnesses, without leave of the Trial Chamber, or of the defence;

(D) The OTP shall not reveal to any one the names, addresses and other identifying information concerning witnesses which may, if necessary, be revealed to it by the Defence;

(E) The names, addresses and all other identifying information concerning the defence witnesses, as well as their whereabouts, if need be , shall not be disclosed to the prosecution, until it is established that the Witnesses and Victims Support Unit of the Tribunal has taken all the necessary measures for the protection of the said witnesses. Failing which, the defence shall be authorised to disclose especially to the prosecutor, and only if need be, only the redacted versions of the documents, prescribed by rule 67(C);

(F) The defence shall use pseudonyms for each witness that it will call to testify whenever referring to such witnesses in Tribunal proceedings and/or communications and discussions between the parties to the trial and the public;

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(G) the defence witness should be afforded protection by the Witness and Victims Support Unit in the same conditions as prosecution witnesses;

(H)(1)defence witnesses shall benefit from immunity from prosecution in relation to the statement they make under oath vis-a-vis the office of the Prosecutor and other national courts;

(2)this immunity from Prosecution shall be exercised on the territory of Tanzania as well as on the territories of various states which lie between the country of residence of the defence witness and the Head Quarters of ICTR during both their travel to the ICTR and their return;

(3)host countries in whose territory witnesses reside are requested to abstain from extraditing or repatriating forcefully such witnesses to Rwanda , or any other country , against their will or choice;

(I)Host governments that accept defence witnesses are requested to cooperate with the Registry of ICTR with a view to establishing, for such witnesses, temporary travel documents such as passports and *laisser passers*, which would permit them to travel to and from Arusha, or to any other place which may be necessary for the purposes of their testimony;

(J)The Registrar and his staff who are responsible for witnesses and victims support should be requested to contact the UNHCR and all governments hosting defence witnesses so that appropriate measures can be taken for their protection throughout the procedure, before, during , and after the trial;

(K)The defence should be authorised to disclose to the Registrar the names and addresses of witnesses which should remain under seal and serve only to facilitate the efforts of the Registry with a view to putting in place the protective and assistance measures ;

(L)The defence should be informed about and associated with all the stages of negotiations and of the implementations of protective and assistance measures which are undertaken by the Registry;

(M)Prohibit the Prosecutor and all other members of her office from sharing, discussing, revealing or disclosing directly or indirectly, to any person natural or legal, and to all governments, in particular the government of Rwanda, any information and indication which would allow defence witnesses to be identified or located;

(N)The prosecutor should, upon reasonable notice to the Defence Counsel, submit a written request to the Chamber, or to one of its Judges, to contact any of the defence witnesses subject to protective measures; and that, at the direction of the Chambers, or a Judge there of, and with the consent of the witness or his relative, the defence counsel, together with the Witness and Victims Support Unit will take the necessary measures to facilitate such contact;

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Measures sought shall not affect rights of the defence to apply to the Trial Chamber for additional or amendment of the protective measures ;

THE PROSECUTOR RESPONDED AS HEREUNDER:

That considering the relevant provisions in the Statute and the Rules, the Prosecutor has no objection to measures sought by the defence as appearing in items no A ,B, C, D, E ,F G, I, K, L and N of the defence motion;

That the contents of the above paragraph notwithstanding, the Prosecutor contended:

(a) that the defence motion is not based on convincing supporting material and does not indicate among other things, whether the witnesses for whom the protective measures are sought originate from or are living within or outside Rwanda neither does the motion give particulars or their numbers, or their immigration status;

(b) that following legal precedents of this very Tribunal on this matter, the Chamber is supposed to be satisfied that witnesses for whom protective measures are sought face real fear for their safety and of their family and that, the fear should be based on an objective basis;

(c) that pursuant to rule 67 (A)(i) and (ii), the defence must notify the prosecutor of the names of the witnesses on whom the accused intends to rely to establish the defence of alibi and any other special defence plea; which disclosure is necessary in order to enable the prosecutor to prepare her rebuttal;

(d) that granting the protective measures without due consideration to rule 67 will infringe the prosecutors rights;

