



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

**JUDGE LAÏTY KAMA**, sitting as a single Judge pursuant to Rule 73 of the Rules;

**BEING SEIZED** of the "Requête aux fins de Mesures de Protection des Témoins," (the "Motion") filed on 26 February 2001, to which documents are attached in support of the Motion;

**CONSIDERING** the "Prosecutor's Brief in Response to Motion by the Defense for Protective Measures Regarding Defense Witness, filed on 24 February 2001" (the "Prosecutor's Response") filed on 14 March 2001;

**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 Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

#### **SUBMISSIONS OF THE PARTIES**

##### *Defense submissions*

1. The Defense seeks protective measures for its potential witnesses before they testify, because they fear for their safety and for the safety of their families. The Defense further submits that the measures sought are justified because she intends to enter a defense of alibi pursuant to Rule 67 of the Rules and if the measures were not to be granted, the Defense would not be in a position to enter such a defense.

2. In support of its request, the Defense relies upon the documents attached to its Motion as well as upon the documents filed by the Prosecutor in support of her Motion seeking protective measures for her witnesses filed on 9 March 2000. The documents attached to the Motion include *inter alia*: a Declaration made on 15 July 1998 by Mr. Philip Reyntjens, a Professor at the University of Anvers, Belgium; three Articles dated 1 February 2001, 19 December 2000 and 18 December 2000 from the "Fondation Hirondelle;" as well Articles by Colette Braeckman on 19 December 2000 reported in the Belgian daily newspaper, "Le Soir."

3. The Articles from the "Fondation Hirondelle" report on the court proceedings in Kenya surrounding the death of Mr. Seth Sendashonga, who was allegedly to testify in the *Kayishema and Ruzindana* trial. The other Articles by Colette Braeckman report on the situation of insecurity in the Democratic Republic of the Congo (the "DRC") resulting from the war of 1998.

4. The Defense, therefore requests the Chamber to order, in essence, the following measures:

- [1] Requiring that the names, addresses and other identifying information concerning Defense witnesses and their whereabouts be kept under seal and not included in any records of the Tribunal;



- [2] Prohibiting the disclosure to the public or the media of the names and addresses of Defense witnesses as well as their whereabouts and other identifying information;
- [3] Requiring the Prosecutor and the Witness and Victims Support Section to limit to the minimum the number of persons with access to information concerning protected witnesses when their names shall have been communicated by the Defense;
- [4] Ruling that the Defense shall be allowed a period of 21 days for the disclosure, to the Prosecutor, of information concerning the Defense witnesses prior to the appearance of the latter;
- [5] Prohibiting the Office of the Prosecutor from revealing to anyone whomsoever the names and addresses as well as other identifying information concerning witnesses when such information shall have been disclosed by the Defense;
- [6] Requiring that the Prosecutor and her representatives, acting on her instructions, shall notify the Defense of any request to contact Defense witnesses and for the Defense to make the necessary arrangements to that end;
- [7] Prohibiting the photographing and/or video recording, or sketching of any Defense witnesses at any time or place without leave of the Chamber and the parties;
- [8] Requiring that the Defense shall use a pseudonym to designate each Defense witness it shall call whenever referring to such witness in proceedings, communications and discussions between the parties to the trial, and to the public;
- [9] That Defense witnesses shall be entitled to protection by the Victims and Witness Support Section under the same conditions as those granted to Prosecution witnesses;
- [10] That the Defense reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

*Prosecutor's submissions*

5. The Prosecutor does not object to measures [1], [2], [4], [7], [8], [9] and [10], although she states that the Defense has provided a limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC. The Prosecutor, however, objects to granting protective measures for the potential Defense witnesses living in Europe.

6. Furthermore, the Prosecutor objects to measures [3], [5] and [6] submitting that these measures will conflict with her mandate to investigate and prosecute matters unrelated to the present case under Article 15 of the Statute. She argues that, orders limiting her contact to Defense witnesses, if granted, should be limited to contacts concerning the present case. Furthermore, the Prosecutor relies on the "Decision on the Defense Preliminary Motion for Protective Measures for Witnesses," in *Prosecutor v. Kayishema* Case No. ICTR-95-1-T, rendered on 23 February 1998, which underscores a Party's right, in this case, the Prosecutor, to present her case with, particularly the rebuttal to the defense plea of alibi.

**AFTER HAVING DELIBERATED**

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

8. 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.

9. 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.

10. 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.

11. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 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.

12. 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."

13. In this case, notice is taken of the documents filed in support of the Motion, which tend to describe a particularly volatile security situations at present in Rwanda and in neighboring countries such as the DRC. These volatile security situations could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda.

14. On this basis, the Chamber sees the fears of the potential witnesses and their families, if they testify on behalf of the Accused without protective measures, as being well founded.

*As to the Merits of the Measures Requested*

15. As to the Prosecutor's argument that the Defense has provided limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC, she objects to granting protective measures for the potential Defense witnesses living in Europe. The Defense, on this score, has requested protective measures for its potential

witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

16. The Chamber considers that the Defense has indeed demonstrated fears, which pertain to potential witnesses residing in Rwanda and insecure African countries such as the DRC. However, taking into account 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, and neighboring countries such as the DRC only, the security situation would affect any potential witness residing elsewhere, in this case Europe. The Chamber, therefore, grants protective measures for potential Defense witnesses residing in Rwanda neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

17. 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], [4] and [7]. Furthermore, the Chamber notes that the Prosecutor objects to measures [3], [5] and [6] for being in conflict with her mandate under Article 15 of the Statute with respect to her investigations and prosecution of matters unrelated to the present case.

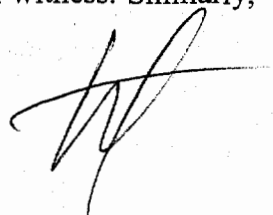
18. The Chamber, upon a plain reading of the requests, is of the opinion that measure [3] and [5] are normal measures assuming the anonymity of witnesses and that they do not conflict with the Prosecutor's mandate under Article 15 of the Statute.

19. At this juncture, as regards anonymity, 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, (the "Nsabimana Decision"). 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."

20. 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], and [7] as requested in the Motion.

21. As regards measure [6] the Chamber, notes the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana*, "Decision on Defense's Motion for Witness Protection" rendered on 25 February 2000, and grants the said measure that requires the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts.

22. As regards measure [8], the Chamber recalls its "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* ICTR-99-50-T rendered on 12 July 2000, whereby at para. 15 the Chamber granted the measure so that the Prosecutor should designate a pseudonym for each protected Prosecution witness. Similarly, the Chamber grants the Defense request in measure [8] as requested.



23. As regards the request made in measure [9], the Chamber, mindful of Article 20(1) of the Statute that all Parties are equal before the Tribunal, considers the Defense request in Measure [9] to be as of right, so that to the extent possible the Defense witnesses should be accorded the same conditions as those granted to Prosecution witnesses when they are under the protection of the Victims and Witness Support Section.

24. As regards measure [10], the Chamber considers that the Defense is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, if necessary.

*As to the taking into effect of the protective measures sought*

25. The Chamber finally decides that, in conformity with the Tribunal's well-established jurisprudence, in any case 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 TRIBUNAL:**

**GRANTS** the Defense requests in measures [1], [2], [3], [4], [5], [6], [7] and [8] of the Motion for its potential witnesses residing in Rwanda, the neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives living in Rwanda and neighboring countries such as the DRC;

Arusha, 22 March 2001.

  
Laity Kama  
ICTR  
  
(Seal of the Tribunal)