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memo



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

-0270-

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 18 September 2001

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MGT
ICTR
REGISTRATION DEPARTMENT

The PROSECUTOR

v.

Alphonse NTEZIRYAYO

Case No. ICTR-97-29-T

**DECISION ON THE DEFENCE MOTION
FOR PROTECTIVE MEASURES FOR WITNESSES**

Articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules

The Office of the Prosecutor:

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

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

CONSIDERING that, on 13 December 2000, in the "Décision relative à la Requête de la Défense aux fins d'obtenir des mesures de protection pour ses témoins", the Chamber dismissed a first Defence Motion for witness protection measures, on the basis of lack of evidence warranting the said measures;

BEING NOW SEIZED of:

- (i) A "Requête aux fins d'obtenir des mesures de protection des témoins de la Défense" filed on 27 March 2001 by Counsel for Nteziryayo with new annex in support (the "Motion"),
- (ii) A "Prosecutor's Response to Nteziryayo's Motion for the Protective Measures for Defence Witnesses" filed on 6 April 2001" (the "Prosecutor's Response"); and
- (iii) A "Réplique de Alphonse Nteziryayo à la Réponse du Procureur sur les mesures de protection des témoins de la Défense" (the "Defence Reply") filed on 17 April 2001;

CONSIDERING that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules, particularly Articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules;

NOW REVIEWS THE MOTION

1. Prior to reviewing the Parties' submissions in regard of the protective measures requested by the Defence for their witnesses (b), the Chamber will consider whether it is satisfied that protective measures are warranted in this case (a).

(a) **Justification of the Protective Measures Requested by the Defence**

2. The Chamber recalls that, pursuant to Article 19 of the Statute, the trial shall be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses", whereas, pursuant to Articles 14 and 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, "[which] protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of victim's identity" (Article 21 of the Statute).
3. The Rules thereupon provide, notably, that "[i]n 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" (Rule 69(A) of the Rules) and that "[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" (Rule 75(A) of the Rules).

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4. Mindful of the rights of the Accused, guaranteed notably by Article 20 of the Statute, the Chamber may therefore order, pursuant to Rules 69 and 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter, provided that such measures are justified by exceptional circumstances.
5. The Defence submits that the measures they request for their witnesses, who are scattered in several countries and, in particular, in Rwanda, Zambia, Tanzania, Togo, Cameroon, Benin, Congo, Belgium and France, are justified in view of:
 - (i) Their precarious security situation as exculpatory witnesses;
 - (ii) The fear they expressed for their safety and for the safety of their close relatives; and,
 - (iii) Their willingness to testify at trial, provided that their security is guaranteed.
6. The Chamber recalls that the determination of the need to order protective measures for witnesses cannot be made purely on the *subjective* basis of either fear expressed by witnesses or their willingness to testify at trial if their security is guaranteed. Rather, the Chamber must be satisfied that an *objective* situation exists whereby the security of the said witnesses is or may be at stake, which accounts for such a fear. Only in this case would protective measures be warranted (*See*, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-I-T, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995: “[F]or a witness to qualify for protection [...], there must be a *real* fear for the safety of the witness or her or his family, and that there must always be an *objective* basis to underscore this fear [...]” (Emphasis ours), a Decision referred to in the “Decision on the Prosecutor’s Motion for Witness Protection”, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A1-I, Trial Chamber I of the Tribunal, 17 September 1999; *See also* ICTY, *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36, “Decision on Motion by Prosecution for Protective Measures”, 3 July 2000, at para. 26: “Any fears expressed by potential witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk. Something more than that must be demonstrated [...]).
7. In this regard, the Chamber considers that the Affidavit filed by Mr. Ntagangwa, an Investigator for the Defence, which principally concerns the reluctance expressed by potential witnesses to come to testify unless they are granted protective measures, only constitutes an *indicia* of the need of protection measures. It does not prove, as such, that the security of those witnesses is objectively at risk.
8. The Chamber will now consider whether it is satisfied that, as otherwise submitted by the Defence, the precarious security situation affecting the witnesses warrants the adoption of protective measures for them. In doing so, the Chamber shall bear in mind that “[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed [it] needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses” (*Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, “Decision on Protective Measures for Defence Witnesses”, 13 July 1998 at para. 9).



