



**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

UNITED NATIONS  
NATIONS UNIES

**TRIAL CHAMBER III**

**OR: ENG**

Before: Judge Lloyd George Williams, Presiding  
Judge Pavel Dolenc  
Judge Asoka de Zoysa Gunawardana

Registry: Ms Marianne Ben-Salimo

Decision of: 13 September 1999

1999 SEP 15 P 3: 59  
ICTR  
CRIMINAL REGISTRY  
RECEIVED

**THE PROSECUTOR  
VERSUS  
THÉONESTE BAGOSORA**

Case No. ICTR-96-7-I

**DECISION ON THE EXTREMELY URGENT REQUEST MADE BY THE  
DEFENCE FOR PROTECTION MEASURES FOR MR. BERNARD NTUYAHAGA**

The Office of the Prosecutor:

Mr. David Spencer  
Mr. Frédéric Ossogo  
Ms Holo Makwaia

Counsel for the Accused:

Mr. Raphaël Constant

<b>International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda</b>	
<b>CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS</b>	
<b>NAME / NOM:</b>	<i>John M. Kiyeyen</i>
<b>SIGNATURE:</b>	<i>[Signature]</i>
<b>DATE:</b>	<i>15/9/1999</i>

## **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")**

1. Trial Chamber III, composed of Judge Williams, presiding, Judge Dolenc and Judge Gunawardana, heard this motion on 17 August 1999.

### **INTRODUCTION**

2. Théoneste Bagosora was arrested in Cameroon on 9 March 1996. The Prosecutor issued an indictment against him. This indictment was confirmed by Judge Aspegren on 10 August 1996, pursuant to Rule 47 of the Rules of Procedure and Evidence, hereinafter referred to as the Rules, on the basis that there was *prima facie* evidence that the accused had 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. Bagosora was transferred to the detention facility in Arusha on 23 January 1997. He made his initial appearance before the Tribunal on 20 February 1997 and pleaded not guilty to the charges contained in the indictment of 10 August 1996.

3. On 11 August 1999, the Prosecutor brought a motion to amend the indictment against Bagosora and Anatole Nsengiyumva to add allegations of complicity in genocide, further allegations of crimes against humanity specifying rape, murder, extermination, persecution and other inhumane acts, and further allegations of serious violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol thereto, including outrages upon personal dignity. This motion was granted on 12 August 1999. On 13 August 1999, Bagosora pleaded not guilty to the charges contained in the Amended Indictment filed 12 August 1999.

### **THE MOTION**

4. On 9 July 1999, the Defence filed a motion entitled, "Extremely Urgent Request for Protection Measures for Bernard Ntuyahaga." The Prosecutor filed a brief in reply to the Defence motion on 23 July 1999. On 9 August 1999 the Defence filed a further brief in reply to the Prosecutor's brief. By letter dated 13 August 1999, and filed 16 August 1999, the Defence wrote to the Attorney-General and the Minister of Justice of the United Republic of Tanzania, notifying them of the Defence motion for protective measures and advising that the motion would be heard on 17 August 1999.

5. In his written submissions, the Defence requested the Trial Chamber to direct the Tanzanian Government not to proceed with the extradition or deportation of Ntuyahaga to any other country, particularly Rwanda. At the hearing of the motion, in addition to that point, the Defence asked, in the alternative, that the Tribunal order that Ntuyahaga be not extradited to Rwanda until such time as he has testified at the trial of Bagosora. He also asked the Trial Chamber to direct the Witness and Victims Support Section to provide protection for Ntuyahaga until he appears as a witness before the Tribunal. He did not indicate the nature of the protection sought in light of the fact that Ntuyahaga is presently detained by the Tanzanian authorities.

6. Counsel for the Defence informed the Trial Chamber that a hearing with respect to Ntuyahaga's extradition took place on 11 August 1999. Counsel for the Defence did not know the outcome of that hearing; however, he submitted that Ntuyahaga had not yet been extradited. It is to be noted that there is a preliminary motion, pending before the Tribunal, to join Bagosora with three other accused, scheduled to be heard 28 October 1999. A date for trial has not yet been fixed and it is not known when the trial will commence.

