



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ORIG: Eng

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

Registrar: Dr. Agwu Ukiwe Okali

Decision of : 3 March 2000

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COMMUNICATIONS
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THE PROSECUTOR
versus
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE

Case No. ICTR-97-36-I and 36-T

DECISION ON THE PROSECUTOR'S MOTION FOR ORDERS FOR
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

Counsel for the Prosecutor:

Mr. Sankara MENON
Mr. Don WEBSTER
Mr. Richard KAREGYESA

Counsel for Emmanuel BAGAMBIKI:

Mr. Vincent LURQUIN

Counsel for Samuel IMANISHIMWE:

Ms. Marie Louise MBIDA
Mr. Georges SO'O

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

SITTING as Trial Chamber III, composed of Presiding Judge Lloyd George Williams, Judge Yakov Ostrovsky, and Judge Pavel Dolenc (the "Trial Chamber" or the "Chamber");

NOTING the Indictment dated and filed on 9 October 1997 against Emmanuel Bagambiki and Samuel Imanishimwe (the "Accused") and confirmed on 10 October 1997 by Judge Lennart Aspegren;

BEING NOW SEIZED of a Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, dated 10 May 1999 and filed on 20 May 1999 (the "Motion");

HAVING CONSIDERED the Response by the Defence for Samuel Imanishimwe to the Prosecutor's Motion for Protective Measures for Victims of and Witnesses to Crimes Alleged in the Indictment, dated 25 November 1999 (the "Response"); and

HAVING HEARD the arguments of the parties on 29 November 1999.

PLEADINGS BY THE PARTIES

Prosecutor's Submissions

1. The Prosecutor submitted that the persons for whom protection is sought fall into three categories: victims and potential prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential prosecution witnesses who reside outside Rwanda in other African countries and who have not affirmatively waived their rights to protective measures; and victims and potential prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.
2. For the victims and potential prosecution witnesses who fall into these categories, the Prosecutor, in the Motion, requested the following orders:
 - a. An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses falling into the categories specified in paragraph 2 of the Motion be sealed by the Registry and not included in any records of the Tribunal, other than the CONFIDENTIAL material provided to the Trial Chamber in support of the Motion.
 - b. An order that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses falling into the categories specified in paragraph 2 of the Motion be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals.

c. An order requiring, to the extent that any names, addresses, whereabouts of, and other identifying information concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, other than the CONFIDENTIAL material provided to the Trial Chamber in support of the Motion, that such identifying information be expunged from those documents.

d. An order prohibiting the disclosure to the public or the media, of the names, addresses, whereabouts of, and other identifying data in the supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential prosecution witnesses, and this order shall remain in effect after the termination of this trial.

e. An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any document or any information contained in any document, or any other information which could reveal or lead to the identification of any individual falling into the categories specified in paragraph 2 of the Motion to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, as designated by the assigned Counsel or the Accused.

f. An order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to sub-paragraph e above (paragraph 3(e) of the Motion), have access to any information referred to in sub-paragraphs a through d above (paragraphs 3(a) through 3(d) of the Motion) and requiring Defence Counsel to advise the Chamber in writing of any change in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of persons falling into the categories specified in paragraph 2 of the Motion.

g. An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witness at any time or place without leave of the Trial Chamber and parties.

h. An order prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any material provided to the Defence in a redacted form until such a mechanism is in place; and in any event, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven (7) days before the victim or witness is to testify at trial.

i. An order that the Accused or the 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 victim or potential prosecution witness or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

j. An order 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.

k. An order prohibiting any member of the Defence team referred to in sub-paragraph f above (paragraph 3(f) of the Motion) from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person.

l. An order prohibiting the Accused individually from personally possessing any material which includes or might lead to discovery of the identity of any protected witness.

m. An order prohibiting the Accused individually from personally possessing any material which includes (but is not limited to) any copy of a statement of a witness even if the statement is in redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and instructing the Detention Centre authorities to ensure compliance with this prohibition.

