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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Original: English

TRIAL CHAMBER II

Before: Judge Mehmet Güney
Sitting as a single Judge pursuant to Rule 73 of the Rules

Registrar: Mr. Adama Dieng

Date: 25 April 2001

THE PROSECUTOR
v.
THARCISSE MUVUNYI & OTHERS
Case No. ICTR 2000-55-I

DECISION ON THE PROSECUTOR'S MOTION FOR ORDERS FOR PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES TO CRIMES ALLEGED IN THE INDICTMENT

Counsel for the Prosecutor:

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Sola Adebeyejo
Jonathan Moses

Counsel for the Defence:

Michael Fisher

JUDICIAL RECORDS ARCHIVES
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: *Dr. MINUSA... K... M... Antonia*

SIGNATURE: *[Signature]* DATE: *25.04.2001*

25.04.2001

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal");

JUDGE MEHMET GÜNEY sitting as a single Judge designated pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules") on behalf of Trial Chamber II;

BEING SEIZED of the "Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "first Motion") and the "Brief in support of the Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" with annexes, filed on 13 February 2001, subsequently replaced by the "Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "first Motion") and the "Brief in support of the Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "Brief") with annexes, filed on 15 February 2001 to correct errors in the first Motion;

CONSIDERING also the "Reply by the Defence to the Motion filed by the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment", filed on 2 April 2001;

CONSIDERING the "Prosecutor's Response to Defence submissions in reply to Prosecutor's Motion for orders for protective measures for victims and witnesses to crimes alleged in the Indictment", filed on 9 April 2001 and the additional Prosecutor's response to Defence submissions in reply to the Prosecutor's Motion for protective measures for victims and witnesses to crimes alleged in the indictment, filed on 19 April 2001;


WHEREAS, acting on the Chamber's instruction, Court Management Section advised the Parties on 16 February 2001 that the Motion would be reviewed on briefs only pursuant to Rule 73 of the Rules;

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

SUBMISSIONS OF THE PARTIES

The Prosecutor

- 1. The Prosecutor requests orders for protective measures for persons who fall into three categories (paragraph 2 of the Motion):
 - a. *Victims and potential prosecution witnesses who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;*



- b. *Victims and potential prosecution witnesses who presently reside outside Rwanda but in other countries in Africa and who have not affirmatively waived their rights to protective measures; and*
 - c. *Victims and potential prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.*
2. The Prosecutor requests that these persons be provided protection by the following orders (paragraph 3 of the Motion):
- a. *An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses described hereinafter, be sealed at the Registry and not included in any records of the Tribunal; that the said witnesses will bear the following pseudonyms: BW, AX, CE, ED, ZC, ZB, QBV, QM, CY, RU, QD, AA, CS, ZD, CP, QBG, ET, QL, RR, QB, NN, EI, BV, RA, QBU, QBX, QBY, QBC, QCC, GAH, QCD, QCM, QCQ, QCW, QCZ, QO, RJ, TQ, DBY, XS, QCY, QCL, QCP, QCO, QCV, QBN, QCS, TN, QBP, QDC, QCN, QX, QCT, QCU, QCR and any other additional witnesses will also be assigned pseudonyms, which will be used during the course of the trial.*
 - b. *An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning potential prosecution witnesses described in the affidavit of the Commander of the Witness Management Unit hereinafter attached, be sealed at the Registry and not included in any records of the Tribunal; and that the said witnesses bear the following pseudonyms: RO, QAP, FAF, AEH*
 - c. *An Order that the names, relations, addresses and whereabouts of victims and other potential prosecution witnesses as well as any other identifying information, be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals.*
 - d. *An Order requiring that to the extent that any names, relations, addresses, whereabouts of or any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, that such identifying information be expunged from those documents;*
 - e. *An Order prohibiting the disclosure to the public or the media, of the names, relations, addresses and whereabouts of these victims and potential prosecution witnesses as well as any other identifying data in the supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential prosecution witnesses, and this order shall remain in effect until the termination of this trial;*