#### **SUBMISSIONS OF THE DEFENCE**

7. The Defence argued that Ntuyahaga's evidence will be important to the trial of Bagosora and that his request for protective measures was in compliance with Rule 75 of the Rules.

8. In support of his argument about the importance of Ntuyahaga's evidence, the Defence referred to the allegations in the original and amended indictments of Bagosora and the former indictment of Ntuyahaga. In particular, he referred to the allegations made with respect to Ntuyahaga's involvement in the deaths of ten Belgian UNAMIR soldiers in Kigali in April 1994. The Defence further submitted that in the Prosecutor's view, Ntuyahaga was involved in these deaths. In support of this argument, he referred to three specific documents produced by the Prosecutor, entitled MINADEF-2, NTIWALO-3 and RUSALEO-3.

9. With respect to the necessity for protective measures, the Defence submitted that if Ntuyahaga is extradited to Rwanda there is a real concern that he will not be able to appear before this Tribunal, and that he may be executed before being called to give evidence at the trial of Bagosora. Thus, he asked the Trial Chamber to prevent Ntuyahaga's extradition on the basis of the danger to life Ntuyahaga would face in Rwanda, or the possibility that he may be executed before testifying in the Tribunal. He questioned whether the Tribunal would have any power to stay the execution of Ntuyahaga in Rwanda if he were sentenced to death before the trial of Bagosora.

10. Lastly, the Defence submitted that the Tribunal has jurisdiction to make the order sought on the basis of the provisions in the Statute of the International Criminal Tribunal for Rwanda, hereinafter referred to as the Statute, and the Rules, permitting the Tribunal to take the necessary measures to ensure a fair trial.

#### **SUBMISSIONS OF THE PROSECUTION**

11. The Prosecutor submitted that Ntuyahaga is not a person over whom this Trial Chamber has any jurisdiction, as there is no case pending against him.

12. The Prosecutor argued that the protective measures contemplated by the Statute and the Rules are not without limits, and referred the Trial Chamber to the decision in *Prosecutor v. Ntagerura*, Case ICTR-96-10-I (Decision on the Defence Motion for the Protection of Witnesses) (24 August 1998). The Prosecutor submitted that this was an analogous situation. It was the Prosecutor's position that the Tribunal has no jurisdiction to interfere in a case of extradition

between two states involving an individual who is not before the Tribunal.

13. The Prosecutor submitted that there was no basis in fact or law for the Defence motion for three reasons. Firstly, there was no evidence before the Tribunal that Ntuyahaga was willing to testify. Secondly, there was no evidence about what Ntuyahaga would say if called as a witness. Thirdly, there was no evidence that if Ntuyahaga were in Rwandan custody, the Rwandan government would not comply with a request from the Tribunal for his attendance at the trial of Bagosora.

#### **RELEVANT PROVISIONS OF THE STATUTE AND THE RULES**

14. The Trial Chamber has considered Articles 19, 20, 21 and 28 of the Statute and Rules 69, 71, 75 and 90*bis* in its determination of the motion. A discussion of the relevant provisions follows.

##### *(a) Article 28 of the Statute*

15. Article 28: Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- a) The identification and location of persons;
- b) The taking of testimony and the production of evidence;
- c) The service of documents;
- d) The arrest or detention of persons;
- e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

16. Article 28 obliges States to cooperate with the Tribunal in its investigation and prosecution of accused persons, and requires States to comply with any request for assistance or order issued by a Trial Chamber. The Defence provided no evidence that either Tanzania or Rwanda would fail to comply with Article 28 if the Trial Chamber requested Ntuyahaga's presence in Arusha to testify at the trial of Bagosora.

17. Article 28 sets out the parameters of State cooperation with the Tribunal in terms of investigation and prosecution of accused persons. The parameters listed do not include measures that would enable the interference with extradition proceedings between two States, a matter which falls within the ambit of treaty obligations and diplomatic relations between States.

##### *(b) Rule 69 of the Rules*

18. Rule 69: Protection of Victims and Witnesses

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber

to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.

(C) Subject to Rule 75, the identity of the victim or witnesses shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence.

