

ICTR-2000-56-1  
12-07-2001  
(1867-1861)

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 12 July 2001

2001 Jul 12 P 14 24  
*Adama Dieng*

THE PROSECUTOR

v.

**Augustin NDINDILYIMANA**  
**Innocent SAGAHUTU**  
**Francois-Xavier NZUWONEMEYE**

Case No. ICTR-2000-56-I

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**ORDER FOR PROTECTIVE MEASURES FOR WITNESSES**

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The Office of the Prosecutor:

Chile EBOE-OSUJI  
Patricia WILDERMUTH  
Amanda REICHMAN

Defence Counsel:

Christopher BLACK  
Francois-Xavier CHARVET  
Fabien SAGATWA

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: *KARRE... KUMBE... A... AFANDE*  
SIGNATURE: *[Signature]* DATE: *12/7/2001*

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

**SITTING** as Judge Pavel Dolenc, as designated by Trial Chamber III pursuant to Rule 73(A) of the Rules of Procedure and Evidence (Rules);

**BEING SEIZED** of the Prosecutor's "Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment" filed on 16 May 2001 (Motion);

**HAVING NOTIFIED** the Prosecutor and the Defence of the Chamber's intention to deal with this Motion on the basis of the written briefs of the parties, pursuant to Article 73(A);

**HAVING RECEIVED** no Defence reply to the Prosecutor's Motion;

**CONSIDERING** Articles 20 and 21 of the Statute of the Tribunal (Statute) and Rules 66, 69 and 75 of the Rules;

**AFTER HAVING DELIBERATED,**

**Measures Requested**

1. In paragraph 3 of the Motion, the Prosecutor seeks the following protective measures for potential witnesses who reside in Rwanda:
  - (a) Requiring the Prosecution to designate for each prosecution witness a pseudonym that shall be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties and the public;
  - (b) Requiring that the names, addresses, whereabouts and other identifying information of victims and potential prosecution witnesses ("identifying information") be sealed by the Registry and not included in any records of the Tribunal and that this identifying information be communicated to the Victims and Witness Support Unit ("VWSS") only in accordance with established procedure and only in order to implement protection measures for these victims and potential witnesses;
  - (c) Requiring that any identifying information that is contained in existing records of the Tribunal should be redacted;
  - (d) Prohibiting the disclosure to the public or the media of any identifying information and that this order shall remain in effect after the termination of the trial;
  - (e) Prohibiting the Defence and the Accused, directly or indirectly, from sharing, discussing, revealing any documents or information contained in any documents, or any information which could lead to the identification of any victims or potential prosecution witnesses to any person or entity other than the Accused, assigned Counsel, or other persons working on the immediate Defence team designated by the assigned Counsel or the Accused;
  - (f) Requiring the Defence to provide the Trial Chamber and the Prosecutor with a designation of all persons working on the immediate Defence team who will have access to any identifying information, to advise the Trial Chamber in writing of any changes in the composition of this team to ensure that any member departing from the Defence team has remitted all material that could lead to the identification of victims or potential Prosecution witnesses;
  - (g) Prohibiting all members of the Defence team from attempting to make any independent determination of the identity of any protected witnesses or encouraging or otherwise aiding any person to attempt to identify any such person;
  - (h) Prohibiting the disclosure to the Defence of any identifying information and any information in the supporting material on file with the Registry and permitting the Prosecution to disclose any materials provided to the Defence in a redacted form, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection or no sooner than twenty-one days before each witness is due to testify at trial;

