



ICTR-2001-62-I
20/02/2002
(1847—1838)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1847

Dieng

OR: ENG

TRIAL CHAMBER II

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

Registry: Adama Dieng

Date: 19 February 2002

The PROSECUTOR

v.

Samuel MUSABYIMANA

Case No. ICTR-2001-62-I

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**DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE
MEASURES FOR VICTIMS AND WITNESSES**

The Office of the Prosecutor
Silvana Arbia
Jonathan Moses
Faria Rekkas

Counsel for the Defence
Gerardus Knoops

Amel

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

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

BEING SEIZED of:

- (i) the "Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 24 September 2001, (the "Motion");
- (ii) the "Brief in Support of the Motion by the Prosecutor for Protective Measures for Victims and Witnesses" (the "Brief");
- (iii) the "Response Motion to the Prosecutorial Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Brief in Support thereof" filed by the Defence on 5 November 2001;
- (iv) the "Reply by the Prosecutor to the Defence Response in Respect of the Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment" filed on 20 November 2001.

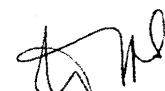
CONSIDERING that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules and Procedure and Evidence (the "Rules");

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

SUBMISSIONS OF THE PARTIES

The Prosecution

1. The Prosecution requests that the Chamber order protective measures for persons who fall into three categories, described at paragraph 3 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 right 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 Motion for protective measures is framed in the following terms:
 - (a) An order that the names, relations, addresses, whereabouts of, and other



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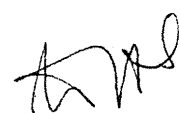
identifying information concerning all victims and potential Prosecution witnesses described hereinafter be sealed by the Registry and not included in any records of the Tribunal, other than the **CONFIDENTIAL** material provided to the Trial Chamber in support of this motion; that the said witnesses will bear the following pseudonyms: **CAA, CAB, CAC, CAD, CAE, CAF, CAG, CAH, CAI, CAJ, CAK, CAL, CAM** and any other additional witnesses will also be assigned pseudonyms which will be used during the course of the trial;

- (b) An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described in Paragraph 2, 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 of these individuals;
- (c) An order requiring that to the extent that any names, relations, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal;
- (d) An order prohibiting the disclosure to the public or the media, of the names, relations, addresses, whereabouts of, and any other identifying data in 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 after the termination of this trial;
- (e) An order prohibiting the Defence and the Accused 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 Paragraph 2 (sic), 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;
- (f) 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 3(e) above, have access to any information referred to in Paragraphs 3(a) through 3(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 (sic);
- (g) An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witness at any time or place without leave of the Trial Chamber and parties;
- (h) An order prohibiting the disclosure to the Defence of the names, relations, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial

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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 twenty-one (21) days before the victim or witness is to testify at trial;

- (i) 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;
 - (j) An order that the Prosecutor designate a pseudonym for each prosecution 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;
 - (k) An order prohibiting any member of the Defence team referred to in Paragraph 3f 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;
 - (l) 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;
 - (m) An order prohibiting the Accused individually from personally possessing any material which includes, (but not limited to) any copy of a statement of a witness even if the statement is in redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and instructing the Detention Centre authorities to ensure compliance with the prohibition set out in this Paragraph.
3. The Prosecution contends that there is a substantial danger for potential victims and witnesses if their identities are known. There is particular risks in north western and central areas of Rwanda where the Prosecutor submit that violence has increased.
4. The Prosecution relies on two affidavits, one from Remi Abdulrahman, Chief of the Security and Safety Section of the Tribunal in Kigali, dated 6 September 2001, and the other from Samuel Akorimo, Commander of Investigations for the Tribunal, dated 14 August 2001, and on informative material in Annexes C to K to the Brief. The aforementioned documents contain reports on attacks on Tutsi refugee camps and other genocide survivors by Rwandan rebels, ex-FAR militiamen and Interahamwe who have spread into central Rwanda, as far as the Gitarama *prefecture*. Due to the presence of Interahamwe in Uganda, of ex-FAR members in Burundi and considering



the ongoing war in the Democratic Republic of Congo (DRC), the Prosecution argues that the risk of violence in Rwanda and the African Great Lakes Region has increased.