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9. The Defence adduces numerous documents in support of the existence of a threat to the security of their witnesses. Among these documents are:
- (i) Two press excerpts of the Belgian daily newspaper “Le Soir” by Veronique Kiessel, dated 10 and 11 February 2001, on the threat levels in Rwanda due to attacks by infiltrators of the *Interahamwe* militias from the Democratic Republic of the Congo (the “DRC”) and assassinations which are alleged to regularly take place in Rwanda;
 - (ii) Three press excerpts from “Fondation Hirondelle” dated 25 January 2001, 21 and 27 February 2001 which report notably on the judicial proceedings in Kenya surrounding the assassination of Seth Sendashonga, who was allegedly to testify before the Tribunal for the Defence in the *Kayishema and Ruzindana* trial, and on the general precarious security of the witnesses who testify at trial before the ICTR;
 - (iii) A press release from “ReliefWeb” (PANA) of 12 January 2001 dealing with the precarious conditions of life of the refugees who leave in refugee camps in the Congo-Brazzaville, places where some Defence witnesses reside;
 - (iv) A press release from “Nouvelles” dated 13 January 2000 dealing with the precarious security situation affecting the refugees in Africa, including those living in the DRC or in Burundi.
10. The Chamber agrees with the Defence that these documents tend to describe a particularly volatile security situation at present in Rwanda and in neighboring countries such as the DRC, which could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda. The Chamber recalls in this respect that it recently emphasised “the upsurge in acts of violence committed against the civilian population in Rwanda and the entire Great Lakes Region” to grant protective measures for the witnesses to appear on behalf of Pauline Nyiramasuhuko (*See, Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR-97-21-T, “Decision on Pauline Nyiramasuhuko’s Motion for Protective Measures for Defence Witnesses and their Family Members”, 20 March 2001 (the “Nyiramasuhuko Decision of 20 March 2001”), at para. 9).*
11. The Chamber notes that the Defence has demonstrated fears, which pertain to potential witnesses residing in Rwanda, the Great Lakes Region and neighboring countries only, and has not demonstrated fears as regards potential witnesses residing elsewhere. However, in the view of the Chamber, the above-mentioned volatile security situation could as well affect witnesses who do not reside in Rwanda, or in the Great Lakes Region. In this respect, the Chamber recalls the Nyiramasuhuko Decision of 20 March 2001 where it considered 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 the entire Great Lakes Region, and neighboring countries only, the security situation would affect any witness even if residing outside of the Region”.
12. The Chamber therefore finds that protective measures for Defence witnesses, in this case, are justified.



(b) The Protective Measures Requested

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13. The Prosecutor does not object to the following protective measures requested by the Defence:
- (i) Measure (a): That names, addresses and other identifying information of potential Defence witnesses be communicated only to the Witnesses and Victims Support Section for its implementation of appropriate protection measures, set forth below, to guarantee the appearance and security of the witnesses;
 - (ii) Measure (b): That where names, addresses or any other identifying information concerning potential Defence witnesses appear in any records in any section other than the Witnesses and Victims Support Section, such information be expunged from those documents and withdrawn from said section;
 - (iii) Measure (c): That disclosure be prohibited of names, addresses, whereabouts and any other identifying information concerning potential Defence witnesses, as well as any other information on file with the Registry or other organ or section of the Tribunal;
 - (iv) Measure (d): That the Office of the Prosecutor be prohibited from disclosing to whomsoever the names, addresses and other identifying information of witnesses once disclosure of same has been made by the Defence;
 - (v) Measure (g): That all hearings, which may be held, addressing the issue of witness protection be held in closed session;
 - (vi) Measure (h): That the Defence be authorised to use a pseudonym to designate each Defence witness during the hearings and throughout the proceedings as well as in its various communications with the media;
 - (vii) Measure (k): That the Office of the Prosecutor be prohibited from making an independent determination of the identity of any protected witness or encouraging or aiding or facilitating, in any way, such determination;
 - (viii) Measure (l): That the Prosecutor ensure that any member of the team leaving the Prosecutor's Office return all documents and information in his or her possession which are likely to reveal the identify of potential Defence witnesses.
14. The Chamber notes that these measures are in accordance with those already granted to witnesses in the present joint cases. They are furthermore warranted in light of the necessary balance between the rights of the Accused to a fair trial and the need, as established above, to protect the witnesses. The Chamber accordingly grants the said measures.
15. The Prosecutor opposes in part measures (e), (f) and (j) of the Motion.
- Measure (e) of the Motion: That names, addresses, whereabouts and any other identifying information concerning Defence witnesses not be communicated to the Office of the Prosecutor until said witnesses are under the protection of the Tribunal.*
16. The Prosecutor contends that unredacted copies of the statements of the Defence witnesses and their identity should be disclosed, consistent with the current jurisprudence



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of the Tribunal, at the latest 21 days prior to their being called to testify at trial. The Defence maintains, in its reply, that the measure should be adopted in its unmodified form.

