

ICTR-98-44A-T

3/4/2001

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 3 April 2001

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ICTR  
*[Handwritten initials]*

THE PROSECUTOR  
v.  
Juvénal KAJELIJELI  
Case No. ICTR-98-44A-T

DECISION ON JUVÉNAL KAJELIJELI'S  
MOTION FOR PROTECTIVE MEASURES FOR DEFENSE WITNESSES

The Office of the Prosecutor:

Ken Flemming  
Don Webster  
Ifeoma Ojemeni  
Melinda Pollard

Counsel for Kajelijeli:

Lennox Hinds  
Richard Harvey

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
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NAME / NOM: *Dr. MINDUA K. M. Antoine*  
SIGNATURE: *[Signature]* DATE: *03.04.2001*

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03 04 2001

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

**SITTING** as Trial Chamber II composed of Judges Laïty Kama, Presiding, William H. Sekule and Mehmet Güney (the "Chamber");

**BEING SEIZED** of the "Notice of Urgent Motion for the Protection of Defense Witnesses," (the "Motion") filed on 1 March 2001, to which is attached a Certification in Support of the Motion (the "Affidavit");

**CONSIDERING** the "Prosecutor's Response to Urgent Motion for Protection of Defense Witnesses Dated 21 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 witnesses who fall in the following categories:
  - i. Those who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;
  - ii. Those who presently reside outside of Rwanda but in other countries in Africa and who have not affirmatively waived their rights to protective measures; and
  - iii. Those who reside outside the continent of Africa and who have requested that they be granted protective measures.
2. The Defense relies upon the Affidavit, which lays out the reasons why the Defense seeks protective measures for its potential witnesses before they testify. In the Affidavit, Defense Counsel for Kajelijeli states that during his visit to Rwanda and Nairobi, on or about 6 to 14 January 2001, his attempts to contact a number of potential Defense witnesses failed because the potential Defense witnesses would not even agree to meet him without an order of protection pursuant to Article 21 of the Statute and Rules 69 and 75 of the Rules.
3. The Defense alleges that many of the potential Defense witnesses are aware of instances of killings, intimidation and threats upon them, and so they are not willing to testify for the Defense. The Defense gives examples of Defense witnesses who were imprisoned upon returning from Arusha allegedly for having testified in the trial of *Akayesu*. Furthermore, the Defense alleges that some of its potential witnesses were killed mysteriously or beaten to death.
4. The Defense relies upon the Statute of the Tribunal, particularly Article 21 and the Rules of Procedure and Evidence, specifically Rule 69 and 75. The Defense submits that the security situation has not changed for the better since the Tribunal granted similar requests in other cases, and it makes specific reference to the Tribunal's findings in the "Decision on the

Prosecution Motion for the Protection of Witnesses,” of 10 December 1998 in *Prosecutor v. Semanza*, (Case No. ICTR-97-20-T), which stated at para 6 that, “Additionally, judicial notice is taken of the context of the security situation affecting the potential witnesses.”

5. The Defense, therefore requests the Chamber to issue the following orders:
- [a] An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential defense witnesses described in para 1, be sealed by the Registry and not included in any records of the Tribunal;
  - [b] An order that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential defense witnesses described in para 1, be communicated only to the Victims and Witnesses 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 any other identifying information, concerning such victims and potential defense witnesses as contained in existing records of the Tribunal be expunged from those documents;
  - [d] An order 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 other information which would reveal the identity of such victims and potential defense witnesses, and this order shall remain in effect after the termination of any trial;
  - [e] An order prohibiting the Prosecution from sharing, discussing or revealing, 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 specified in para. 1, to any person or entity other than persons working on the immediate Prosecution team;
  - [f] An order requiring the Prosecution to provide to the Trial Chamber and the Defense a designation of all persons working on the immediate Prosecution team who will, pursuant to measure [e] have access to any information referred to in measures [a] to [d] and requiring the Prosecutor to advise the Chamber in writing of any changes in the composition of this team and requiring the Prosecutor to ensure that any member departing from the Prosecution team has remitted all documents and information that could lead to the identification of persons specified in para 1;
  - [g] An order prohibiting the photographing, audio and/ or video recording, or sketching of any defense witness at any time or place without leave of the Trial Chamber and parties;
  - [h] An order prohibiting the disclosure to the Prosecution of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that witnesses have been afforded an adequate mechanism for protection and allowing the Defense to disclose any materials provided to the Prosecutor in redacted form until such mechanism is in place; and in any event, that the Defense is not required to reveal the identifying data to the Prosecutor sooner than 60 days before the commencement of trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules;
  - [i] An order that the Prosecutor shall make a written request, on reasonable notice to the Defense, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential witnesses 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 parents

or guardian of that person if that person is under the age of 18, to an interview by the Prosecutor. The Prosecutor shall undertake the necessary arrangements to facilitate such contact; and

- [j] An order requiring that the Defense designate a pseudonym for each defense 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 until such time that the witness decides otherwise;
- [k] The Defense reserves the right to apply to the Chambers to amend the protective measures sought or to seek additional protective measures, when necessary.