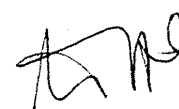
5. Relying on the affidavit of Mr Akorimo, the Prosecution exposes the risk of violence against victims and Prosecution witnesses in the Gitarama *prefecture*, after a group of armed infiltrators killed persons in the Gitarama area in June 2001. Further, the Prosecution submits that, in the Gitarama *prefecture*, the perpetrators and victims of the genocide live in absolute proximity with each other, and the likelihood of harm from perpetrators to victims is very high.
6. Moreover, the Prosecution alleges that these threats affect not only victims and potential witnesses residing in Rwanda but also those living in those areas and even outside the continent, due to the presence in those areas of Interahamwe groups, former Rwandan Armed Forces (ex-FAR) and members of the former civilian government of Rwanda.
7. Finally, the Prosecution relies on the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR to demonstrate that such orders as those requested have been granted in the past and would not affect the Accused's rights.

The Reply by the Defence

8. Counsel for Musabyimana opposes the measures requested by the Prosecutor. The Defence argues that there are insufficient grounds to grant the use of pseudonyms insofar as the enumerated threats emanate from governmental or military sources and the Accused, who is a bishop, fulfils his religious functions and is not affiliated with the government or the military.
9. The Defence alleges that several procedural safeguards can be implemented instead of the drastic measure of "anonymous witnesses".
10. Alternatively, the Defence requests that the order not to disclose identifying data to the Defence sooner than 21 days before the victim or witness is to testify at trial" be rejected by the Chamber.

The Response by the Prosecution

11. The Prosecution argues that, in accordance with the jurisprudence of the Tribunal, there is compelling evidence to grant the measures requested. Furthermore, the full names and identifying features of the witnesses will be provided to the Defence in time for adequate preparation.
12. The Prosecution maintains that the fact that the Accused holds a non-military and non-governmental position is irrelevant to the issue of witness protection. The Prosecution contends that disclosing the names and details of witnesses at an early



stage causes an increased risk of danger to witnesses by the Accused, or his supporters, or those who oppose of the work of the Tribunal.

13. The Prosecution rejects the suggestion of the Defence to use “other” procedural safeguards since the Defence has failed to distinguish between protective measures during trial and protective measures presently requested, which are to be implemented before trial.
14. Moreover the Prosecution asserts that the “21 days” request is in accordance with the earlier Decision of the Tribunal in *the Prosecutor v. Tharcisse Muvunyi and Others* (Case No. ICTR-2000-5-I, 25 April 2001) and that such period provides adequate time for preparation of the Defence.

HAVING DELIBERATED

Legal Basis of the Motion

15. The Chamber recalls that, pursuant to Article 19 of the Statute, a trial shall be conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. The Chamber also acknowledges that, pursuant to Articles 14 and 21 of the Statute, the Tribunal shall provide 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).
16. Pursuant to Article 20 of the Statute and mindful of the specific 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 may order on a case by case basis, pursuant to Rules 69 and 75 of the Rules, any appropriate measures for the protection of witnesses.
17. Rule 69(A) of the Rules provides 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 75(A) of the Rules further stipulates 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 Witnesses and Victims Support Section (the “WVSS”), 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.”
18. The Chamber also recalls Rule 69 (C) of the Rules whereby “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the prosecution and the defence.”
19. To determine the appropriateness of such protective measures, the Chamber must be satisfied that “an objective situation exists whereby the security of the said witnesses

is or may be at stake.” (See *The Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-T, “Decision on the Defence Motion for Protective Measures for Witnesses”, 18 September 2001). In the instant case, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information contained in the supporting documents to the Motion.

20. To demonstrate the existence of exceptional circumstances, the Tribunal also requires that the Parties provide updated information when seeking the granting of these protective measures (See *The Prosecutor v. Ntagerura*, Case No. ICTR-96-10A-I, “Decision on the Prosecutor’s Motion for the Protection of Victims and Witnesses, 27 June 1997). The Chamber notes that some of the evidence adduced in support of the volatile security situation in Rwanda and the Great Lakes region as annexed to the Brief is more than two years old and does not adequately address the present security situation in these areas.
21. Nonetheless, the Chamber notes that the affiant Remi Abdulrahman, in his capacity as Chief of the Security and Safety Section of the ICTR in Kigali, has presented an updated assessment of the security situation in Rwanda and the neighbouring countries. The latter’s affidavit indicates that the security situation in the western part of Rwanda, in the areas of Gisenyi and Ruhengeri, presents a certain threat level. Moreover, the affidavit of Samuel Akorimo indicates that infiltrators in Ruhengeri and Gisenyi Provinces in early May 2001 have aggravated the potential for reprisals from armed dissidents. The Trial Chamber finds that these affidavits contain serious and detailed allegations of violence and that the objective security situation prevalent in Rwanda and neighbouring countries could be of such nature as to put at risk the lives of victims and potential Prosecution witnesses residing there.
22. The Chamber finds that the Prosecutor has not provided substantive evidence of threats to the lives of witnesses residing outside Africa. However, the Chamber concurs with its reasoning in the “Decision on Pauline Nyiramasuhuko’s Motion for Protective Measures for Defence Witnesses and their Family Members” of 20 March 2001 (Case No. ICTR-97-21-0338). In that instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears in regard to 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 the exceptional circumstances of this case, the Chamber finds justified the measures required by the Prosecution at points (a), (b), (d), (e), (h), (i), (k) and (l), noting that these measures are in accordance with orders formerly granted by the Tribunal in similar exceptional circumstances.