17. The Chamber however recalls that it ordered that the Parties in the present proceedings to immediately disclose the identity and unredacted statements of the protected witnesses to the opposing party upon confirmation of the enforcement of the protection measures by the Witnesses and Victims Support Section of the Tribunal (the "WVSS") (See, 'Butare' Cases, "Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses", 8 June 2001, at para. 25). The Prosecutor's objection is therefore dismissed, and measure (e) is granted in its present formulation.
18. The Defence is further directed to provide the WVSS, as soon as possible, with a list of their witnesses who require protection pursuant to the present Decision. The Chamber further orders the Defence to disclose immediately the unredacted statements and identity of all their witnesses upon confirmation of the enforcement of the protection measures herein ordered by the WVSS.

Measure (f) of the Motion: That at no time and under no circumstances shall the public or the media take photographs or make video recordings or draw sketches of witnesses without the authorisation of the Chamber and the Parties.

19. The Prosecution agrees with measure (f) subject to the deletion of the words "and the Parties". In their Reply to the Prosecutor's Response, the Defence agrees with the proposed deletion. The Chamber therefore grants measure (f), which is consistent with similar measures granted in respect of witness protection, with the said correction.

Measure (j) of the Motion: That no member of the Office of the Prosecutor shall communicate with any Defence witness without the consent of the witness and the express authorisation of the Chamber or a designated judge of the Chamber.

20. The Prosecution submits that contact with the other Party's witnesses is an *inter partes* matter. Such contacts should therefore not be subject to "the express authorization by the Chamber or a designated Judge". The Prosecution proposes that the measure read, as in the "Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses" of 3 April 2001 (See, *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T), as follows: "The Prosecutor and her representatives may notify the Defence of any request for contacting the Defence witnesses, and the Defence shall make arrangements for such contacts". The Defence maintains, in their reply, that the measure should be adopted as such. They notably submit that the principle of the equality between the Parties is at stake, since the Defence is to make such a request to the Chamber or a Judge thereof prior to contacting protected witnesses of the Prosecutor (See, *Prosecutor v. Nsabimana and Nteziryayo*, Case No. ICTR-ICTR-97-29-T, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 21 May 1999, Measure (i)).
21. The Chamber agrees with the Defence that the principle of the equality between the Parties requires that either Party may contact the opposing Party's protected witnesses subject to the same conditions.

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22. However, the Chamber recalls that it ordered, on 10 July 2001, in respect of “all the protected witnesses in [the ‘Butare’ joint] proceedings [...] [t]hat contact or communication with either Prosecution or Defence protected victims or witnesses, or their close family members, that is to say, the witness’s father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to either the Prosecution or the concerned Defence. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the party on behalf of which the victim or the witness would testify at trial shall undertake the necessary arrangements to facilitate such contact” (*‘Butare Cases’*, “Decision on the Prosecutor’s Allegations of Contempt, the Harmonization of the Witness Protection Measures and Warning to the Prosecutor’s Counsel”, 10 July 2001).
23. The formulation above encompasses the present Defence request and complements it by referring to contact or communication with victims and close family members of victims or witnesses, by specifying that the contact or communication is subject to a written request, and by providing for the modalities to facilitate such contact or communication. The Chamber therefore grants the Defence request subject to the formulation of the above Order of 10 July 2001.
24. The Prosecutor further opposes measures (m) and (n) of the Motion in their entirety.

Measure (m) of the Motion: That a witness may refuse to make any statement which might incriminate him or her, and should the Chamber oblige a witness to testify, such testimony may not be used as evidence against said witness except for prosecution of perjury.