19. Rule 69 allows either party to apply to a Trial Chamber for protection of victims or witnesses who may be in danger or at risk. Evidence that a real fear exists that the witness will be unavailable to testify is necessary to support a motion for protective measures.

*(c) Rule 75 of the Rules*

20. Rule 75: Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measure to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

21. Rule 75 enables the Trial Chamber to order measures to protect the privacy and security of witnesses. Protective measures can be ordered in situations where witnesses have a real fear for their safety and where there is a valid basis for such fear. If these measures become necessary, based on the particular circumstances of this case, the Defence can bring a motion for an order from the Trial Chamber, at the appropriate stage.

*(d) Rule 90bis of the Rules*

22. Rule 90bis: Transfer of a Detained Witness

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

(B) The transfer order shall be issued by a Judge or Trial Chamber only after verification that the following conditions have been met:

...

(e) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(f) transfer of the witness does not extend the period of his detention as foreseen by the requested State

23. Rwanda has transferred detained witnesses to the Tribunal, pursuant to Rule 90bis in previous cases. *See Prosecutor v. Akayesu*, Case ICTR-96-4-T (Order for Temporary Transfer of Three Detained Witnesses Pursuant to Rule 90bis of the Rules of Procedure and Evidence) (31 October 1997); *Prosecutor v. Musema*, Case ICTR-96-13-T (Order for Temporary Transfer of

Three Detained Witnesses (Q, L, AB) pursuant to Rule 90bis of the Rules of Procedure and Evidence) (19 April 1999).

### **PREMATURITY OF THE MOTION**

24. This Tribunal cannot anticipate the Tanzanian Government's decision on Ntuyahaga's extradition. It is not now known whether Ntuyahaga will be extradited to Rwanda.

25. The Defence submitted that Ntuyahaga will be subject to Category 1 charges of genocide, if he is extradited to Rwanda, and that if convicted of such charges, he will face the death penalty. It is unknown at this time if the Tanzanian Court will order the extradition of Ntuyahaga, and if Ntuyahaga is extradited, when he will be tried in Rwanda, and whether he will be convicted. In the event that Ntuyahaga is tried and convicted in Rwanda before the trial of Bagosora, the Defence did not present sufficient evidence to the Tribunal to establish that Rwanda would fail to cooperate with a request from the Tribunal to stay Ntuyahaga's execution until after his testimony at the trial of Bagosora. Indeed, in the past, the Rwandan authorities have cooperated with the Tribunal, allowing accused in their custody, who are witnesses before the Tribunal, to come to Arusha to testify. *See Akayesu, supra.*

26. The arguments on which the Defence relies to support the motion are speculative at this stage. Therefore, it is premature for the Tribunal to make an order with respect to the extradition proceedings.

### **PRE-CONDITIONS FOR AN ORDER FOR PROTECTIVE MEASURES**

27. Rule 69 allows either party to apply for protective measures in "exceptional circumstances." The genocide that occurred in Rwanda during 1994 and the subsequent volatile security situation in Rwanda are clearly exceptional circumstances contemplated by this Rule.

28. To grant protective measures to a witness, pursuant to Rule 75, the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. *See Prosecutor v. Tadic, Case IT-94-1-T (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) (10 August 1995).*

### **RELEVANCE AND IMPORTANCE OF NTUYAHAGA'S EVIDENCE**

29. The Defence must establish that Ntuyahaga's evidence is relevant and necessary. Counsel for the Defence presented no evidence that he had contacted Ntuyahaga with regard to this motion, or that Ntuyahaga agrees to testify before the Tribunal. Nor did the Defence submit any proof regarding the nature of his evidence and the relevancy of that evidence to Bagosora's defence. Thus, the Defence was not in a position to establish how Ntuyahaga's appearance will be material to the discovery of the truth. *See Prosecutor v. Akayesu, Case ICTR-96-4-T (9*

March 1998) (26 February 1998). Statements by Counsel, from the bar, without supporting evidence, are not sufficient.

