

ICTR-97-21-T

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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

THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO

and

Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

2001 APR - 31 P 12:24

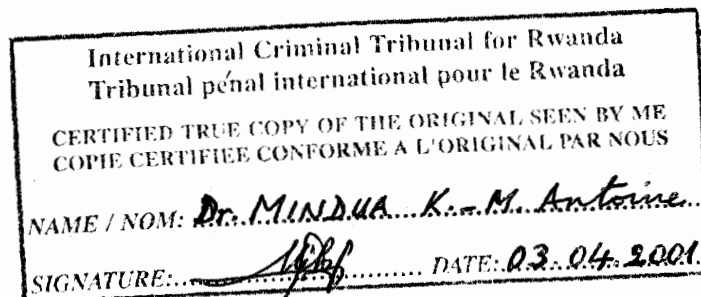
DECISION ON ARSÈNE SHALOM NTAHOBALI'S  
MOTION FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES

The Office of the Prosecutor:

Japheth Mono  
Ibukunolu Alao Babajide  
Manuel Bouwknecht

Counsel for Nyiramasuhuko:

René Saint-Léger  
Michael Bailey



03 04 2001

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”);

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

**BEING SEIZED** of the:

- i. “Requête en Prescription de Mesures des Témoins à Décharge,” (the “Motion”) filed on 9 January 2001 2000, to which is attached 2 annexes;
- ii. “Prosecutor’s Response to Arsène Shalom Ntahobali’s Motion Seeking Orders for Protective Measures for Defense Witnesses,” (the “Prosecutor’s Reply”) filed on 19 February 2001; and
- iii. “Requête en Prescription de Mesures des Témoins à Décharge: Réplique à la Réponse du Procureur,” (the “Defense Response to the Prosecutor’s Reply”) filed on 28 February 2001;

**CONSIDERING** that attached to the Prosecutor’s Reply is a “Brief in Reply to the Motion filed by the Prosecutor for Witness Protection Measures for Victims and Witnesses of the Crimes alleged in the Indictment ICTR-97-21-I and Motion for Protection Measures for Consultants, Investigators, Interpreters, Witnesses and Expert Witnesses of the Defense,” which was filed on 20 February 1998, on behalf of the Accused. The newly assigned Defense Counsel for the Accused had written a letter to the Registry requesting the withdrawal of the said Motion of 20 February 1998, which was granted;

**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 Chamber will decide the Motion 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, for the following three categories of witnesses:

- a) Potential Defense witnesses currently residing in Rwanda, who wish to testify at Trial;
- b) Potential Defense witnesses currently residing outside Rwanda, in other African countries who wish to testify at Trial;
- c) Potential Defense witnesses residing outside Africa, who also wish to testify at Trial;

2. The Defense relies upon the documents attached, including a report by the Special Representative for the Commission on Human Rights Mr. Michel Moussalli, pursuant to Resolution 1998/69 (E/CN.4/1999/33) dated 8 February 1999, and a report submitted by the ICTR President to Secretary General for transmission to the United Nations General Assembly and the Security Council entitled “Third Annual Report of the ICTR.” (A/53/429, S/1998/857) dated 23 September 1998.

3. The Defense, therefore requests the Chamber to make, in essence, the following orders granting the instant Motion:

- [1] Order that the names, addresses and other identifying information of all potential Defense witnesses be kept sealed at the Registry and expunged from the Tribunal's records;
- [2] Order that names, addresses and other identifying information of all potential Defense witnesses be disclosed by the Registry 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] Order that where the names, addresses and other identifying information concerning these potential Defense witnesses appear in the Tribunal's records and in any section other than the Victims and Witnesses Support Section, such information should be expunged from the said records and withdrawn from the said section;
- [4] Prohibiting the 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 records filed with the Registry, or with any other section of the Tribunal;
- [5] Authorizing the use of a pseudonym to designate each potential witness during the proceedings and in all communications on this case to the media and the public;
- [6] Order that the names, addresses and other identifying information concerning potential Defense witnesses bearing such pseudonyms and their whereabouts be kept under seal and expunged from the Tribunal's records open to the media and the public;
- [7] Prohibiting disclosure of the names and addresses of the Defense witnesses as well as their whereabouts and other identifying information by the Prosecutor or members of her Office as long as the Chamber is not satisfied that adequate protection has been provided for the said witnesses;
- [8] Authorizing the Defense, 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 in any event the Defense 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] Prohibiting the Prosecutor and any member from the team 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;
- [10] Prohibiting any member of the Office of the Prosecutor from disclosing to the media and to the public any item from the records leading to the identification of the witnesses or any other document or information that might reveal the identity of the witnesses;
- [11] Prohibiting the Prosecutor or members of the Prosecution team 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] Order the Prosecutor to notify the Chamber and the Defense, in writing of the status of members of the Prosecution team who have access to any information

