

5150-

ICTR-98-44-T
3/8/2001
(2615 - 26081)

2615;
Mushamp.



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER II

ENGLISH
Original: FRENCH

Before Judge: Laity Kama, Presiding Judge, designated by the Trial Chamber
pursuant to Rule 73 of the Rules of Procedure and Evidence

Registry: Agwu Ukiwe Okali

Date filed: 13 December 2000

2001 SEP - 31 P 12:01
M
10/15

THE PROSECUTOR

v.

JOSEPH NZIRORERA

Case No. ICTR-98-44-T

DECISION ON DEFENCE MOTION SEEKING ORDERS FOR
PROTECTIVE MEASURES FOR ITS WITNESSES

Office of the Prosecutor:

Ken Fleming
Ifeoma Ojemeni
Melinda Pollard

Counsel for the Defence:

Andrew J. McCartan

Translation certified by LCSS, ICTR

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
(THE "TRIBUNAL"),**

Sitting in the person of Judge Laity Kama, Presiding Judge, designated by Trial Chamber II pursuant to Rule 73 of the Rules of Procedure and Evidence,

Having been seized of a motion by Counsel for the Defence of Joseph Nzirorera seeking orders for protective measures for its witnesses, together with a supporting brief, filed on 23 June 2000,

Being seized subsequently of another motion by Counsel for the Defence of Joseph Nzirorera seeking orders for protective measures for Defence witnesses ("Defence Motion"), repeating and supplementing the previous motion, filed at the Registry on 9 August 2000,

Considering the Prosecutor's response filed on 9 August 2000,

Considering the Defence reply to the Prosecutor's response filed on 29 September 2000,

Having decided to rule on the Defence motion solely on the basis of the parties' briefs, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules"); the Parties having been notified of the decision by the Court Management Section of the Tribunal (see memorandum No. ICTR/JUD-11-6-813 of 12 September 2000),

Considering the Statute of the Tribunal (the "Statute"), in particular Articles 20 and 21 thereof, and the Rules, in particular Rules 69 and 75 thereof,

Pleadings by the Parties

Measures sought by the Defence

1. The Defence is seeking protection for the following three categories of persons: potential Defence witnesses residing in Rwanda, who have not expressly waived their right to protection; victims who are potential Defence witnesses residing in other African countries, who have not expressly waived the same right; and victims who are potential Defence witnesses residing outside Africa, who have applied for such protection.

2. For these three categories of victims and potential Defence witnesses, the Defence prays the Trial Chamber to order as follows:

(a) That the names, addresses, whereabouts and any other information that could lead to the identification of victims and potential Defence witnesses mentioned in paragraph 2 of its motion should be kept under seal by the Registry and do not appear in any record of the Tribunal;

(b) That the names, addresses, whereabouts and any other information which could lead to the identification of victims and potential Defence witnesses mentioned in paragraph 2 of its motion be disclosed only to the officials of the Witnesses and Victims Support Section, in accordance with the established procedure and for the sole purpose of implementing the protection measures ordered for such persons;

(c) That where the names, addresses, whereabouts and any other information which could lead to the identification of such persons appears in the documents of the Tribunal, such information be expunged from the documents concerned;

(d) That the names, addresses, and whereabouts of such persons and any other information from supporting material which could lead to the identification of any of these persons, as well as any other information in the documents filed with the Registry or any other indication which could disclose their identity, not be released to the public or the media, even at the end of the trial;

(e) That the Prosecutor does not directly or indirectly disclose or reveal to, or discuss with, anybody whatsoever, apart from his immediate collaborators, any document or any other information which could disclose the identity or lead to the identification of the persons mentioned in paragraph 2 of its motion;

(f) That the Prosecutor list for the Trial Chamber and the Defence all his immediate collaborators who, pursuant to paragraph 3 (e) above, will have access to the information mentioned in paragraphs 3 (a) to 3 (d) above, and that the Prosecutor notify the Trial Chamber in writing of any change in her team and ensure that any immediate collaborator no longer part of her staff return all documents and information which could lead to the identification of the persons mentioned in paragraph 2 of her motion;

(g) That no photograph, audio or video recording, or sketch of any Defence witness be produced without the authorization of the Trial Chamber and the Parties;

(h) That the names, addresses, whereabouts and any other information which could disclose the identity of such persons, as well as other information in the supporting material filed with the Registry, not be disclosed to the Prosecutor, as long as the Trial Chamber is not satisfied that the witnesses are adequately protected, and that the Defence be allowed to disclose only redacted versions of documents to the Prosecutor as long as the protection mechanism is not in effect, and that, in any event, no information relating to the identity of the persons referred to be disclosed to the Prosecutor more than 60 days prior to the commencement of the trial, unless the Trial Chamber rules otherwise pursuant to Rule 69 (A) of the Rules;

