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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original: English

Before: Judge Laïty Kama, Presiding Judge
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 12 July 2000

THE PROSECUTOR

v.

ELIÉZER NIYITEGEKA

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JUDICIAL RECORDS ARCHIVES
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DECISION ON THE PROSECUTOR'S MOTION
FOR PROTECTIVE MEASURES FOR WITNESSES

Counsel for the Prosecutor:

Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :

Ms Sylvia Geraghty

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The “Tribunal”)

SITTING as Trial Chamber II, composed of Presiding Juge Laïty Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses in *Prosecutor v. Eliézer Niyitegeka* (the “Motion”), filed on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor’s Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

CONSIDERING that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

WHEREAS Defence Counsel for Eliézer Niyitegeka responded to the Motion on 3 May 2000 in a « Defence Motion in response to Prosecutor's motion for protection of witnesses dated 9 March 2000 » (« the Response »), filed with the Registry on 4 May 2000;

CONSIDERING that this short delay after the deadline set on 3 may 2000 is not unreasonable in view of the filing process within the Registry, the Chamber decides to consider the Defence Response despite its late filing;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the “Statute”) and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the “Rules”):

ARGUMENTS OF THE PROSECUTION

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.
2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue, on the basis of the points made in paragraph 3 of the Motion, the following orders:
 - 3(a). Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;
 - 3(b). Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;

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- 3(c). Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;
- 3(d). Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any 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 these individuals, and this order shall remain in effect after the termination of the trial;
- 3(e). Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;
- 3(f). Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;
- 3(g). Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;
- 3(h). 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 Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;
- 3(i). Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview;
- 3(j). Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the



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witnesses in question decide otherwise.

Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

4. Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

RESPONSE OF THE DEFENCE

5. Counsel for Niyitegeka objects to point 3(f) of the Motion whereby she should have to disclose the members of her team that were appointed by the Registrar ;

6. Counsel for Niyitegeka contends that point 3(f) violates Rule 69 (c) by limiting the right of the Accused to know the identity of those who will testify at trial until seven days before their appearance. Such a measure would be unreasonable given the Defence's difficulties to conduct investigations and her limited resources. She submits that a period of not less than 60 days prior to the intended appearance of the witnesses would be appropriate.

7. Counsel for Niyitegeka submits that the Prosecutor should set out the specific risks alleged for each Prosecution witness.

HAVING DELIBERATED,

On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):

8. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

9. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the Tribunal in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses, 20 November 1998) quoting the findings of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in *Prosecutor v. Tadić*, IT-94-I-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995). In these decisions, both Trial Chambers held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decisions, both Trial Chambers determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

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10. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation prevalent in Rwanda and neighboring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. The Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

On point 3(f) of the Motion

11. The Chamber will grant the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.

12. The Chamber endorses the holding in *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information".

On points 3(g) and 3(i) of the Motion

13. Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the accused and decides to grant them as they stand.

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

14. Counsel for Niyitegeka submitted that the seven day period was unreasonable considering that Rule 69(c) provides that subject to Rule 75, the identity of witness shall be disclosed in sufficient time prior to the trial to allow for the preparation of the Defence. Counsel for Niyitegeka submitted that the disclosure period should be not less than 60 days prior to the appearance of the witnesses.

15. According to the Chamber, the seven (7) day period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

16. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (*Prosecutor v. Semanza*, ICTR-97-21-I, (10 December 1998); *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000); *Prosecutor v. Nsabimana and Nteziryayo*, IctR, (21 May 1999);).

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On the Use of Pseudonyms (point 3(j) of the Motion)

17. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in *Prosecutor v. Muhimana*, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";


MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

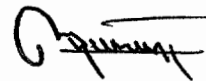
Arusha, 12 July 2000



Laity Kama
Presiding Judge



William H. Sekule
Judge



Mehmet Güney
Judge

(Seal of the Tribunal)