3. The Prosecutor, in the Motion, further requested the Trial Chamber to hold an *in camera, ex parte* hearing to consider the CONFIDENTIAL INFORMATION which was provided with the Motion in a sealed envelope FOR THE TRIAL CHAMBER ONLY in order to properly assess the danger to the victims and potential prosecution witnesses.
4. At the hearing, the Prosecutor, however, withdrew her request for the *in camera, ex parte* hearing to consider the confidential information mentioned in paragraph 3 above.
5. The Prosecutor also withdrew her request, set out in paragraph 2(m) above (paragraph 3(m) of the Motion), for an order, *inter alia*, prohibiting the Accused from personally possessing any material which includes any copy of a statement of a witness, unless the Accused is in the presence of his Counsel.
6. Finally, at the hearing, the Prosecutor modified her request set out in paragraph 2(h) above (paragraph 3(h) of the Motion) so that the Prosecutor would not be required to reveal the identifying data to the Defence sooner than twenty-one (21) days, rather than seven (7) days, before the victim or witness is to testify at trial.

Defence Response

1. In its Response, the Defence objected to the Prosecutor's requests made in paragraphs 3(e), 3(f), 3(h), and 3(m) of the Motion (paragraphs 2(e), 2(f), 2(h), and 2(m) of the Prosecutor's Submissions above).
2. Since the Prosecutor withdrew her request set out in paragraph 3(m) of her Motion (set out in paragraph 2(m) of the Prosecutor's Submissions above), at the hearing, the Defence requested the Trial Chamber to reject paragraphs 3(e) and 3(f) of the Motion and to modify the order requested in paragraph 3(h) of the Motion to read thirty (30) days.
3. Finally, at the hearing, the Defence argued that the Prosecutor should have provided current and specific evidence of the exceptional circumstances justifying the protective measures sought.

DELIBERATIONS

1. Article 21 of the Statute of the Tribunal (the "Statute") and Rules 69 and 75 of the Rules of Procedure and Evidence of the Tribunal (the "Rules") provide for protection of victims and witnesses. Rule 75(A) of the Rules establishes that a Trial Chamber may "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused." Article 20 of the Statute sets out the rights of the accused, including, *inter alia*, the right "[t]o have adequate time and facilities for the preparation of his or her defence..." (Art. 20(4)(b)) and the right "[t]o examine, or have examined, the witnesses against him or her..." (Art. 20(4)(e)). The Trial Chamber is sensitive to the need to safeguard both, the rights of the accused and the security and privacy of victims and witnesses. It is with this in mind that the Chamber considers the Prosecutor's present requests.
2. The Trial Chamber now turns to the contested or controversial aspects of the Prosecutor's Motion, as modified during the hearing.
3. As to paragraph 3(e) of the Motion, the Chamber notes the argument the Defence made in paragraph 11 of the Response that "it will be incumbent on the Prosecutor to provide the Defence with parameters, to define the limits within which it must operate, since it will not be easy for the Defence to know what constitutes confidential information as understood by the Prosecutor." The Trial Chamber finds this argument to be without substance since the words of the order sought by the Prosecutor, namely "which could reveal or lead to the identification of any [protected] individuals", provide a sufficient guideline for ascertaining what constitutes confidential information in the context of the proposed order. The Trial Chamber will therefore grant the measure sought by the Prosecutor in paragraph 3(e) of the Motion without modification.
4. In our view, the order for disclosure to the Prosecutor of the identities of all members of the Defence team sought in paragraph 3(f) of the Motion seems to be unnecessarily

intrusive and its grant cannot be justified in the absence of further evidence. Moreover, since the Registrar oversees the appointment of members of the Defence team, disclosure of the identities of the team, even if only to the Trial Chamber, is unnecessary. For these reasons the Trial Chamber will deny the Prosecutor's request for disclosure of identities of the members of the Defence team.