(i) That, in the event that the Prosecution wishes to contact any protected victim, potential Defence witness, or family member of such person, it submit a written request to the Trial Chamber or one of its judges, after duly notifying the Defence; and that, where such interview is granted by the Trial Chamber or one of its judges and the consent of the person concerned or his parents or legal guardian, if the person is less than 18 years old, is obtained, the Prosecutor take all the necessary steps for the interview to take place;

(j) That the Prosecutor provide a pseudonym for each Defence witness and that such pseudonym should be used each time reference is made to the said witness during the trial, in communications and discussions between the Parties and in any dealings with the public, until such time that the witnesses concerned decide otherwise.

3. In its supporting brief, the Defence contends that the Tribunal has granted similar motions in the past and cites two decisions of 17 September 1999 and 23 November 1999 in the matters of *the Prosecutor v. Bagilishema* (No. ICTR-95-1A-I) and *the Prosecutor v. Ngeze* (No. ICTR-97-27-I).

4. The Defence further cites a decision of 10 August 1995 on the Prosecutor's motion for protective measures for Prosecution witnesses, rendered by the International Criminal Tribunal for the former Yugoslavia in the matter of *the Prosecutor v. Tadic* (No. IT-94-I), in which the Trial Chamber, in ordering the protection of witnesses, also found that an order for the non-disclosure of the identity of a witness to the public or media must take account of fears for the safety of the witnesses and their families and that such fears must have objective grounds. In addition, the Trial Chamber had held that an order for non-disclosure could be justified by fears expressed by persons other than the witness.

5. The Defence also cites a decision of 10 December 1998 granting a motion for the protection of witnesses (*the Prosecutor v. Semanza*, Case No. ICTR-97-20-I), in which Trial Chamber II of this Tribunal took into consideration the prevailing climate of insecurity in respect of potential witnesses. The Defence argues that the situation has not changed, as evidenced by the documents appended to the Prosecutor's motion for the protection of Prosecution witnesses filed in the present matter; which documents, the Defence intends to rely on in support of its motion.

6. Moreover the Defence further underscores that it reserves the right, if necessary, to request the Trial Chamber to amend the protective measures requested or to order additional protection.

Prosecutor's Response

In her response, the Prosecutor mainly contends:

7. That the Defence has not adduced evidence of the threats or danger to which the witnesses would be exposed if they accepted to testify before the Tribunal.

2611

8. That Trial Chamber II of the Tribunal, in rendering its decision of 12 July 2000 in *the Prosecutor v. Bicomupaka* (Case No. ICTR-99-50-I), had taken into consideration the genuine fears which existed at the time as to the security of witnesses or their families.

9. That the Defence cannot rely on the documents which were appended to the motion for the protection of prosecution witnesses filed by the Prosecutor in the present matter; as Prosecution witnesses must be protected from the people who committed the genocide and their accomplices.

10. The Prosecutor therefore prays the Trial Chamber to dismiss the motion because the Defence has not provided adequate evidence in support thereof.

Defence Reply

In its reply to the Prosecutor's response, the Defence notably argues *inter alia*:

11. That the Prosecutor wrongly contends that the Defence did not show by evidence of threats or danger to which the Defence witnesses would be exposed if they accepted to testify before the Tribunal.

12. That, on the contrary, a number of murders of Defence witnesses in the *Rutaganda*, *Akayesu* and *Kayishema* cases highlights the need to order the protective measures sought.

13. That the above-mentioned murders are a cause for real fears regarding for the safety of potential Defence witnesses.

14. That, if potential Defence witnesses are not granted the same protection provided to prosecution witnesses, they would be little disinclined to testify which would be highly prejudicial to the accused.

After having deliberated,

Whereas the Defence, in its motion, prays the Trial Chamber to order protective measures for potential Defence witnesses residing in Rwanda, in other African countries and outside the African continent;

Whereas, pursuant to Article 20 (4) (e) of the Statute, "In the determination of any charge against the accused, the accused shall be entitled to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her";

Whereas, pursuant to Rule 75 of the Rules, a judge or Chamber may, at the request of either party, 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";

Whereas Rule 69 (A) of the Rules provides that non-disclosure of the identity of a victim or witness who may be in danger or at risk may be granted by the Chamber only in exceptional circumstances;

Whereas the Chamber notes the case law established by the "Decision on the motion for the protection of Defence witnesses" of 31 July 1998, rendered in *the Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), in which the Tribunal took into consideration both the fact that the witnesses for whom protection was being sought were living in a climate of insecurity at the time and real fear for their lives and their physical and mental integrity, and that the Defence had adduced sufficient facts to justify the need for protective measures to be granted to Defence witnesses living in Zambia, The Netherlands, Belgium, France and Côte d'Ivoire;

