

ICTR-97-21-T
20/3/2001
(7399-7393)

7399
-mlaga



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule
Sitting as a single Judge pursuant to Rule 73 of the Rules

Registrar: John M. Kiyeyeu

Date: 20 March 2001

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T

2001 MAR 20 P 3:54
JUDICIAL RECORDS ARCHIVES
RECEIVED
ICTR

**DECISION ON PAULINE NYIRAMASUHUKO'S
MOTION FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES AND
THEIR FAMILY MEMBERS**

The Office of the Prosecutor:

Japhet Mono
Ibukunolu Alao Babajide
Manuel Bouwknecht

Counsel for Nyiramasuhuko:

Nicole Bergevin

20.03.2001.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal);

WILLIAM H. SEKULE sitting as a single Judge designated pursuant to **Rule 73** of the Rules on behalf of Trial Chamber II (the "Chamber") including Judges Laïty Kama, and Mehmet Güney;

BEING SEIZED of the "Motion by Pauline Nyiramasuhuko's Defense Seeking Orders for Protective Measures for Witnesses and their Families," (the "Motion") filed on 28 November 2000, to which are attached seven annexes.

CONSIDERING the "Prosecutor's Response to Pauline Nyiramasuhuko's Motion Seeking Orders for Protective Measures for Defense Witnesses and their Family Members" (the "Prosecutor's Response") filed on 28 December 2000;

NOTING the "Decision on Protective Measures for Defense Witnesses and Their Families and Relatives" in the case of Pauline Nyiramasuhuko (the "Accused") rendered on 30 March 1998;

CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the Rules;

CONSIDERING that the Judge will decide the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

AFTER HAVING DELIBERATED

1. As a preliminary matter, it is noted that the Decision of the Chamber on 30 March 1998 on behalf of the Accused granted the protective measures for ten Defense witnesses residing in Nairobi, at the time. The Defense, upon trying to meet the witnesses in order to implement the said Decision, found that these people had moved out of Nairobi due to the high insecurity faced by many refugees, including Rwandan refugees. Therefore, the Defense brings this Motion seeking protective measures for potential Defense witnesses because the ten Defense witnesses for whom measures were sought could not be found.

2. The Chamber notes that the Defense brings the Motion on the basis of Articles 19, 20 and 21 of the Statute and Rules 69 and 75 of the Rules.

3. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rule 69 and 75 of the Rules. Such protection measures shall include, but shall not be limited to the conduct of in camera proceedings and the protection of victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

4. The Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The



Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.

5. Rule 69 of the Rules *inter alia* provides that 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.

6. Thus, the Chamber, being mindful at all times of guaranteeing the full respect of the rights of the Accused, pursuant to Article 19(1) of the Statute shall therefore, order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

7. In its Motion, the Defense specifically requests the Chamber to order the following measures:

- "[1] That names, addresses and other information leading to the identification of all potential Defense witnesses be kept sealed at the Registry and expunged from the Tribunal's public records;
- [2] That names, addresses and other information leading to the identification of all potential Defense witnesses be disclosed only to the staff of the Victims and Witnesses Support Section and to witnesses, in accordance with the established procedure and for the sole purpose of implementing protective measures for the persons concerned;
- [3] That where the names, addresses and other identifying information concerning these potential Defense witnesses appear in the Tribunal's public records, such information should be expunged from the said records;
- [4] The non-disclosure to the public and media of the names and addresses of these witnesses, their whereabouts and all other identifying information concerning them and appearing in the evidence or the records filed with the Registry, or any other information likely to reveal the identities of such potential Defense witnesses even after the trial;
- [5] That the Prosecutor be prohibited from disclosing, discussing or revealing, directly or indirectly, any document or information contained in any document, or any other information leading to the identification of potential Defense witnesses whose disclosure is prohibited, except to members of the Prosecution team;
- [6] That the Prosecutor should notify the Chamber and the Defense of the status of members of the Prosecution team who have access to any information mentioned in sub-paragraphs [1] to [4] above, and that the Prosecutor be compelled to notify the Chamber and the Defense in writing of any change in the composition of the Prosecution team, ensuring that any member leaving the said team returns all materials in his possession, if such materials are likely to reveal the identities of potential Defense witnesses;
- [7] That photographing, sound or video recording and sketching of any Defense witnesses be prohibited at any place and time, save with leave of the Chamber and Parties;
- [8] That disclosure to the Prosecutor of names and addresses of potential Defense witnesses and other information leading to their identification as well as any other information included in the supporting materials filed with the Registry be prohibited as long as the Tribunal is unsure of adequate protection for the said witnesses, and that the Defense be allowed, until such time that protective measures have been put in place, to disclose to the Prosecutor only the