- (i) Requiring the Accused or Defence Counsel to make a written request, on reasonable notice to the Prosecution, to the Trial Chamber to contact any protected victim or potential prosecution witness or any relative of such person. At the direction of the Trial Chamber and with the consent of such person or the parents or guardian of such person if that person is under the age of eighteen years, to an interview by the Defence, the Prosecution shall undertake to make the necessary arrangements to facilitate such contact;
  - (j) Prohibiting the photographing and audio and/or video recording or sketching of any protected prosecution witness at any time or place without the leave of the Trial Chamber and the parties.
2. In paragraph 4 of the Motion, the Prosecution seeks to reserve its right to amend the protective measures sought or to seek additional protective measures, including those for additional categories of witnesses.
  3. In support of this Motion, the Prosecutor argues that the current security situation in Rwanda is "volatile" and relies on an Affidavit of Remi Abdulrahman, Chief of the Security and Safety Section of the ICTR in Kigali, dated 11 May 2001 (Affidavit). The Affidavit states that the security situation in Rwanda is being closely monitored by his office and that daily security assessments are made
  4. In this Affidavit, Mr. Abdulrahman asserts that the security situation in Rwanda presents a threat to the safety of witnesses. He explains that travel in the western part of Rwanda, and particularly in Gisenyi, Ruhengeri, Kibuye, Cyangugu and Gikongoro prefectures, is deemed to be extremely dangerous because of insurgence activity. In these areas, ICTR staff can only travel with heavy military escort and the appearance of armed troops in a local community can serve to identify the witness. In some prefectures, the security situation prevents ICTR investigators from traveling beyond the main towns, which may also reveal the identity of the witness who must travel to meet with the investigators.
  5. The Affidavit asserts that the identification of potential witnesses may expose the witnesses and their families to attack. This has led many potential witnesses to relocate to other communities or to decline to cooperate with the ICTR investigation staff.
  6. The Affidavit explains that no military escort requirements or travel restrictions apply in Butare, Kibungo and Kigale prefectures and that there has not been any indication of infiltrator or insurgence activity within the past year. No information is given concerning the security situation in Gitarama or Byumba prefectures.

## LEGAL BASIS

7. The Prosecutor's requests are based on Article 21 of the Statute and Rules 69 and 75. Article 21 of the Statute empowers the Tribunal to provide in its Rules for the protection of victims and witnesses. Rule 75(A) provides for general measures designed to safeguard the privacy and security of the witness:

A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

8. Rule 69, on the other hand, is concerned with the production of evidence and creates an exception to the general rules of disclosure to the opposing party as provided in Rules 66 and 67:
  - (A) 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...
  - (C) Subject to rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation of the prosecution and the defence.

## FINDINGS

### RULE 75

9. The Tribunal finds that the measures requested in paragraphs 3(a), (b), (c), (d), (g), (i) and (j) are appropriate measures to safeguard the privacy and security of victims and witnesses and are consistent with the rights of the accused.

#### Measure 3(e)

10. In paragraph 3(e), the Prosecutor requests an order prohibiting:

The defence and the accused, directly or indirectly, from sharing, discussing, revealing any documents or information contained in any documents, or any information which could lead to the identification of any victims or potential prosecution witnesses to any person or entity other than the Accused, assigned Counsel, or other persons working on the immediate Defence team designated by the assigned Counsel or the Accused.

11. Such orders have been granted in a number of recent decisions. See, for example, *Prosecutor v. Tharcisse Muvunyi & others*, 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 (25 April 2001).
12. The Tribunal nevertheless finds that this measure is overly broad and unenforceable. Even the most cautious defence investigation might incidentally or indirectly reveal information that could somehow lead to the identification of potential prosecution witnesses.
13. The Chamber recalls that witness protection measures bind both parties. As Presiding Judge Pillay observed in *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Prosecutor's Motion for Witness Protection (13 July 2000), "this obligation to respect the protective measures for witnesses as ordered is incumbent both on the Prosecutor and the Defence."
14. Therefore, the names, addresses and other protected identifying information which could reveal the identities of the witnesses cannot be disclosed to the public or to the media by any person including the Defence and the Accused. However, the Tribunal, relying on the recent decision of the Appeals Chamber in *Prosecutor v. Musema*, ICTR-96-13-A, Decision (Extremely Urgent Motion for Protective Measures for Witnesses) (22 May 2001), recognizes an implicit exception to this general rule for the limited sharing of general information by the Defence Counsel and the immediate Defence team acting

pursuant to the request of Counsel, to individual members of the public where necessary to prepare the Defence. Such exception applies only where the disclosure is limited to what is necessary and is done in such a way as to minimize the risk of the information being divulged further.

**Measure 3(f)**

15. In paragraph 3(f) the Prosecutor requests that this Tribunal order the Defence to provide the Trial Chamber and the Prosecutor of a list of all persons working on the Defence team who will have access to any identifying information. No legal basis is given for such a request other than Rules 69 and 75 and it is not clear how this proposed list will serve to protect victims and witnesses or to safeguard their privacy and security.
16. Pursuant to Rule 75, for the purpose of ensuring diligence in the handling of protected materials, the Tribunal finds that it is prudent to require that Defence Counsel notify the Chamber in writing of any person leaving the Defence team and confirm in writing that Counsel has ensured that all confidential materials dealing with protected witnesses have been remitted to Counsel.

