

ICTR-96-10-I

07-02-2000

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

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TRIAL CHAMBER III

OR: ENG

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 4 February 2000

THE PROSECUTOR

v.

André NTAGERURA
Case No. ICTR-96-10-I

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**DECISION ON THE DEFENCE MOTION FOR ADDITIONAL
PROTECTIVE MEASURES FOR DEFENCE WITNESSES**

The Office of the Prosecutor:
Léonard Assira Éngouté
Richard Karegyesa
Liliane Rasendra
Alexandra Harvey
Ayo Fadugba

Counsel for André Ntagerura:
Benoît Henry

1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "TRIBUNAL")

SITTING as Trial Chamber III, composed of Judge Lloyd G. Williams, presiding, Judge Yakov Ostrovsky and Judge Pavel Dolenc (the "Trial Chamber");

BEING NOW SEIZED OF a Defence Motion Requesting an Order for Additional Protective Measures for Defence Witnesses (the "Motion") under Article 21 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute") and Rule 75 of the Rules of Procedure and Evidence (the "Rules"), filed 16 June 1999;

HAVING CONSIDERED the Prosecutor's Response to the Motion, filed 10 September 1999 (the "Response");

NOTING the Indictment against André Ntagerura, filed 9 August 1996 by the Prosecutor, and confirmed on 10 August 1996 by Judge Lennart Aspegren;

CONSIDERING that the Defence filed a Motion for Orders for Protective Measures for Defence Witnesses on 21 November 1997 (the "Initial Motion"), followed by a Supplementary Motion thereto, filed 11 May 1998;

NOTING that Trial Chamber II heard the Initial Motion on 13 May 1998 and rendered a Decision on the Initial Motion, on 24 August 1998;

HAVING HEARD the arguments of the parties on 29 November 1999 **NOW DECIDES** the motion.

THE SUBMISSIONS OF THE DEFENCE

The Defence submits that:

2. In its ruling on the Initial Motion, Trial Chamber II requested States and international organizations to co-operate in the implementation of the protective measures ordered by the Tribunal, without specifically referring to the preamble of Security Council Resolution 955 establishing the Tribunal, or to Article 28 of the Tribunal's Statute which provides that the Tribunal may request co-operation and assistance from States;
3. Trial Chamber II failed to specifically grant the measure sought in Paragraph 23(J) of the Initial Motion, that "The Registrar and his services responsible for witness 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, that is, before, during, and after the trial";

4. None of the measures ordered by the Tribunal in respect of the Initial Motion required that all appropriate measures be taken to ensure the availability of witnesses throughout the trial period; and
5. Potential defence witnesses living in, *inter alia*, Kenya, Cameroon, Tanzania and Zambia fear expulsion from the territories of the States of their sojourn and that should they be expelled, it would be difficult for the Defence to use them as witnesses in Ntagerura's trial.

The Defence consequently requests an order that:

6. Upon receipt by the Defence Counsel of confidential information regarding its witnesses, the Registrar must take, through the Witnesses and Victims Support Section, all possible measures to ensure that the said witnesses are ready to come and testify before the Tribunal during the trial (See Motion, at para. 30 (i));
7. To that end, the Registrar should collaborate with the UNHCR and with States including Kenya, Cameroon, Tanzania and Zambia (See Motion, at para. 30(ii));
8. In accordance with Rule 66, the information about the identity of the witnesses provided by the Defence must not be disclosed to the Prosecutor or to anyone else except in compliance with the provisions of Rule 67 of the Rules or an order issued by the Chamber pursuant to Rule 73 *ter* (B)(iii) of the Rules (See Motion, at para. 30(iii)).

THE SUBMISSIONS OF THE PROSECUTOR

9. The Prosecutor responds that, with the exception of the Defence request that its witnesses be available for trial, all of the measures now requested by the Defence were previously sought and granted.
10. The Prosecutor notes that the Defence did not explain why it is seeking to reintroduce such measures and observes that the Defence makes no mention of problems in the implementation of the previously granted protective measures.
11. Consequently, the Prosecutor urges the Trial Chamber to grant the measure concerning the availability of Defence witnesses at trial, subject, however, to a strict regard for the laws of the host States and international conventions, and to reject the other measures sought on the ground that they were granted to the Defence in the Decision on the Initial Motion.

DELIBERATIONS

12. The Trial Chamber notes that the availability of a witness to give evidence is primarily based on whether such a witness wishes to give evidence on the particular issue, obviously subject to the Trial Chamber's power to summons a witness pursuant to Rule 98.