On point 2 (c) of the Motion

24. The Chamber modifies, *propriu motu*, measure (c) by adding the words “that such identifying information be expunged from the documents in question” insofar as the original order lacked such precision regarding measures to be taken in case of

identifying information concerning witnesses in existing records of the Tribunal. (See *The Prosecutor v. Kajelijeli Case No. ICTR-98-44-I* “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, 6 July 2000).

On point 2 (f) of the Motion

25. The Chamber grants the measures requested by the Prosecutor, with a simplification and modification of the measure which provides that any member leaving the Defence team remit “all materials” that could lead to the identification of protected individuals, given that the term “information” used in the requested order may be understood to include intangibles which, naturally, cannot be remitted (*The Prosecutor v. Bagambiki and Imanishimwe, Case No. ICTR-97-36-I and 36-T*, Decision of 3 March 2000).

On point 2 (g) of the Motion

26. The Chamber, in accord with its Decision of 18 September 2001 in *the Prosecutor v. Nteziryayo, (Case No. ICTR-97-29-T)*, agrees with measure (g) subject to the deletion of the words “and the parties” in regard to the responsibility to prohibit photographing, audio and/or video recording, or sketching of any Prosecution witness.

On point 2 (h) of the Motion, Timing of Disclosure of Unredacted Witness Statements

27. The Chamber notes that the Prosecution requests that the disclosure of identifying data which would reveal, *inter alia*, the identity of potential witnesses be prohibited to the Defence “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 twenty-one (21) days before the victim or witness is to testify at trial”. The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and be conditioned to the implementation of protective measures.
28. The Chamber notes that the Tribunal’s jurisprudence on the timing of disclosure of identifying information and unredacted statements in witness protection orders has varied since the first orders rendered in 1996, due to the specific circumstances of the cases examined.
29. The Chamber recalls that in several decisions rendered between July and September 2000, Trial Chamber II ordered the Prosecution to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of the witnesses (See for instance the said Order in the *Prosecutor v. Karemera*, 6 July 2000).



30. Accordingly, in light of the necessity to strike a balance between the right of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily conceal identifying information concerning its witnesses but modifies, *propriu motu*, measure (h) by ordering that: "Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence."

On point 2 (m) of the Motion

31. The Chamber concurs with the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", dated 21 May 1999, in the *Prosecutor v. Nsabimana and Nteziryayo*, finding that such request "is overly broad and may impinge Article 20(4)(b) of the Statute". The Chamber therefore denies measure 2(m).
32. The Chamber finally recalls that, in conformity with the Tribunal's jurisprudence, such protective measures are granted on a case by case basis, and shall take effect only once the particulars and locations of the potential witnesses have been forwarded to the Victims and Witness Support Section by the Prosecution, bearing in mind the practicalities involved

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS measures (a), (b), (d), (e), (i), (j), (k) and (l);

DENIES measures (m);

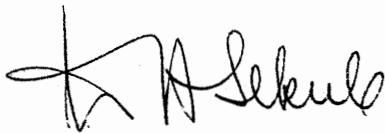
MODIFIES measures (c), (f), (g) and (h) **GRANTING** them as follows:

- (c) An order requiring to the extent that any names, relations, addresses, whereabouts of and 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 the documents in question;
- (f) 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 3(e) above, have access to any information referred to in Paragraphs 3(a) through 3(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 materials* that could lead to the identification of persons specified in Paragraph 2;



- (g) An order prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Trial Chamber;
- (h) An order prohibiting the disclosure to the Defence of the names, relations, addresses, whereabouts of and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry until such time as the Trial Chamber is assured that witnesses are protected. Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence.

Arusha, 19 February 2002



William H. Sekule

Presiding Judge



Winston C. Matanzima Maqutu

Judge



Arlette Ramaroson

Judge

