

ICTR-96-13-I
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Case No. ICTR-96-13-T



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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CRIMINAL REGISTRY,
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TRIAL CHAMBER I

OR:ENG

Before: Judge Lennart Aspegren

Registry: Ms Marianne Ben Salimo

Decision of: 20 November 1998

**THE PROSECUTOR
VERSUS
ALFRED MUSEMA**

Case No. ICTR-96-13-T

**DECISION ON THE PROSECUTOR'S MOTION
FOR WITNESS PROTECTION**

The Office of the Prosecutor:

Ms Jane Anywar Adong
Mr. Charles Adeogun-Phillips

Counsel for the Accused:

Mr. Steven Kay QC

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

SITTING in the person of Judge Lennart Aspegren, member of Trial Chamber I;

CONSIDERING the indictment dated 12 July 1996 and filed by the Prosecutor against Alfred Musema 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 genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

CONSIDERING that this indictment was confirmed by Judge Yakov Ostrovsky in a decision on 15 July 1996;

CONSIDERING the initial appearance of the accused which took place on 18 November 1997;

BEING SEIZED of a motion, filed on 22 October 1998 by the Prosecutor, for orders for protective measures for victims and witnesses to crimes alleged in the indictment;

HAVING RECEIVED, on 11 November 1998, a Defence reply to the Prosecutor's request for orders for protective measures for victims and witnesses to crimes alleged in the indictment, and a brief in support thereof on 18 November 1998;

HAVING HEARD the parties at an audience held to that end on 18 November 1998;

TAKING INTO ACCOUNT Articles 20 and 21 of the Statute and Rules 66, 69 and 75 of the Rules;

NOTING the Tribunal's decision of 18 November 1997 in this case to withdraw assigned counsel and to allow the Prosecutor temporarily to redact identifying information of her witnesses;

AFTER HAVING DELIBERATED,

Measures Requested

1. The Prosecutor requests the Trial Chamber to issue an order:
 - " (1) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all prosecution witnesses, be sealed by the Registry and not included in any Tribunal records;
 - (2) Requiring, to the extent that any names, addresses, whereabouts of and any other identifying information, concerning potential prosecution witnesses is contained in existing Tribunal or public records, that those names, addresses, whereabouts of, and other identifying information, concerning the witnesses be expunged from those documents;

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- (3) Prohibiting the disclosure to the public or the media, of the names, addresses, whereabouts of, and any other identifying data in the supporting material on file with the Registry or any other information which would reveal the identity of prosecution witnesses;
- (4) Prohibiting the Defence and the accused from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents, or any other information which is prohibited from being disclosed to the public, to any one other than assigned Counsel or others working on the immediate Defence team designated by the assigned Counsel or the accused;
- (5) Prohibiting the photographing, audio and video recording, or sketching of any witness at any time or place without leave of the Trial Chamber and parties;
- (6) Prohibiting the disclosure to the Defence team of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of prosecution witnesses, and any information in the supporting material on file with the Registry until such time that the Tribunal is assured that the witnesses have been afforded an adequate mechanism for protection; and allowing until such mechanism is in place, the Prosecutor to disclose any materials provided by the Defence in a redacted form;
- (7) That in order to comply with Article 66 of the Statute, the Prosecutor will submit a written request to the Trial Chamber, or Judge thereof, to lift the protective measures respecting certain witnesses, should those measures no longer appear to be necessary after appropriate verification and investigation. At the direction of the Trial Chamber or a Judge thereof, notice will be given to the Witness Protection Unit where protective measures have been lifted;
- (8) That the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected prosecution witnesses or the relatives of such witnesses. At the direction of the Trial Chamber or a Judge thereof, and with the consent of the witness or his/her relative to the interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;
- (9) Requiring that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public."

2. The Prosecutor further reserves the right to apply to the Trial Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

3. As a point of order, the Tribunal notes that reference to Article 66 of the Statute in measure 7 of the Prosecutor's motion is erroneous. After having been so requested by the Tribunal, correction was made by the Prosecutor to her measure 7 by indicating that reference instead should be to Rule 66(B) of the Rules.