### **SELF-INCRIMINATION**

30. At this time it is not known whether Ntuyahaga would agree to testify at the accused's trial or whether he would choose not to do so, out of concern about self-incrimination, for any matter on which he may be prosecuted in Rwanda or elsewhere. In *Prosecutor v. Ntagerura*, Case ICTR-96-10A-I (Decision on the Defence Motion for the Protection of Witnesses) (24 August 1998), the Trial Chamber held that it could not extend the immunity from prosecution granted under Rule 90 with respect to self-incriminating statements beyond subsequent proceedings before the Tribunal. The Trial Chamber further held that it was not within the jurisdiction of the Tribunal to extend such immunity to prosecution in a national court.

### **DANGER OR RISK FACED BY NTUYAHAGA**

#### *(a) Evidence that a Real Fear Exists*

31. The Defence filed no documentation establishing Ntuyahaga's fear. The only factor before this Trial Chamber, with respect to any real fear held by Ntuyahaga, is that of lawful extradition proceedings and possible prosecution in Rwanda, which could render Ntuyahaga unavailable to testify at the trial of the accused.

32. In his oral submissions, Counsel for the Defence referred this Tribunal to the decision in *Prosecutor v. Rutaganda*, Case ICTR-96-3-T (Decision on the Urgent Motion Filed by the Defence for the Immediate Transfer and Appearance of a Detained Witness, Froduald Karamira) (26 March 1998), in which, he submitted, the Government of Rwanda refused to send Froduald Karamira, who had been convicted of Category 1 genocide in Rwanda, to the Tribunal to testify. The Defence stated that Karamira was then executed. In that context, it must be pointed out that Trial Chamber I dismissed the Defence motion for an order to produce Karamira as a witness on three grounds. Firstly, Karamira had not exhausted all local remedies. Secondly, the Defence failed to show that the conditions of Rule 90*bis* had been met. Thirdly, the Defence failed to produce any evidence that Karamira would consent to testify for the Defence.

33. Counsel for the Defence also made reference to individuals who died in prison in Rwanda but provided no particulars as to the circumstances under which such deaths occurred.

#### *(b) Fear of Criminal Prosecution*

34. This Trial Chamber is of the view that the phrase "in danger or at risk" does not include being subject to the lawful acts of a state, e.g., prosecution. For a person to be in danger or at risk, the threat must be of an unlawful act.

35. Whether fear of criminal prosecution is a fear from which a witness should be protected, pursuant to Rule 69, was considered by this Tribunal in *Prosecutor v. Kayishema and Ruzindana*,

Case ICTR-95-1-T (Decision on the Motion for Protection of Defence Witnesses) (6 October 1997). The Trial Chamber held that protective measures for witnesses should not hinder due process or be used as a means to provide immunity to the witnesses against possible prosecution. The Trial Chamber went on to add that protective measures should not extend to providing immunity from criminal prosecution by any appropriate authority.

36. In *Prosecutor v. Kanyabashi*, Case ICTR-96-15-T (Decision on the Protective Measures for Defence Witnesses and Their Families) (25 November 1997), the Trial Chamber stated that there is always a need for substantiation of requests for the protection of witnesses. In that case, the Trial Chamber concluded that the reports submitted by the Defence on the security situation in Rwanda and neighbouring countries established that the situation in those countries may well pose a risk to potential defence witnesses. The Defence sought protection for those potential witnesses in the granting of refugee status. The Trial Chamber held that the granting of refugee status falls within the ambit of domestic law, and that national authorities have the sovereign right to prosecute criminal offenders within their territory. On that basis, it refused to grant the order sought. The Trial Chamber reiterated its finding in *Kayishema and Ruzindana*, *supra*, that protective measures should not extend to providing immunity from criminal prosecution by any appropriate authority. While the Trial Chamber held that it could not interfere with the sovereignty of the Republic of Kenya, in recognition of the security situation in Rwanda, it authorized the Registrar to solicit the assistance of the Kenyan Government and the UNHCR to ensure the availability of the witnesses to the Tribunal.

#### LESS RESTRICTIVE MEASURES

37. There are measures available to the Defence to ensure Ntuyahaga's evidence is presented to this Trial Chamber, and to protect Bagosora's right to a fair trial, pursuant to Articles 19 and 20, other than by interfering with the extradition proceedings between two States. The Defence has not shown that the stay of extradition proceedings is the only measure available to protect Bagosora's right to a fair trial, pursuant to Articles 19 and 20.