**Measure 4**

17. In paragraph 4 of the Motion, the prosecution seeks to reserve its "right to amend the protective measures sought or to seek additional protective measures, including those for additional categories of witnesses, if necessary." The Tribunal notes that the Prosecutor cannot unilaterally amend any protective measures. Rather, either the Prosecution or the Defence can apply to the Trial Chamber or Judge to amend protective measures under Rule 69 or 75. However, all such measures are granted on a case-by-case basis by a Judge or Trial Chamber.

**RULE 69**

**Geographic Limitations on Exceptional Circumstances**

18. The Tribunal is satisfied that the presence of rebel insurgents, which requires security constraints on UN staff members in the prefectures of Gisenyi, Ruhengeri, Kibuye, Cyangugu and Gikongoro presents an exceptional circumstance for the purposes of Rule 69(A). Based on the evidence presented by the Prosecutor, there is reason to believe that the identification of potential witnesses may present a danger or risk to those witnesses who reside in these areas.
19. The Tribunal recalls that the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties, but also should be evaluated in the context of the entire security situation affecting the concerned witnesses. However, the specific and up-to-date information provided by the Prosecutor indicates that there is little risk of identification of witnesses or of threat to witnesses in the other prefectures. In light of the relatively calm security situation affecting witnesses in these areas, it cannot be said that they are facing exceptional circumstances.

**Time limits for unredacted disclosure**

20. As noted above, Rule 69 creates an exception to the Prosecutor's general disclosure obligation in Rules 66 and 67. Rule 69 nevertheless requires that the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence.
21. Despite this clear indication that identities should be revealed prior to the trial, it has been the practice of this Tribunal in a number of recent cases to allow for non-disclosure until 21 days before the witness testifies. See, for example, *Prosecutor v. Muvunyi*, 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 (25 April 2001) and *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (27 March 2001). However, none of these decisions discuss the rationale for departing from the clear language of Rule 69(C). Other cases have required disclosure of witness identities prior to the trial. See, for example, *Prosecutor v. Ntakirutimana*, ICTR-96-17-T, Decision on Witness Protection (22 August 2000) and *Prosecutor v. Ngeze*, ICTR-97-27-I, Decision on the Prosecutor's Motion for Witness Protection (23 November 1999).
22. This Tribunal prefers to adhere to the strict language of the Rule. A period of 21 days prior to trial is deemed sufficient to allow adequate time for the preparation of the defence.

**THE TRIBUNAL THEREFORE:**

**ORDERS that the following protective measures be taken for all potential prosecution witnesses residing in Rwanda:**

- (a) that the Prosecution designate a pseudonym for each witness that shall be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties and the public;
- (b) that the names, addresses, whereabouts and other identifying information of these witnesses ("identifying information") be sealed by the Registry and not included in any records of the Tribunal and that this identifying information be communicated to the Victims and Witness Support Unit ("VWSS") in order to implement protection measures for these witnesses;
- (c) that any identifying information relating to these witnesses that is contained in existing records of the Tribunal be expunged;
- (d) that the disclosure to the public or to the media of any identifying information relating to these witnesses prior to, during and after the trial is prohibited;
- (e) that the Accused and all members of the Defence team are prohibited from attempting to make any independent determination of the identity of any of these witnesses and from encouraging or otherwise aiding any person to attempt to identify any of these witnesses;
- (f) that the Accused or Defence Counsel make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of these witness whose identity is

known to the Defence or any relative of such person. At the direction of the Trial Chamber and with the consent of such person, or the parents or guardian of such person if that person is under the age of eighteen years, to an interview by the Defence, the Prosecution shall undertake to make the necessary arrangements to facilitate such contact;

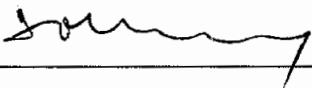
- (g) that the photographing and audio and/or video recording or sketching of any of these witness at any time or place is prohibited without the leave of the Trial Chamber and of the parties.

**ORDERS that the following protective measures be taken for all potential prosecution witnesses residing in Gisenyi, Ruhengeri, Kibuye, Cyangugu and Gikongoro Prefectures:**

- (h) that the Registry not disclose to the Defence any identifying information on file with the Registry in relation to these protected witnesses;
- (i) that the Prosecution may initially disclose materials to the Defence in a redacted form in order to protect the names, addresses and other identifying information relating to these protected witnesses; and
- (j) that the identities and all previously redacted information pertaining to these protected witnesses must be disclosed to the Defence no later than 21 days prior to the commencement of the trial.

**DENIES the motion in all other respects.**

Arusha, 12 July 2001.



Judge Pavel Dolenc



Seal of the Tribunal