5. The Chamber finds merit, however, in the latter part of the order sought by the Prosecutor in paragraph 3(f) of the Motion, namely that "Defence Counsel [be required] to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of [the protected] persons...." The Chamber will therefore grant the Prosecutor's request for such an order with the modification that the words "all documents and information" be replaced with the words "all materials". This modification will be entered in recognition of the fact that the term "information" could be understood to include intangibles that, naturally, cannot be remitted.
6. The Trial Chamber agrees with the Defence that if the order sought by the Prosecutor in paragraph 3(h) of the Motion were granted in the form as set out in the Motion, that is with the seven (7) day time period for the Prosecutor's disclosure of identifying data to the Defence, the right of the Accused to have adequate time for the preparation of defence, guaranteed by Article 20(4)(b) of the Statute, could well be impaired. The Chamber will grant the order sought by the Prosecutor in paragraph 3(h) of the Motion with the modification introduced by the Prosecutor during the hearing that the time period be increased to twenty-one (21) days. The proposed order will be further modified to read "... until such time as the Trial Chamber is assured that the *victims and* witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form, *either when the victim or witness is under the Tribunal's protection or twenty-one (21) days before the victim or witness is to testify at trial, whichever comes first.*" The order so modified will be consistent with the Tribunal's prior orders (*see, e.g. Prosecutor v. Semanza*, Case No. ICTR-97-20-I (Decision on the Prosecution Motion for the Protection of Witnesses) (10 Dec. 1998), will respect the rights of the Accused, and will keep the identifying data from the Defence only so long as necessary for the protection of victims and witnesses.
7. While the Defence did not object to the order sought by the Prosecutor in paragraph 3(l) of the Motion, the Chamber is of the opinion that an order prohibiting the Accused from possessing any material that includes or might lead to discovery of the identity of any protected witness is unnecessary since the order sought in paragraph 3(e) of the Motion already provides sufficient protection. For this reason, the Chamber will deny the Prosecutor's request to make the order sought in paragraph 3(l) of the Motion.
8. Finally, although the Prosecutor has provided sufficient evidence to show that the protective measures are sought because of the danger to victims and potential prosecution witnesses arising from the security situation in Rwanda, the Prosecutor is instructed to provide more current and specific evidence when seeking the granting of protective

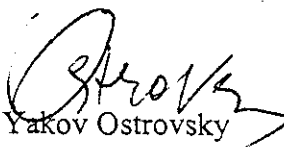
measures in the future. The Chamber would like to call to the Prosecutor's attention that such an instruction was already made by the Tribunal earlier (*see Prosecutor v. Ntagerura*, Case No. ICTR-96-10A-I (Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses) (27 June 1997) at para. 8) and would like to stress the importance of following it.

FOR THESE REASONS, THE TRIBUNAL

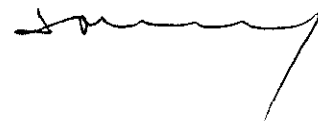
1. **GRANTS** the measures sought by the Prosecutor in paragraphs 3(a) through 3(e), 3(g), and 3(i) through 3(k) of the Motion.
2. Also **GRANTS**, with the modification explained above, the Prosecutor's request made in the latter part of paragraph 3(f) of the Motion for an order requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all materials that could lead to the identification of persons specified in paragraph 2 of the Motion.
3. Further **GRANTS**, with the modifications explained above, the Prosecutor's request made in paragraph 3(h) of the Motion for an order prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the victims and witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any material provided to the Defence in a redacted form, either when the victim or witness is under the Tribunal's protection or twenty-one (21) days before the victim or witness is to testify at trial, whichever comes first.
4. **REJECTS** the request for an order for disclosure of the identities of all members of the Defence team sought by the Prosecutor in paragraph 3(f) of the Motion.
5. Also **REJECTS** the request for the order sought by the Prosecutor in paragraph 3(l) of the Motion.

Arusha, 3 March 2000.


Lloyd George Williams
Presiding Judge


Yakov Ostrovsky
Judge

Pavel Dolenc
Judge



(Seal of the Tribunal)