Whereas the Chamber endorses the requirements laid down by the above-mentioned decision;

Whereas, in the instant case, the Defence has not provided any report or document to support its argument regarding a climate of insecurity which would prevail against Defence witnesses, whether they are residing in Rwanda, in other African countries or outside the African continent, and which could possibly imperil their lives and physical integrity;

Whereas the Chamber notes besides that, with respect to Defence witnesses residing in Rwanda, the Defence could have provided recent evidence of the climate of insecurity affecting the said witnesses, in support of its motion;

Whereas, however, the Defence states that its motion relies on the same documents as those appended to the Prosecutor's motion for the Protection of Prosecution witnesses filed on 9 March 2000, which documents the Chamber deemed to be adequate grounds for the Prosecutor's motion, as granted in its Decision of 12 July 2000;

Whereas the Chamber finds that the documents filed by the Prosecution in support of the above-mentioned motion are factual elements which could also be adequate grounds for the Defence motion for the protection of Defence witnesses;

Whereas, however, the Chamber notes that the Defence motion does not provide enough information to make it possible to identify and locate each witness although the Tribunal has ruled that "the need for protective measures for a witness must be evaluated case by case and that blanket witness protection measures are not granted and, further, that protection orders only become effective upon having given the particulars specifying the identity and location of each witness to the Witness and Victims Support Section" ("Decision on Defence motion seeking orders for protective measures for Defence witnesses", 15 February 2000, *the Prosecutor v. Nsabimana*, Case No. ICTR-97-29-I);

Whereas, in addition, in a decision of 30 June 1998 in the matter of *the Prosecutor v. Rutaganda* (No. ICTR-96-3-T), the Tribunal had decided that the Defence motion seeking protective measures for Defence witnesses was inadmissible because it sought blanket protection for its witnesses and did not concern specific Defence witnesses;

Whereas the Chamber notes that the Prosecution also failed to indicate in its motion specific identity of each witness or the specific problems of safety that each of them would have faced;

Whereas the principle of equality of arms between parties is fundamental in Criminal Law and that the Chamber finds that it would be violating this principle if it directed the Defence to submit material in support of its motion that had not been required of the Prosecution when it filed its motion for the protection of Prosecution witnesses;

Whereas, in the above-mentioned Decision of 15 February 2000 in the *Nsabimana* case, the Tribunal, in granting the Defence motion for the protection of Defence witnesses, had taken into consideration its Decision of 21 May 1999 handed down in the same matter granting Prosecution witnesses the same protection, whereas the Prosecution, in its motion, had "... specified neither the precise identity nor the particular security problems personally facing such witnesses";

Whereas, given the concern to guarantee the rights of the Accused in all circumstances, and in light of the specific facts of the instant case, it is proper to afford Defence witnesses the same protection as ordered for Prosecution witnesses by Decision of 12 July 2000;

Whereas the protective measures for Defence witnesses sought in paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of the Defence motion are equivalent to measures (a), (b), (c), (d), (e), (g), (i) and (j) respectively sought and obtained by the Prosecutor for Prosecution witnesses;

Whereas, pursuant to its Decision of 12 July 2000 referred to above, the Chamber holds that the term "all documents and information" should be replaced by the expression "all material", as was the case for the measure sought in paragraph (f) of the Prosecutor's motion;

Whereas, regarding the measure sought in paragraph (h) of the Defence motion that would allow the Defence to not disclose to the Prosecutor any information regarding the identity of the persons concerned more than 60 days prior to the commencement of trial, unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules, the Chamber is of the view that the 60 day time-limit suggested by the Defence should be reduced to 21 days, consistent with that afforded to the Prosecutor in this case and consistent with the Tribunal case law;

Whereas the Chamber directs the Defence and the Prosecutor to henceforth provide more recent and specific evidence when seeking orders for protective measures for their witnesses.

For these reasons

The Tribunal

Grants the protective measures for potential Defence witnesses sought by the Defence in paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of its motion;

Amends the measure sought in paragraph (f) of the Defence motion and orders the Prosecutor to ensure that all departing members of her staff to return any identifying material concerning protected witnesses;

Amends the measure sought in paragraph (h) of the Defence motion and orders the Defence to disclose to the Prosecutor the identity of Defence witnesses prior to the commencement of the trial and, in any case, no later than 21 days before the date of appearance of the said witnesses.

2608

Arusha, 13 December 2000

Laïty Kama,
Presiding Judge of Trial Chamber II

(Seal of the Tribunal)
