

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

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

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
versus
EMMANUEL BAGAMBIKI,
SAMUEL IMANISHIMWE
AND
YUSUF MUNYAKAZI

Case No. ICTR-97-36-T

DECISION ON THE DEFENCE MOTION FOR THE PROTECTION OF WITNESSES

The Office of the Prosecutor:

Mr. Pierre Prosper

Counsel for the accused:

Ms. Marie Louise Mbida Kanse Tah
Mr. Georges So'o

WMS

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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SIGNATURE: *[Signature]* DATE: 1.10.98

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 H. Khan (“the Trial Chamber”);

CONSIDERING the indictment filed on 9 October 1997 by the Prosecutor against Emmanuel Bagambiki, Samuel Imanishimwe and Yusuf Munyakazi (“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”), and confirmed by Judge Lennart Aspegren on 10 October 1997;

CONSIDERING THAT the initial appearance of Samuel Imanishimwe took place on 27 November 1997;

BEING NOW SEIZED OF a motion filed by the Defence Counsel on 29 April 1998 pursuant to Article 21 of the Statute and rule 75 of the Rules in which he generally seeks protective measures for potential witnesses for Samuel Imanishimwe but specifically seeks confidentiality whereby the identities of witnesses would not be divulged to the public and the media (measures 5,7 and 8); those seeking for anonymity of the witnesses whereby the identity of the witnesses would not be divulged to the Prosecutor and her team (measure 6) and miscellaneous and general measures (measures 1-4 and 11-13);

CONSIDERING the Prosecutor’s response to the said motion filed on 18 June 1998;

HAVING HEARD the arguments of the parties on 29 June 1998;

TAKING INTO ACCOUNT the provisions regarding the protection of victims and witnesses in Articles 19(1) and 21 of the Statute of the Tribunal (“the Statute”) and rules 69 and 75 of the Rules;

CONSIDERING rule 73 which provides for motions generally;

THE ARGUMENTS OF THE DEFENCE:

The Defence Counsel submitted:

- (a) that several factors have affected the identification and availability of potential witnesses for the defence of Samuel Imanishimwe. For example, the apparent danger upon the lives of the witnesses, their families and properties as exemplified by the alleged killing of potential witnesses such as Colonel Théoneste Lizinde on 6 October 1996 in Nairobi and Mr. Seith Sendanshonga in Nairobi, Kenya recently;
- (b) that the above said factor have resulted into the constant change of names and addresses and the continuous mobility of witnesses from place to place, particularly for witnesses located in African refugee camps in the Democratic Republic of Congo(formerly Zaire) and in the Central African Republic;
- (c) that some potential witnesses in Europe, North America, Eastern, Central and West Africa have been contacted but they had expressed their unwillingness to testify due to fear of being arrested as perpetrators of the genocide;
- (d) that the Tribunal should seek the cooperation of the countries where the refugees are located so that those countries could assist the Defence and the Tribunal’s Victims and Witnesses Support Section (“the VWSS”) to ensure the availability of Defence witnesses for the purpose of appearing before the Tribunal;
- (e) that furthermore, those countries should give valid travel documents to the potential witnesses and also grant them refugee status;

THE ARGUMENTS OF THE PROSECUTOR

The Prosecutor contended:

(a) that Defence motion had not given sufficient factual grounds to allow the Tribunal to make any finding on the merit of the request put forward by the Defence;

(b) that the Defence Counsel for Samuel Imanishimwe should demonstrate that potential witnesses in Europe, North America or any other continent truly fear for their safety and that there is a danger posed against their lives in the event that they testify;

(c) that since the public needs to see and know the names of those witnesses who come from abroad, a balance should be struck between having a public hearing and the right of protection of witnesses;

(d) that further, there should be a case by case identification of witnesses who should depose by way of affidavit or a report from the Defence investigators about their safety so as to gauge the risk posed to their lives, families or property;

(e) that the Defence should be ordered to substantiate their request in default of which the motion should be rejected;

(f) that in the alternative, if the Trial Chamber were to hold that an appropriate factual basis exist to justify protective measures to be made, the Prosecutor would not object to the witness protection measures in question as long as the disclosure of the witnesses's identity to the Prosecutor is made within sufficient time to enable the Prosecution to prepare for cross-examination;

In reply, the Defence Counsel reiterated their arguments asserted above.