25. The Prosecutor contends that Rules 90(E) and 77(B) of the Rules account for the concerns underlying this measure, and that the latter, if granted, could undermine the said protections currently afforded by the Rules.
26. The Chamber agrees with the Prosecutor and reiterates a finding made on a similar request presented by the Defence of the co-Accused, that “la mesure sollicitée (...) est redondante en ce qu’elle est prévue par les dispositions de l’Article 90 E) du Règlement” (*Prosecutor v. Nsabimana*, Case No. ICTR-97-29-T, “Décision relative à la Requête de la Défense aux fins d’obtenir des mesures de protection pour les témoins de la Défense”, 15 February 2000).

Measure (n) of the Motion: That the Defence be allowed to request the amendment of measures sought in any case, or for certain witnesses, on the basis of a change in circumstances or previously unknown circumstances.

27. The Chamber agrees with the Prosecutor’s submissions in respect of this measure which is unnecessary and redundant, in that “the Defence 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” (*Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, “Decision on Jean de Dieu Kamuhanda’s Motion for Protective Measures for Defence Witnesses”, 22 March 2001, at para. 24).

28. The Chamber therefore denies the Defence request in respect of measures (m) and (n) of the Motion.

(c) Taking into Effect of the Measures Ordered

29. The Chamber finally decides, in conformity with the Tribunal's well-established jurisprudence, that the protective measures herein ordered shall take effect once the particulars and locations of the witnesses have been forwarded to the WVSS.

FOR THE ABOVE REASONS,

THE TRIBUNAL

I. GRANTS the Defence Motion in part, and ORDERS as follows:

- (i) That names, addresses and other identifying information of potential Defence witnesses be communicated only to the Witnesses and Victims Support Section for its implementation of appropriate protection measures, set forth below, to guarantee the appearance and security of the witnesses;
- (ii) That where names, addresses or any other identifying information concerning potential Defence witnesses appears in any records in any section other than the Witnesses and Victims Support Section ("WVSS"), such information be expunged from those documents and withdrawn from said section;
- (iii) That disclosure be prohibited of names, addresses, whereabouts and any other identifying information concerning potential Defence witnesses, as well as any other information on file with the Registry or other organ or section of the Tribunal;
- (iv) That the Office of the Prosecutor be prohibited from disclosing to whomsoever the names, addresses and other identifying information of witnesses once disclosure of same has been made by the Defence;
- (v) That all hearings, which may be held, addressing the issue of witness protection be held in closed session;
- (vi) That the Defence be authorised to use a pseudonym to designate each Defence witness during the hearings and throughout the proceedings as well as in its various communications with the media;
- (vii) That the Office of the Prosecutor be prohibited from making an independent determination of the identity of any protected witness or encouraging or aiding or facilitating, in any way, such determination;
- (viii) That the Prosecutor ensure that any member of the team leaving the Prosecutor's Office return all documents and information in his or her possession which are likely to reveal the identify of potential Defence witnesses;
- (ix) That names, addresses, whereabouts and any other identifying information concerning Defence witnesses not be communicated to the Office of the Prosecutor until said witnesses are under the protection of the Tribunal;



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- (x) That at no time and under no circumstances shall the public or the media take photographs or make video recordings or draw sketches of witnesses without the authorisation of the Chamber and the Parties;
- (xi) That contact or communication by the Prosecution with protected victims or witnesses of the Defence, or their close family members, that is to say, the witness's father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to the Defence. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the Defence shall undertake the necessary arrangements to facilitate such contact;

II. DENIES the following prayers for Orders:

- (i) That a witness may refuse to make any statement which might incriminate him or her, and should the Chamber oblige a witness to testify, such testimony may not be used as evidence against said witness except for prosecution of perjury;
- (ii) That the Defence be allowed to request the amendment of measures sought in any case, or for certain witnesses, on the basis of a change in circumstances or previously unknown circumstances;

III. RECALLS the Defence to provide as soon as possible, and on a continuous basis, the WVSS with the names and whereabouts of their witnesses who require protection pursuant to the present Decision;

IV. ORDERS the Defence, upon confirmation of the enforcement of the protection measures for those witnesses by the WVSS, to disclose immediately, and in any event 30 days prior to the commencement of the Defence case, their unredacted statements and identity to the Prosecution.

Arusha, 18 September 2001



William H. Sekule
Presiding Judge



Winston C. Malanzima Maqutu
Judge



Arlette Ramaroson
Judge

(Seal of the Tribunal)