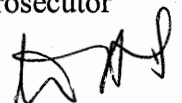


- redacted form of documents submitted for disclosure and that it be prescribed that in any event the Defense should not be compelled to disclose to the Prosecutor information leading to the identification of potential Defense witnesses no sooner than seven days before they testify before the Tribunal;
- [9] That the Prosecutor request, in writing, leave of the Chamber or of one of its Judges, notifying the Defense in sufficient time, to communicate with any potential Defense witness or members of their families. That the Defense, on the instruction of the Chamber or one of its judges, and with the consent of the witness targeted by such request, or the concerned member of his family or guardian, if such a witness is below 18 years of age, take necessary measures to facilitate such contact;
 - [10] That the Defense be allowed to assign a pseudonym to each witness it intends to call to testify and wherever reference is made to Defense witnesses during the trial, as well as in communication and discussion between the Parties to the case, and with the public;
 - [11] That all members of the Prosecution team targeted by the sub-paragraphs above be prohibited from making independent determination of the identity of any protected witness, encouraging or otherwise abetting anyone, in any way, to try to determine the identity of such a person;
 - [12] That these measures also apply to families of the said witnesses, that is to say, the witness's father, mother, spouse(s) and children;
 - [13] That the Chamber request the cooperation of governments concerned, UNHCR as well as any other organization likely to intervene in ensuring the safety of the said witnesses, including a guarantee that they would not be detained or expelled.

8. In support of its request, the Defense relies upon the documents filed as Annexes to the Motion, which include two reports by the Special Representative for the Commission on Human Rights Mr. Michel Moussalli, pursuant to Resolution 1998/69 (E/CN.4/1999/33), articles in the "Journal of Humanitarian Assistance," updates for May 1998 to May 1999, an "Amnesty International Report", ARF 02/01/99 of February 1999 and a report submitted to the United Nations General Assembly entitled "UN Human Rights Field Operation in Rwanda," dated 11 September 1998.

9. The Chamber notes that all these documents report on the upsurge in acts of violence committed against the civilian population in Rwanda and the entire Great Lakes Region. The documents describe the human rights violations which have occurred since 1994 in Rwanda and since 1998 from the war in the Democratic Republic of the Congo (the DRC). The 1999 report by Amnesty International enumerates human rights violations at page 717, which include: "[...] large-scale massacres of unarmed civilians, deliberate and arbitrary killings, extra-judicial executions, "disappearances", torture, including rape and other forms of sexual abuse, ill-treatment, arbitrary arrests[...]." The report goes on to explain at page 716 that, "People continue to be targeted purportedly on account of their real or perceived ethnicity and/ or political affiliation. Civilians are targeted by combatants out of reprisal for losses suffered or simply to punish alleged collaborators and informants."

10. On her part, the Chamber notes, the Prosecutor objects to measure [11], for being unjustified and impossible to be complied with. The Prosecutor also objects to part of measure [8], on the time frames within which the Defense must disclose to the Prosecutor



information leading to the identification of potential Defense witnesses before the potential witnesses testify.

11. The Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defense Witnesses" rendered on 13 July 1998, at para. 9, that, "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses."

12. In this case, notice is taken of the documents filed in support of the Motion, which tend to describe a particularly volatile security situation at present in Rwanda and neighboring countries within the Great Lakes Region. This volatile security situation could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda.

13. On this basis, the Chamber notes that the Defense has demonstrated fears, which pertain to potential witnesses residing in Rwanda, the Great Lakes Region and neighboring countries only, and has not demonstrated fears as regards potential witnesses residing elsewhere. However, taking into account the representations of the parties and being aware of the present security situation affecting these potential witnesses, the Chamber considers that though the Defense has provided sufficient factual grounds for the protective measures sought by the Defense with respect to those witnesses residing in Rwanda, the entire Great Lakes Region, and neighboring countries only, the security situation would affect any potential witness even if residing outside of the Region.

14. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measure [1], [2], [3], [4], [5], [6], [7] and [10]. The Chamber recalls the reasoning in *Prosecutor v. Nsabimana*, Case No. ICTR-97-29-I, "Decision on the Defense Motion to Obtain Protective Measures for the Witnesses of the Defense," rendered on 15 February 2000. In the said Decision, the Chamber highlights *inter alia* that in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear."