The Basis of the Motion

The Legal Basis

4. The Prosecutor brought her motion before the Tribunal based on the provisions of Article 21 of the Statute and Rules 69 and 75 of the Rules.

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5. 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 *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.

6. 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.

7. 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. However, this is subject to the proviso that, in accordance with Rule 69(C), the identity of the victims and witnesses shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the Prosecution and the Defence.

8. It should be noted, though, that measures for the protection of witnesses are granted on a case by case basis, and take effect once the particulars and locations of the witnesses have been forwarded to the Witnesses and Victims Support Unit.

The Arguments

9. The Prosecutor submits, *inter alia*, that since January 1996 and, more recently, following the fighting in the Democratic Republic of Congo, over a million Rwandan refugees who fled from their homes fearing reprisals, were forced to return to Rwanda. The Prosecutor contends that as a direct result of this, the level of violence directed against survivors of and witnesses to the genocide has increased dramatically resulting in the deaths of a significant number of survivors and potential witnesses.

10. The Defence Counsel, in his written reply of 11 November 1998 and in his brief of 18 November 1998 in support thereof, and during the hearing, opposes all the measures sought by the Prosecutor. The Defence counsel contends, *inter alia*, that the measures, if ordered, would prejudice the right of the accused to an adequate defence by hampering investigations and by preventing the Defence from having full knowledge of the prosecution case. Specifically, the Defence Counsel submits that the granting of measures 1 and 9 would prevent public scrutiny or accountability of a witness in proceedings which are founded upon the principles of Article 20(2) of the Statute. Furthermore, the Defence Counsel objects in part to measure 8 on the ground that to extend the measure to include relatives of witnesses would be onerous and unfair as it could be inadvertently breached during Defence investigations or in circumstances where it would be impracticable to contact the Prosecutor or the Trial Chamber. The Defence Counsel also argues that measure 4 as sought by the Prosecutor is such as to prevent the Defence from discussing anything with persons outside the immediate Defence team concerning the case.

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11. 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 annexures presented by the Prosecutor in support of her motion, namely, the United Nations High Commissioner for Human Rights Field Operation in Rwanda (“HRFOR”) Status Report (HRFOR/STRPT/33/1/24 January 1997/E) and the HRFOR Summary Report on the Human Rights Situation in Rwanda (HRFOR UPD 11 September 1996 E). Judicial notice is also taken of the HRFOR Report on the Human Rights Situation in Rwanda and of the activities of HRFOR (HRFOR/RPT/13/May-June 1997/E) and of the HRFOR Status Report (HRFOR/STRPT/56/1/28 August 1997/E). Many other concordant reports were issued by various sources. All these reports 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 Prosecutor as being well founded. Therefore, taking into account the representations of the parties and being aware of the present security situation affecting the prosecution witnesses, it considers there to be sufficient factual grounds for the protective measures sought by the Prosecutor.

On the non-disclosure of the identity of a witness

14. The Prosecutor in her motion requests for the non-disclosure of the identity of prosecution witnesses.

15. Pursuant to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise. However, this is subject to the proviso of Rule 69(C) whereby the identity of the witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation of the defence.

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). 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 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 Prosecutor and the Defence, is of the opinion that the arguments presented in support of the Prosecutor's motion do demonstrate the existence of exceptional circumstances warranting the non-disclosure of the identity of witnesses deemed to be in danger or at risk.

On measures 1, 2, 3, 5, 8 and 9 of the motion

18. As regards *measures 1, 2, 3, 5, 8 and 9* of the Prosecutor's request, the Tribunal takes note of the submissions of the parties and grants the said measures insofar as they are consistent with the rights of the accused.

On measure 4

19. By *measure 4* of the motion, the Prosecutor requests an order prohibiting the Defence and the accused from sharing, discussing or revealing, directly or indirectly, any documents, or any information contained in any documents, or any other information which is prohibited from being disclosed to the public, to any one other than assigned Counsels or others working on the immediate Defence team designated by the assigned Counsel or the accused.

20. The Tribunal recalls that when measures are ordered for the protection of witnesses, the parties to the case are bound by the terms of the Tribunal's decision thereon. This obligation to respect the protective measures for witnesses as ordered is incumbent on both the Prosecutor and the Defence.