SUBMISSION BY THE CHIEF OF THE VICTIMS AND WITNESS SUPPORT SECTION:

The Chief of the VWSS submitted that each party is obligated to identify its own witnesses and then communicate with the VWSS. Furthermore, he cautioned that the parties should refrain from making references to the death of Mr. Seith Sendashonga because he was not a protected witness under the protection of the Tribunal at that time of his assassination.

DELIBERATIONS:

The Trial Chamber has considered the provisions on witness protection as stipulated in both the Statute and the Rules as they pertain to this motion. Furthermore, the Trial Chamber takes cognisance of the fact that, in accordance with Article 20(4)(e) of the Statute, the accused has the right "to examine, or have examined, the witnesses against him or he to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses."

However, it is our view that although orders for appropriate measures may be given for the protection of defence witnesses, such witnesses need to be identified in more detail by the Defence before they could be granted protection by the Trial Chamber. Considering the importance of having a proper defence for the accused and considering that protective measures have been granted to the Prosecutor and for other accused, in the interests of justice, the protective measures requested by the Defence should be granted in the manner specified below.

A. Cooperation by the Relevant States

The Trial Chamber is 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;

The Trial Chamber takes judicial notice of similar motions decided by the Tribunal in the cases of *The Prosecutor v. Georges Anderson Rutaganda (ICTR- 96-3-T)* (decided on 6 March 1997) and *The Prosecutor v. Elie Ndayambaje (ICTR- 96-8-T)* (decided on 8 September 1997) in which the Tribunal solicited the cooperation of States, UN organizations including the United Nations High Commissioner for Refugees ("the UNHCR") and any other competent organization.

This Trial Chamber, therefore, is of the view that the Registrar should make the necessary contact and negotiate with the relevant States on matters concerning the protection of defence witnesses.

B. On the Issue of Confidentiality: the Non-Disclosure of the Identity of Witnesses to the Public and the Media

Regarding the security of the witnesses, the Trial Chamber agrees with the submission of the Prosecution that there is a need for the Defence to substantiate its request for the relief sought. In the present case, the Defence has not provided such a basis but we understand from the submission of the Defence Counsel that potential witnesses live a migratory lifestyle as they endeavour to hide from those who might seek them for various reasons.

It is our view that since the details of the witnesses are not known, the Defence Counsel should compile a list of witnesses and convey the same to the VWSS. It is also the opinion of this Trial Chamber that some witnesses may face certain risks should they choose to testify without protection. As this may prejudice the rights of the accused in conducting a proper defence, such witnesses should be protected if they are to testify before the Tribunal.

The Trial Chamber is, therefore, of the considered opinion that as far as the measures on non-disclosure of the identity of the Defence witnesses to the public and the media are concerned, it is appropriate. Therefore, the Trial Chamber grants the relief sought by the Defence, to the extent possible, as indicated below in the operative part of this decision.

C. Regarding Immunity From Criminal Prosecution

The Trial Chamber is conscious of the fact that genuine refugees are usually protected by the 1951 Convention Relating to the Status of Refugees as executed by the UNHCR. Furthermore, at the request of a party, after furnishing sufficient evidence to the Trial Chamber, protection may be granted pursuant to Article 21 of the Statute and rule 75 of the Rules, for purposes of testifying before the Tribunal.

The issue of criminal prosecution of refugees falls within the ambit of domestic laws of the State authorities who reserve the right to identify the proper criminals. Hence, if those people seeking refuge have committed genocide, war crimes, serious non-political crimes, crimes against the peace, and crimes against humanity, they cannot be protected. The State authorities reserve the right to prosecute criminal offenders within their territories as a matter of sovereignty.

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

D. With Regard to The Issue of Anonymity: The Request for The Temporary Non-Disclosure of The Identity of Defence Witnesses to The Prosecution

We have given serious consideration to the provisions of rules 66 and 67 of the Rules and find that whilst rules 66 and 69 of the Rules make it obligatory for the Prosecution to disclose to the Defence the evidence on which it would be relying, there is no reciprocal obligation placed upon the Defence to disclose to the Prosecution the witnesses it wishes to call. However, pursuant to Rule 67(A)(ii) of the Rules, if the Defence of alibi or a special Defence would be relied upon by the Defence and notification about this is given, then the Defence is obliged to disclose, *inter alia*, the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.

We are, however, aware of the new provisions of rule 73 *ter* of the Rules, adopted on 8 June 1998, in which a Trial Chamber may order the Defence, before the commencement of its case but after the close of the case for the Prosecution, to file a list of the witnesses it intends to call.

We bear in mind that the Prosecutor supports the application of the Defence, in principle, provided that the necessary disclosure is made within a reasonable time to enable her to prepare her cross-examination.