15. In the present case, the Chamber, following this reasoning, and considering the submissions of the Defense, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Defense witnesses were their identity to be disclosed. Consequently, the Chamber grants measures, [1], [2], [3], [4], [5], [6], [7], and [10] as requested in the Motion.

16. Furthermore, the Chamber grants measure [8] but, in line with its jurisprudence in *Prosecutor v. Nzirorera* Case No. ICTR-98-44-I, "Decision on the Prosecutor's Motion for the Protective Measures for Witnesses," rendered on 12 July 2000, orders that the Defense disclose information leading to the identification of potential Defense witnesses, at least 21 days before they testify before the Tribunal.

17. As to measure [9], the Chamber in line with its jurisprudence in *Prosecutor v. Bicamumpaka*, Case No. ICTR-99-50-T, in the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," rendered on 12 July 2000 which found that, "[...] this is

a normal protective measure which does not affect the rights of the Accused [...],” grants protective measure [9] as requested.

18. As to measure [11], the Chamber recalls the findings in *Prosecutor v. Nsabimana and Nteziryayo*, Case No. ICTR-97-29-I, in the “Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses” rendered on 17 June 1999, wherein a similar request was granted to the Prosecutor because the Trial Chamber considered that “[...] granting the Prosecution’s request does not lower any ethical duty owed by both Parties.” A similar request was granted in *Prosecutor v. Bagambiki and Imanishimwe* Case No. ICTR-97-36-T, “Decision on the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses,” rendered on 3 March 2000. The Chamber, therefore, in line with the jurisprudence laid out in the said Decisions, grants the Defense request in Measure [11] as requested.

19. As to measure [12] the Chamber recalls a similar request in *Prosecutor v. Rutaganda*, ICTR-96-3-T in the “Decision on Protective Measures for Defense Witnesses” rendered on 13 July 1998, whereby such protective measures were extended to the spouse and children of the witnesses. Considering the documents annexed in support of the Defense Motion, the Chamber is of the opinion that there is sufficient showing of the real fear for the safety of the potential witnesses’ father, mother, spouse(s) and children. The Chamber, therefore, grants, pursuant to Rule 75 of the Rules, measure [12] of the Motion as requested by the Defense.

20. The Chamber notes that by measure [13] the Defense requests that the Chamber seek the cooperation of governments concerned, UNHCR as well as any other organization likely to intervene in ensuring the safety of the said witnesses, including a guarantee that they would not be detained or expelled.

21. The Chamber recalls the findings in *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-97-21-T, “Decision on Protective Measures for Defense Witnesses and their Families and Relatives”, rendered on 30 March 1998. Therein, at para 20, it was the opinion of the Trial Chamber that, “[...] it [the Tribunal] is mandated to solicit the co-operation of States and the UNHCR in the implementation of protective measures for witnesses.”

22. Therefore, the Chamber accedes to measure [13] inasmuch as the assistance of governments, the UNHCR and any other organization may possibly be sought by the Victims and Witnesses Protection Unit in implementing measures of protection for Defense witnesses so as to guarantee the right of the Accused, pursuant to Article 20(4)(e) of the Statute, so as to obtain the attendance and examination of witnesses on behalf of the Accused under the same conditions as the witnesses against the Accused.

As to the taking into effect of the protective measures sought

23. The Chamber finally decides that in conformity with the Tribunal’s well-established jurisprudence, such protective measures are granted on a case by case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Chamber adds that the Defense shall furnish to the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

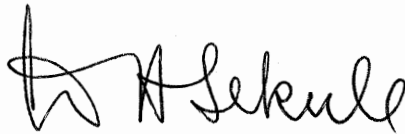
FOR THE ABOVE REASONS, THE CHAMBER:

GRANTS the Defense requests in measures [1], [2], [3], [4], [5], [6], [7], [9], [10], [11] and [12] of the Motion;

GRANTS the Defense requests in measure [13] inasmuch as the assistance of governments, the UNHCR and any other organization may possibly be sought by the Victims and Witnesses Protection Unit in implementing measures of protection for Defense witnesses so as to guarantee the right of the Accused, pursuant to Article 20(4)(e) of the Statute, so as to obtain the attendance and examination of witnesses on behalf of the Accused under the same conditions as the witnesses against the Accused.

MODIFIES the Defense request in measure [8] of the Motion, and orders the Defense to disclose to the Prosecutor information leading to the identification of potential Defense witnesses, at least twenty one (21) days before they testify before the Tribunal.

Arusha, 20 March 2001.



William H. Sekule
Judge

(Seal of the Tribunal)