(e) that measure H sought by the Prosecutor cannot be granted as sought as it is violative of Article 1 of the Statute which gives powers to the Tribunal to prosecute all those who committed crimes stipulated in the Statute;

(f) that the contents of paragraph (e) above notwithstanding, the request sought cannot be granted for want of further details on the status of the witnesses, as immunity from prosecution is governed by international conventions, notably;

The Geneva Convention of 28 July 1951 on the Status of Refugees,

The Vienna Convention of 18 April 1961 on Diplomatic Relations,

The Vienna Convention of 24 April 1963 on Consular Relations;

(g) that the above conventions notwithstanding, even where the earmarked defence witnesses have refugee, diplomatic or consular status, granting them immunity will still be violative of Article 1 and in particular Article 15 of the statute which grants powers to the Prosecutor to conduct investigation

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independently as a separate organ of the Tribunal;

(h) that under Rule 91 of the Rules, the Chamber has power to direct the Prosecutor in case of false testimony under oath, to investigate the matter with a view to preparing and submitting an indictment for false testimony;

(i) Article 1 of the Statute and rule 91(b) of the Rules will be violated if the Chamber will grant the immunity sought by the defence;

(j) that although the Tribunal has primacy over national jurisdictions, the latter cannot be forced *ex officio* to grant immunity from arrest to witnesses which, in the case of Tanzania, will be violative of the agreement signed on 31 August 1995 between the United Nations and the Government of the United Republic of Tanzania;

DELIBERATIONS

(i) WHEREAS generally, measures for the non-disclosure of the identity of victims and witnesses to the public and the media as provided for by the general provisions of rule 69(A) of the Rules, and also more specifically by rule 75(B) of the Rules are not objected to by the Prosecutor;

(ii) WHEREAS it is imperative in view of the security situation in Rwanda and the general need founded on law, to protect witnesses wherever they are;

(iii) MINDFUL of protective measures granted to witnesses under Rule 90(E) which provide that witnesses have the right to object to making any incriminating statement and where the Chamber deems it fit to compel the witness to answer any question, the testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence before the Tribunal other than perjury;

(iv) NOTING that the only type of immunity which falls within the jurisdiction of this Tribunal is the kind provided for under rule 90(E) whereby witness will not be prosecuted by this Tribunal for giving compelled evidence which may incriminate them, excluding perjury;

(v) TAKING INTO ACCOUNT that, with regard to defence request no. L, procedures already exists by which the Witness and Victims Services Unit informs the defence counsel of its activities and the results thereof, rendering it unnecessary to grant this portion of the said request;

(vi) MINDFUL of the fact that based on the defence supporting material and in the circumstances of this motion, there are reasons for defence witnesses to have real fear for their lives and that of members of their immediate family;

(vii) TAKING INTO ACCOUNT the fact that there must be a limit to the number of people related to the witness who will be protected;

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(vii) TAKING INTO ACCOUNT previous decisions on protective measures for witnesses in particular decisions in the case of *The Prosecutor vs Anatole Nsengiyumva* (ICTR-96-12-T), *The Prosecutor vs George Rutaganda* (ICTR 96-10-T), *The Prosecutor vs Clement Kayishema and Obed Ruzindana* (ICTR 95-1-T) and *The Prosecutor vs Ferdinand Nahimana* (ICTR-96-11-T) which decisions emphasise that protection to witnesses must be granted only where real fear exist;

**FOR THESE REASONS, THE TRIAL CHAMBER
DECIDES as follows:**

(1) Grants measures sought as appearing in items no. A ,B, C, D, E ,F G, I, K and N of the defence motion as appearing herein above which measures were not objected to by the prosecutor; and that protective measures granted shall extend to the witnesses, spouses and members of their immediate families only;

(2) The Chamber in light of rule 90(E) **refrains** from granting immunity from prosecution by national jurisdiction in respect of defence witnesses testimony, for want of jurisdiction, *inter alia*;

(3) That States and other international organisations are **called upon** to cooperate in the implementation of, among other things, these protective measures;

Arusha, 24 August 1998.



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

(Seal of the Tribunal)