We recognize that a fair trial calls for each party to be accorded an opportunity to cross examine each other's witnesses so as to solicit or extract the truth. Hence, it is the opinion of this Trial Chamber that once the Defence witnesses are brought under the protection of the Tribunal, the Defence should disclose their identities, in sufficient time prior to the trial, to allow the Prosecution to prepare their rebuttal. In the meantime, until the witnesses are protected by the Tribunal, the Defence may, in the spirit of cooperation, disclose to the Prosecutor any evidentiary material it deems fit, *albeit*, in a redacted form.

We also recognize that there is a need for the Prosecution to contact some Defence witnesses hence under rule 75, the Trial Chamber can *propria motu* allow the Prosecutor to make such contact upon prior notice to the Defence. It is the view of the Trial Chamber, therefore, that the Prosecutor should be allowed to consult witnesses under the conditions given herein.

It is the view of this Trial Chamber that since the Defence has failed to advance its reasons for anonymity, the request is denied.

E. With Respect to Granting Similar Measures to the Defence as Those Granted to the Prosecutor

This Trial Chamber is aware of the need to conduct a fair and expeditious trial whilst according full respect for the rights of the accused with regard for the protection of victims and witnesses. To this end, we take cognisance of Article 19 of the Statute, rules 75 and 69 of the Rules.

The Trial Chamber has also borne in mind the fact that the measures sought by the Defence are pertinent for justice to be achieved and recognises that, pursuant to Article 20 (1) of the Statute, all parties are equal before the Tribunal.

The Trial Chamber is mindful of its numerous previous decisions pertaining to the protection of witnesses for both the Prosecution and the Defence in which protective measures were granted to both parties.

Hence, given those considerations, this Trial Chamber is inclined, to the extent possible, to grant the defence protective measures similar to those accorded to the Prosecution witnesses.

FOR ALL THE ABOVE REASONS THE TRIBUNAL:

GRANTS the Defence request for protective measures and **HEREBY DECIDES** the following:

- (i) That the Defence Counsel shall furnish the VWSS with the particulars pertaining to its witnesses to enable the VWSS to take appropriate protective measures as provided below to ensure the witnesses's presence and their safety.

(ii) That pursuant to Security Council Resolution 955/94 and Article 28 of the Statute, the Tribunal authorises the Registrar to solicit the assistance of the UNHCR and those States where potential witnesses are located. In this regard, the Registrar after receiving the information concerning the witnesses from the Defence Counsel, shall take all possible measures to ensure their availability to the Tribunal in cooperation with the governments of States mentioned by the Defence Counsel in his submission above.

(iii) That subject to rule 67 of the Rules, the names, addresses, whereabouts of the defence witnesses and other identifying information about them shall not be disclosed to the Prosecution, until further notice. For the moment, the Defence should immediately provide redacted evidential materials with the understanding that full disclosure will be done once the witnesses are under the protection of the Tribunal but within the context of rule 73 *ter* (B)(iii) of the Rules.

(iv) That the names, addresses, whereabouts of the Defence witnesses and other identifying information of the defence witnesses shall be kept under the seal of the Tribunal and not included in any of the public records of the Tribunal.

(v) That in cases where such names, addresses, whereabouts of the defence witnesses and other identifying information about the defence witnesses that appear in the Tribunal's public records, this information shall be expunged from the said records.

(vi) That the names, addresses, whereabouts of the defence witnesses and other identifying information of the defence witnesses shall not be disclosed to the public and the media.

(vii) That the public and the media shall not take photographs, make audio and video recordings or sketching of the defence witnesses who are under the protection of the Tribunal, without its authorization.

(viii) That the Prosecution and its representatives shall notify the Defence Counsel of any request for contacting the defence witnesses, and the Defence Counsel shall make arrangements for such contacts.

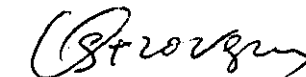
(ix) That the Defence shall be permitted to designate pseudonyms for each of its witnesses for use in the proceedings of the Tribunal, during any *inter partes* communication and to the public as well as in the official proceedings of the Tribunal.

(x) That 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 abovementioned protective measures for the defence witnesses.

Arusha, 30 September 1998



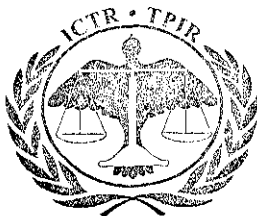
Judge William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge



(Seal of the Tribunal)