- f. *An Order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any other information contained in any documents, or any other information which could reveal or lead to the identification of victims and potential prosecution witnesses specified in Paragraph 2, to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team. Such persons so designated by the assigned Counsel or the Accused;*
- g. *An Order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 2(e) above, have access to any information referred to in Paragraphs 2(a) through 2(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above.*
- h. *An Order prohibiting the photographing, audio and/or video recording, or sketching of any victims and potential prosecution witness at any time or place without leave of the Trial Chamber and parties;*
- i. *An Order prohibiting the disclosure to the Defence of the names, addresses, relations and whereabouts of, and any other identifying data which would reveal the identities of the victims and potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and in any event, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than 21 days before the victim or witness is likely to testify before the Trial Chamber, unless otherwise decided by the Trial Chamber, pursuant to Rule 69(A) of the Rules.*
- j. *An Order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential prosecution 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 the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;*
- k. *An Order prohibiting the disclosure to the Defence of the names, addresses, relations and whereabouts of, and any other identifying data which would reveal the identities of the victims and potential prosecution witnesses in the exhibits and other such materials to be used by the Prosecution for the Trial, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate*

mechanism for protection and allowing the Prosecutor to disclose any such materials provided to the Defence in a redacted form until such a mechanism is in place;

- l. An Order prohibiting any member of the Defence team referred to in Paragraph 2f above, from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;*
- m. An Order prohibiting the accused individually or any member of the Defence Team, from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;*

2. The Prosecutor submits two Affidavits, from Samuel Akorimo and Remi Abdulrahman respectively dated 8 January 2001 and 13 February 2001, and informative material annexed to the Brief to demonstrate that there is a substantial threat to the lives of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed.

The Reply by the Defence

3. The Defence submits that the second motion filed on 15 February had a different list of annexes, that did not enclose the Affidavit of Samuel Akorimo Commander of the Witness Management Unit referred to as annex K in the first Motion.

4. The Defence alleges that they were served with excessively edited witness statements, and has not been served with the witness statements referred to at paragraph 3(b) of the second Motion.

5. The Defence submits that the supporting material provided by the Prosecutor is insufficient to establish the exceptional circumstances required by Rule 69(A) of the Rules.

6. The Defence submits in general that measures (a) to (m) are oppressive and unfair and violate the International Covenant on Civil and Political Rights.

7. The Defence objects to the disclosure of identifying material only 21 days before a witness is likely to testify as being unfair as, *inter alia*, it is alleged that some prosecution witnesses will give false testimony against the Accused and that they will not have enough time to prepare thorough pre-trial investigation.

The Prosecutor's Response

8. The Prosecutor submits that the Motion was filed anew to correct errors present in the first Motion.

9. In reply to the alleged violation of the International Covenant on Civil and Political Rights, the Prosecutor submits that the orders sought do not prevent an accused from exercising the right to examine witnesses against him, but that this right has to be balanced against the recognised dangers in exceptional cases such as most cases before this Tribunal.

10. The Prosecutor justifies measure (g) by stating that, due to the specific nature of the documents provided to the Defence, it is appropriate to know the identity of all persons working on the immediate Defence team.

11. The Prosecutor alleged that measures (f), (l) and (m) do not impose a strict liability on the Accused and the defence team and are aimed at guaranteeing the protection of the witness's identity.

12. As regard measure (m), the Prosecutor notes that even if an expanded form of the measure not granted in the in the case of the *Prosecutor v. Nyiramasuhuko and Ntahobali*, case No. ICTR-97-21-I, (« Decision on the Prosecutor's Motion to re-file Motion to order protective measures for the victims and witnesses » rendered on 27 February 2001), the formulation of the measure in the current Motion is more specific as it prohibits the Accused or any member of the Defence team to possess any material that might lead to the identification of a protected witness, and should therefore be granted.

13. In relation to the alleged lack of disclosure of the content of the witnesses's statements on the one hand, and of the redacted Indictment on the other hand, the Prosecutor recalls that an Order rescinding the non-disclosure Order was issued on 6 February 2001, and that the unredacted Indictment containing the names of the massacre sites and other relevant places at which events took place has been available since then.

14. The Prosecutor recalls her obligation in accordance with Rule 66(A)(ii) of the Rules to provide, no later than 60 days before trial, a copy of statements of all witnesses whom she intends to call at trial. Consequently, if the Accused has not yet received a copy of witness statements for witnesses RO, QAP, FAF, and AEH, she is not in breach of any of her obligations in respect to those obligations.

15. The Prosecutor recalls the Tribunal's jurisprudence which provides the defendant with 21 days to make such enquiries about the witnesses as are necessary.

16. The Prosecutor further submits that the information annexed should not be considered as being outdated but simply highlights that there have been security issues throughout Rwanda for a long period, and until today. Concerning the Affidavit of Samuel Akorimo, the Prosecutor submits that it clearly indicates that four potential witnesses have already been threatened and that, moreover, a non-disclosure order may be based on fears expressed by others.