identifying potential Defense witnesses, and that the Prosecutor be compelled to notify the Chamber and the Defense of any change in the composition of the Prosecution team;

- [13] Order that the Prosecutor ensures that any member leaving the Prosecution team returns all materials in his possession, if such materials are likely to reveal the identities of potential Defense witnesses;
- [14] Order that photographing, sound or video recording and sketching of any protected witnesses be prohibited at any place and time, save with leave of the Chamber and Parties;
- [15] Prohibit members of the Office of the Prosecutor from communicating with any protected witness or members of their families or guardian, if such a family member is a minor unless with the written consent of the witness and the express leave of the Chamber or of a Judge designated by the Chamber.

*Prosecutor's submissions*

4. The Prosecutor does not object in principle to the Motion, although she objects to measure [11] as being unjustified and impossible to comply 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 they testify.

**AFTER HAVING DELIBERATED**

5. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rules 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.

6. 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.

7. 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.

8. 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.

9. In support of its request, the Defense relies upon the documents filed as Annexes to the Motion. In particular, the report by Mr. Moussalli highlights some of the security conditions and human rights violations in Rwanda, which he describes as involving,

“[g]eopolitical interests of various regional as well as extra regional States,” especially the Democratic Republic of the Congo (the “DRC”). At page 6 of the Report, the International Commission of Inquiry is quoted as having reported that; “[t]he danger of the repetition of a tragedy comparable to the Rwandan genocide of 1994, but on a sub regional scale cannot be ruled out.”

10. 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.”

11. 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 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.

12. On this basis, the Chamber notes that the Defense has demonstrated fears pertaining to potential witnesses residing in Rwanda and neighboring countries within the Region only, and has not demonstrated fears as regards potential witnesses residing elsewhere. However, taking into account the representations of the Parties, particularly the documents in support of the Motion 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 protective measures to be granted with respect to those witnesses residing in Rwanda and neighboring countries within the Region only, the security situation could affect any potential witness even if residing outside the Region.

*As to the Merits of the Measures sought*

13. 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], [7], [9], [10], [12], [13] and [14]. 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.”

14. 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], [7], [9], [10], [12], [13] and [14] as requested in the Motion.

15. As regards measures [5] and [6], the Chamber recalls its “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses” in *Prosecutor v. Bicamumpaka* (ICTR-99-50-T) of 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 considers that such a request is warranted in this case and therefore, grants the Defense requests in measures [5] and [6] as requested.

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

17. 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" of 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." Another 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," of 3 March 2000. The Chamber in this case considers that the request in measure [11] is warranted and therefore, grants it.

18. The Chamber furthermore notes that a request similar to measure [15] was granted, as it did not affect the rights of the Accused, in the "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defense Witnesses and Their Family Members" of 20 March 2001 (*Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T). The Chamber therefore considers that measure [15] is warranted and accordingly grants with modifications to the effect that the Prosecutor request, in writing, leave of the Chamber or 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.

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

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

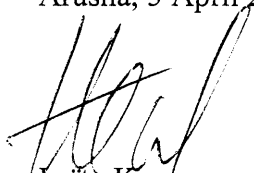
**FOR THE ABOVE REASONS, THE CHAMBER:**


**GRANTS** the Defense requests in measures [1], [2], [3], [4], [5], [6], [7], [9], [10], [11], [12], [13] and [14] of the Motion;

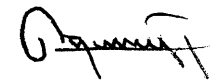
**GRANTS** measure [8], with modifications requiring the Defense to disclose to the Prosecutor information leading to the identification of potential Defense witnesses, at least 21 days before they testify before the Tribunal.

**GRANTS** measure [15], with modifications to the effect that the Prosecutor request, in writing, leave of the Chamber or 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.

Arusha, 3 April 2001,

  
Laity Kama  
Judge, Presiding

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