38. There is provision in Rule 71 that if the Trial Chamber were satisfied that Ntuyahaga was willing to give evidence, and that such evidence was necessary, it could consider granting an order that such evidence be given by deposition or by means of a video-conference, regardless of the results of the extradition proceedings. It is, however, to be observed that in this case the Defence has failed to adduce evidence to satisfy the Trial Chamber that such an order is justified in this case. Thus it is seen that Bagosora's right to a fair trial, pursuant to Articles 19 and 20, could be secured by use of a less restrictive measure than that proposed by the Defence, and without interference in matters of national jurisdiction and interaction between States.

39. A direction by the Trial Chamber to the Tanzanian Government to stay the extradition proceedings of Ntuyahaga at this time would not be the least restrictive measure by which to secure protection for this proposed witness.



## JURISDICTION

40. There is no provision in the Statute or the Rules enabling the Tribunal to direct the Tanzanian Government to order a stay of extradition proceedings, until an undetermined date, on which it is anticipated that the proposed witness might give evidence.

41. Article 8 of the Statute sets out the primacy of the Tribunal over national courts of all States with respect to persons indicted by the Prosecutor. This primacy will not be extended to Ntuyahaga, who is not an accused person before the Tribunal and who has not sought the protection of the Tribunal at this time.

42. In *Prosecutor v. Nsengiyumva*, Case ICTR-96-12-I (Decision on Protective Measures for Defence Witnesses and Their Families and Relatives) (5 November 1997), and in *Kanyabashi, supra*, where protective measures were sought, the Trial Chamber held that it did not have jurisdiction to order the UNHCR or any State to grant refugee status to a witness. However, it did acknowledge its mandate to solicit the cooperation of the UNHCR and States when appropriate. In *Ntagerura, supra*, the Tribunal found that the proposed witnesses had a real fear, but held that it did not have jurisdiction to grant immunity from prosecution in a national jurisdiction for evidence given at the Tribunal. The Defence had sought immunity as a protective measure.

43. In *Prosecutor v. Ntuyahaga*, Case ICTR-98-40-T, at 8 (Decision on the Prosecutor's Motion to Withdraw the Indictment) (18 March 1999), the Tribunal held that once Ntuyahaga was no longer under indictment, pursuant to the Statute and the Rules, the Tribunal no longer had any jurisdiction over him. Thus, the Tribunal held that it did not "have jurisdiction to order the release of a person who is no longer under indictment into the custody of any given State." *Ibid.*

44. Taking into consideration all the circumstances, the Trial Chamber holds that it does not have jurisdiction to order a stay of the extradition of Ntuyahaga.

## SOVEREIGNTY

45. Ntuyahaga's extradition proceedings are a matter between two sovereign states. The Tribunal should not interfere with this process or with matters affecting the sovereignty of Tanzania.

46. On 31 August 1995, Hans Corell, Under-Secretary General of the United Nations for Legal Affairs, The Legal Counsel, wrote a letter to Daudi Ngelautwa Mwakawago, Permanent Representative of Tanzania to the United Nations. In that letter, Corell confirmed the understanding of the Agreement Between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Tribunal for Rwanda ("Host Agreement"), as follows:

In relation to Article VII

It is the understanding of the Parties that without prejudice to the provisions of the Agreement, the United Nations shall prevent the seat of the Tribunal from becoming a refuge for persons who are avoiding arrest under any law of the United Republic of Tanzania or are required by the Government for extradition to another country or who are endeavoring to avoid service of legal process.

47. This further reinforces the view of the Trial Chamber that it is not appropriate to interfere in the extradition proceedings of Ntuyahaga.

48. For the reasons given, the Trial Chamber **DENIES** the motion for protective measures for Ntuyahaga.

Done in English and French, the English being authoritative.

Arusha, 13 September 1999.



Lloyd George Williams  
Presiding Judge



Pavel Dolenc  
Judge



Asoka de Zoysa Gunawardana  
Judge

Seal of the Tribunal