*Prosecutor's submissions*

6. The Prosecutor submits that the Defense Counsel for the Accused sets out the factual basis for the Motion in an Affidavit. The Prosecutor points out that for an order for protective measures to be granted, there must be real fear for the safety of the witness or his/her family, and there must always be an objective basis for the fear as was the finding in the Chamber's "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* (Case No. ICTR-99-50-T) of 12 July 2000.

7. The Prosecutor is of the position that the Affidavit in support of the Motion does not provide any evidence that potential Defense witnesses will suffer at the hands of the Prosecution witnesses, or anybody, nor does it establish any link to the situation of specific witnesses. The Prosecutor points out that the Defense is, in fact, relying upon the applicable law and the jurisprudence of the Tribunal.

8. Nevertheless, the Prosecutor, in the interests of justice, concedes to the orders sought in measures [a], [b], [c], [d], [g] and [j]. As regards measure [j] the Prosecutor requests the Chamber to strike out the words, "until such time as the witness decides otherwise," because matters concerning designation of a pseudonym and when it can be made public are left to the discretion of the Chamber.

9. The Prosecutor objects to measures [e], [f], [h] and [i] submitting that these measures, as they read, 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.

10. As to measure [i], the Prosecutor requests that if the Chamber grants the said measure, the unredacted statements of the Defense witnesses should be disclosed to her 60 days before the testimony of the Defense witness.

**AFTER HAVING DELIBERATED**

11. 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. 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.

12. 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.

13. Rule 69 of the Rules provides *inter alia* 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.

14. Thus, the Chamber, 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.

15. The Chamber recalls the findings in *Prosecutor v. Rutaganda*, (Case No. ICTR-96-3-T), "Decision on Protective Measures for Defense Witnesses" of 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."

16. The Chamber notes that the Defense has not provided sufficient justifying elements that clearly demonstrate that the fears of its potential witnesses are well founded. Nevertheless, the Chamber considers the exceptional circumstances of the case, in particular the fact that trial on the merits has already started and that similar measures for protection have been granted on behalf of Prosecution witnesses, whose security concerns are essentially similar to those of the Defense witnesses in this case. The Chamber is, therefore, satisfied that there is sufficient basis for it to conclude that the fears of the Defense witnesses, if they testify on behalf of the Accused without protective measures, are well founded.

*As to the Merits of the Measures Requested*

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measures [a], [b], [c], [d] and [g]. The Chamber notes that the Prosecutor does not object to granting the protective measures requested for.

18. In the present case, and as discussed at paras. 15 and 16 in this Decision, the Chamber is satisfied 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, [a], [b], [c], [d] and [g] as requested in the Motion.

19. The Chamber, however, notes that the Prosecutor objects to measures [e], [f], [h] and [i] 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. The Chamber, upon a careful consideration of the matter is of the opinion that measures [e] and [f] are normal measures requiring that witnesses remain anonymous and that they do not conflict with the Prosecutor's mandate under Article 15 of the Statute, therefore, the Chamber grants measures [e] and [f] as requested.

20. As regards measure [h], the Chamber considers the measure to be a normal measure that potential Defense witnesses remain anonymous. As regards disclosure of unredacted

statements of the Defense, the Chamber recalls the Tribunal's jurisprudence according to which disclosure should be set at least 21 days prior to the day in which the witness is to testify at trial. Accordingly, the Chamber grants measure [h], with modifications by replacing the phrase, "sooner than 60 days before the commencement of trial," with the phrase, "at least 21 days prior to the day in which the witness is to testify at trial."

21. As regards measure [i] the Chamber, mindful of the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana*, "Decision on Defense's Motion for Witness Protection" of 25 February 2000, requires that 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 [j], the Chamber, in line with its jurisprudence in *Prosecutor v. Bicamumpaka*, (ICTR-99-50-T) of 12 July 2000, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," grants the measure, but modifies it by striking out the words, "until such time that the witness decides otherwise," because the Chamber is of the opinion 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. (See, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" of 6 July 2000 in this case)

23. As regards measure [k], 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, when necessary.

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

24. 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 the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

**FOR THE ABOVE REASONS, THE TRIBUNAL:**

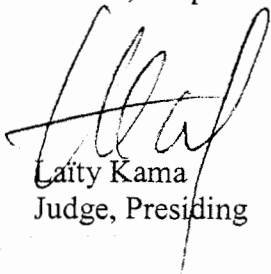
**GRANTS** the Defense requests in measures [a], [b], [c], [d], [e], [f] and [g] of the Motion.


**GRANTS** measure [h], with modifications to the effect that disclosure to the Prosecutor of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential witnesses, and any information in the supporting material on file with the Registry is prohibited, until such time as the Trial Chamber is assured that witnesses have been afforded an adequate mechanism for protection and allowing the Defense to disclose any materials provided to the Prosecutor in redacted form until such mechanism is in place; and in any event, that the Defense is required to reveal the identifying data to the Prosecutor at least 21 days prior to the day in which the witness is to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.

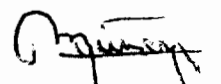
**GRANTS** measure [i] with modifications requiring the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts.”

**GRANTS** measure [j], with modifications requiring that the Defense designate a pseudonym for each defense 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.”

Arusha, 3 April 2001

  
Laity Kama  
Judge, Presiding

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