13. The Trial Chamber notes that Article 28 of the Statute provides for co-operation of States with the Tribunal upon request by a Trial Chamber. Article 21 of the Statute prescribes that the Rules provide for the protection of victims and witnesses.
14. Can it be said that the Tribunal is empowered to prevent the relocation of a witness who, for personal reasons, wishes to move from one State to another? The Trial Chamber thinks not. The Trial Chamber is fortified in its view by Rule 75 which specifically states:
 - (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 measures to safeguard the **privacy** and security of victims and witnesses....(emphasis added)
15. From the evidence adduced and the arguments submitted, it is clear that one of the main concerns of Defence Counsel is that at least some of the witnesses may be expelled from their present country of residence. That would seem to indicate that they may very well be in these countries illegally. The Tribunal has no power or authority to compel States to prevent them from expelling witnesses from their territory. Such acts would be interference in the sovereignty of the respective States.
16. The Trial Chamber does not wish to make an order that would lead to an interference with the sovereign prerogative of States to control the sojourn of aliens in their territories. Moreover, the Tribunal cannot encourage individuals to commit illegal acts, such as prolonging their stay in the territory of a State where their presence is unlawful, nor can the Tribunal protect people against the lawful consequences of illegal acts. The Chamber recognizes the right of individuals to leave the territory of a State.
17. In any event, if a witness for good legal reason is expelled from a country, he or she would have the address of Defence Counsel, and if genuinely willing to give evidence would be able to correspond with Counsel as to his or her whereabouts. In these circumstances, it is difficult to see what problems may arise in having such persons appear before the Tribunal to give evidence.
18. Article 20 of the Statute sets out the rights of the accused, including the right "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her." The Trial Chamber is sensitive to the requirements of a fair trial and to the tenet that accused persons be able to rely on witnesses on their behalf in their defence.

20. **THE TRIAL CHAMBER ORDERS** that:

- (a) Upon receipt by Defence Counsel of confidential information regarding its witnesses, the Registrar shall take, through the Witnesses and Victims Support Section, appropriate measures to ensure that the said witnesses are available to testify before the Tribunal in Arusha, during Ntagerura's trial;
- (b) The Registrar should collaborate with the UNHCR and with the Governments and States, including but not limited to Kenya, Cameroon, Tanzania and Zambia;
- (c) In accordance with Rule 66, the information about the identity of the witnesses provided by the Defence must not be disclosed to the Prosecutor or to anyone else except in compliance with the provisions of Rule 67 or an order issued by the Chamber pursuant to Rule 73 *ter* (B)(iii).

21. **THE TRIAL CHAMBER DIRECTS** that this Decision be interpreted and carried out, in accordance with the Statute and the Rules, with due respect for laws of States and international conventions, as noted in paragraph 16 above.

Arusha, 4 February 2000.

Lloyd George Williams
 Lloyd George Williams
 Judge, Presiding

*Agrees with
 a separate opinion
 which is attached*
 Yakov Ostrovsky
 Judge

Pavel Dolenc
 Pavel Dolenc
 Judge

Seal of the Tribunal

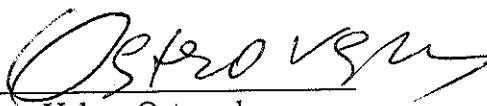


SEPARATE OPINION OF JUDGE YAKOV OSTROVSKY

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1. I concur with the Decision of the Chamber granting the measures sought by the Defence, as set out in paragraphs 30(i), 30(ii), and 30(iii) of the Motion. Furthermore, I am in full agreement that this Decision be interpreted and carried out with due respect for laws of States and international conventions.
2. However, I disagree with paragraphs 14 and 15 of the Decision.
3. With respect to paragraph 14, I note that neither party raised the question of the Tribunal's power to prevent the relocation of a witness who, for personal reasons, wishes to move from one State to another. Moreover, this is not a proper issue for the Chamber's consideration. Relocation of a witness who wishes to move from one State to another is a matter of relations between the witness and the States concerned and is not a matter into which the Tribunal should interject itself.
4. Furthermore, reference to Rule 75(A) in paragraph 14 is erroneous. Rule 75(A) provides for the protection of witnesses and the word "privacy", in the context of this Rule, means that the identity of the witnesses should not be disclosed. In any case, Rule 75(A) has nothing to do with the matter of relocation of witnesses from one State to another.
5. Paragraph 15 is controversial because of its one-sided approach. Of course, the Tribunal has no power or authority to compel States to refrain from expelling witnesses from their territories where their presence in the State is unlawful. However, there could be various reasons for the expulsion of witnesses. The Motion could be understood to express a concern that a State might expel a person because he or she agreed to participate in a trial before the Tribunal in the capacity of a witness. In such a case, Article 28 of the Statute which provides for cooperation of States with the Tribunal, must be recalled.

Arusha, 4 February 2000.



Yakov Ostrovsky
Judge

[Seal of the Tribunal]