21. Consequently measure 4 of the Prosecutor's request shall not be granted.

On redaction of the supporting materials (measure 6)

22. By *measure 6* of the motion, the Prosecutor requests in part thereof that leave be granted for materials to be disclosed to the Defence in a redacted form. This measure would remain until such time as the Tribunal is assured that the witnesses have been afforded an adequate mechanism for protection.

23. On this point, the Tribunal recalls that in its aforementioned decision of 18 November 1997 to withdraw assigned counsel, it granted permission to the Prosecutor to temporarily redact the names and other identifying information of her witnesses in the supporting material until such time as the Tribunal has ordered protective measures for the Prosecutor's witnesses. This was subject to the caveat however that the identity of the victims and witnesses shall be disclosed in sufficient time prior to Trial to allow adequate time for the preparation of the defence.

24. Thus, measure 6, as pertains to the redaction of supporting material need not be granted anew.

On measure 7

25. By *measure 7* of the motion, the Prosecutor advances that in order to comply with Article 66(B) of the Rules, the Prosecutor will submit a written request to the Trial Chamber, or a Judge thereof, to lift the protective measures respecting certain witnesses, should those measures no longer appear to be necessary after appropriate verification and investigation. At the direction of the Trial Chamber or a Judge thereof, notice will be given to the Victims and Witnesses Support Unit where protective measures have been lifted.

26. Rule 66 of the Rules provides for the disclosure of materials by the Prosecutor. Rule 66(B) stipulates that at the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C) of Rule 66, permit the Defence to inspect any books, documents, photographs and tangible objects in her custody or control, which are material to the preparation of the Defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. The Tribunal takes particular notice of Rule 66(A)(ii) whereby the Prosecutor shall disclose to the Defence no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.

27. In the opinion of the Tribunal, measure 7 as requested by the Prosecutor falls outside the measures envisaged under Rules 69 and 75 of the Rules. The lifting of measures of protection are addressed when so needed during the trial proceedings, at which point, in the opinion of the Tribunal, the Prosecutor is at liberty to approach the Tribunal for appropriate relief.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

HEREBY DECIDES the following:

1. The Prosecutor shall furnish the Registrar with all the particulars pertaining to her affected witnesses, and that appropriate measures as set forth below be taken.
2. The Registrar, after receiving the information concerning the witnesses from the Prosecutor, shall take all possible measures to ensure the availability of the said witnesses to the Tribunal.
3. The names and identities of the Prosecutor's witnesses shall be forwarded by the Prosecutor to the Registrar only in confidence, and they shall not be disclosed to the media or the public until such time as the said witnesses are under the protection of the Tribunal.
4. The Registrar shall not reveal the names and identities of these witnesses either to the media or the public without the express consent of the Prosecutor.

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- 5. In cases where the names, addresses, locations and other identifying information of the Prosecutor's witnesses appear in the Tribunal's public records, this information shall be expunged from the said records.
- 6. The names, addresses, locations and other identifying information of the Prosecutor's witnesses contained in the supporting materials of the Prosecutor shall not be disclosed to the public or media.
- 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 Prosecutor's witnesses who are under the protection of the Tribunal, without its authorization.
- 8. The Prosecutor 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. The Defence Counsel and any representative acting on his behalf shall notify the Prosecutor prior to any contact with any of the Prosecutor's witnesses, and the Prosecutor shall make arrangements for such contacts.

REMINDS the Prosecutor of the Tribunal's decision of 18 November 1997 to withdraw assigned counsel, wherein the Prosecutor was authorized to withhold disclosure to the Defence of the identity of the witnesses and to temporarily redact their names, addresses, locations and other identifying information from the supporting material on file with the Registry, until such time as the said witnesses are under the protection of the Tribunal.

RECALLS that, pursuant to Rule 69(C) of the Rules, the identity of the witnesses shall be disclosed by the Prosecutor to the Defence in sufficient time prior to the trial to allow adequate time for preparation of the defence.

DIRECTS the Registrar to execute this decision immediately and to report back in writing to the Trial Chamber on its implementation.

Arusha, 20 November 1998.


 Lennart Aspegren
 Judge

(Seal of Tribunal)