AFTER HAVING DELIBERATED

17. Pursuant to Article 21 of the Statute, the Tribunal shall provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, without being limited to, the protection of the witness's identity. Rule 75 provides, *inter alia*, that a Judge or the Trial Chamber may *proprio motu*, or at the request of either party, or of the victims of witnesses or of the Victims and Witnesses Support Section, order appropriate measures for their privacy and protection, provided that these measures are consistent with the rights of the Accused.

18. According to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise.

19. Article 20 of the Statute sets out the rights of the Accused including, *inter alia*, the right "[t]o have adequate time and facilities for the preparation of his or her Defence" and the right "[t]o examine, or have examined, the witnesses against him or her". The Chamber also recalls Rule 69(C) of the Rules whereby the identity of a witness shall be disclosed in sufficient time prior to trial to allow adequate time for the preparation of the Defence.

20. Mindful of guaranteeing the full respect of the rights of the witnesses and those of the Accused, the Chamber shall order any appropriate measures for the protection of the victims and witnesses so as to ensure a fair determination of the matter before it. The Chamber shall decide on a case-by-case basis and the orders will take effect once the particulars and locations of witnesses have been forwarded to the Victims and Witnesses Support Unit.

21. To determine the appropriateness of protective measures, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information annexed to the Brief. Having considered the Defence's objections, the Chamber has reviewed the Affidavit of Samuel Akorimo dated 8 January 2001, which tends to demonstrate the complexity of the security situation in Butare *préfecture*. The Chamber notes that it contains serious and detailed allegations of violence and threats against witnesses that could come to testify "in this present trial and other trials involving Butare *préfecture*". The affidavit by Remi Abdulrahman emphasises the level of threat in several regions of Rwanda due to attacks by infiltrators from the DRC that can also spread in Butare *préfecture*. The Chamber is convinced, on the basis of these documents, that a volatile security situation exists in Rwanda and neighbouring countries, which could endanger the lives of the witnesses who may be called to testify at trial.

22. In relation to documents in support of threats for witnesses residing outside Africa, the Chamber considers that the Prosecutor has not provided evidence of threats to the lives of witnesses residing outside of that region. However, the Chamber concurs with its finding in the "Decision on Pauline Nyiramasuhuko's motion for protective measures for Defence witnesses and their family members" filed on 20 March 2001. In that

instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears as regards potential witnesses residing outside Rwanda and the region, it decided that the present security situation "would affect any potential witness even if residing outside the region".

23. In relation to the need for the protection of witnesses' identities, having reviewed the supporting documents, the Chamber holds that, in the present case, exceptional circumstances do warrant non-disclosure orders based on the fears expressed by these witnesses.

24. The measures requested by the Prosecutor have been examined in accordance with the current practice of the Tribunal. The Chamber deems justified the measures seeking to protect the identity of the witnesses and pursuant to Rule 75(B) of the Rules, grants measures (a), (b), (c), (d), (e), (f), (h), (i), (j), (k) and (l).

25. As for measure (g), the Chamber grants the measures requested by the Prosecutor, but for practical reasons, modifies the measure which provides that any member leaving the Defence team remits "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted. (See the Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, Decision of 3 March 2000), in which the Trial Chamber substituted the words "all materials" in place of "all documents and information."

26. In relation to measure (i) of the Motion, the Chamber concurs with the Tribunal's jurisprudence according to which the deadline for disclosure should be set at least twenty-one days prior to the day in which the witness is to testify at trial. (See "Decision on the Prosecutor's Motion for protective measures for witnesses", filed on 6 July 2000, in the Prosecutor v. Karemera).

27. As to measure (m) opposed to by the Defence, the Chamber denies it and concurs with the finding of the "Decision on the Prosecutor's Motion for protective measures for victims and witnesses", in the Prosecutor v. Nsabimana and Nteziryayo, dated 21 May 1999, that denied a similar order. The Chamber decides that the present request is not more specific than the one referred to in the said Decision but is alike overly broad and may impinge Article 20(4)(b) of the Statute.

28. Finally, the Chamber recalls that such protective measures are granted on a case-by-case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded under seal to the Victims and Witnesses Support Section by the Prosecutor

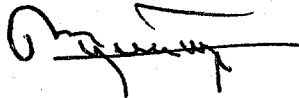
FOR THESE REASONS, THE TRIBUNAL:

GRANTS measures (a), (b), (c), (d), (e), (f), (h), (i), (j), (k) and (l).

GRANTS measure (g) with the following modification: to replace the words “all documents and information” with the words “all materials”;

DENIES measure (m).

Arusha, 25 April 2001,



Judge Mehmet Güney



(Seal of the Tribunal)