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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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Original: FRENCH

TRIAL CHAMBER I

Before: Judge Andréia Vaz

Registry: Adama Dieng

Decision of: 29 May 2002

THE PROSECUTOR

v.

JEAN MPAMBARA

Case No. ICTR-2001-65-I

2003 JAN 15 / P 2:52
JUDICIAL RECORDS/ARCHIVES
ICTR

**DECISION
(PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES
FOR PROSECUTION WITNESSES)**

Office of the Prosecutor:

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MPAMB(C) 02-013 (E)

The International Criminal Tribunal for Rwanda ("the Tribunal")

Sitting as Trial Chamber I, in Trial Chamber I, before Judge Andréia Vaz, designated pursuant to Rule 73(A) of the Rules of Procedure and Evidence as amended on 31 May 2001 (the "Rules");

Being seized of:

- (i) A Motion by the Prosecution for protective measures for its witnesses, filed on 28 March 2002 (the "Motion");
- (ii) A Defence Response to the said Motion filed on 7 May 2002 in which the Chamber is requested to vary the orders sought by the Prosecution ("the Response"); and
- (iii) The Prosecution's Reply to Defence's Response filed on 13 May 2002 (the "Reply");

Noting *in limine* that the Prosecution argues in its Reply that Defence Response is inadmissible for having been filed more than five days after receipt of the Motion; in violation of Rule 73(D) of the Rules.

Considering, however, that by accepting, at the Chamber's request, to file its Response on 6 May 2002 even though the French version of the Prosecution Motion was still unavailable, the Defence had facilitated proceedings by expediting submissions by the parties, and the Chamber's Decision thereby: which act was commended by the parties and the Chamber.

Rejects the said objection *in limine* of the Prosecution.

Noting moreover that:

- (i) As part of its Response, the Defence filed a counter-motion requesting that the Prosecution be reminded of its obligation to ensure that documents are served on the Accused in the language that he understands ("the Counter Motion");
- (ii) The Prosecution has responded to the (said) Counter Motion in its Response;
- (iii) There is need to deliberate on the Counter Motion before ruling on the Prosecution Motion *per se*;

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Hereby considers the Counter Motion and the Motion on the basis of briefs filed by the parties in conformity with Rule 73(A) of the Rules.

SUBMISSIONS

I. Defence Counter Motion

1. Defence requests the Chamber to remind the Prosecution of its obligation to ensure that documents are served on the Accused in a language that he understands. In fact, at the time of filing their Response, the Accused and his Counsel were yet to obtain, a French translation of the Prosecution Motion.
2. The Chamber, however, notes in agreement with the Prosecutor's response on the issue, that responsibility for the administration and servicing of the Tribunal lies exclusively with the Registrar pursuant to Article 16(1) of the Statute and Rule 33(A) of the Rules and further, in terms of Rule 3(E) of the Rules that only the Registrar "shall make any necessary arrangements for interpretation and translation of the working languages."
3. Furthermore, the Chamber is of the opinion that in terms of Article 20 of the Statute, if the Accused does not speak the language used in the document, the Registry is obliged to provide only evidentiary material which relate to the charges against him, namely those submitted [by either party] at trial as well as the material referred to in Rule 66(A)(i) and (ii) of the Rules¹ both of which categories do not apply to the Motion.
4. Moreover, the Chamber notes that Defence Counsel did not make his response contingent upon the receipt of the French translation of the Motion when he accepted on 26 April 2002 to file said Response by Monday, 6 May 2002 as suggested by the Chamber.
5. Lastly, the Chamber notes that from the Defence Counsel's Response it is clear that he understood the purport of the Motion to which he has objected. The fact that the French translation was not available prior to the filing of the said Response did not therefore prejudice the defence of the Accused.

¹ For example, see *The Prosecutor v. Mika Muhimana*, Case No. ICTR-95-1B I, Decision on the Defence Motion for the Translation and Prosecution and Procedural documents into Kinyarwanda, the language of the Accused, and into French, the language of his Counsel, 6 November 2001 and ICTY, *The Prosecutor v. Zejnil Delalić and others* Case No. IT-96-21, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.

6. The Chamber therefore concludes that the Defence Counter Motion must be rejected.

II. Prosecutor's Motion

7. To ensure a fair and expeditious trial and due regard for the protection of victims and witnesses, the Chamber may, in conformity with Articles 14, 19 and 21 of the Statute and Rules 69 and 75 of the Rules, order appropriate protection measures for victims and witnesses as long as they are justified by exceptional circumstances (a). If the Chamber is satisfied with the said measures, it may then consider whether or not the specific protection measures sought by the Prosecution for its witnesses (b) are warranted.

(a) Are protection measures for Prosecution witnesses warranted in the instant case?

8. The Prosecution submits that the protection measures are warranted in light of the spiraling violence against victims and potential Prosecution witnesses, due, in particular, to the infiltration of Rwandan territory by *ex-Interahamwe* or *ex-RAF* rebels engaged in a guerilla war with government forces as well as among Rwandan immigrants in other countries in and out of Africa. According to the Prosecutor, this is the threat that haunts victims and potential witnesses for the prosecution residing:

(i) In the Rukara *commune* (currently the Umutara *préfecture*; Kibungo *préfecture* in 1994), where Jean Mpambara was *bourgmestre* until 1994, in Umtara *préfecture* and in the neighbouring Kibungo *préfecture*);

(ii) In Rwanda in general; and

(iii) Out of Rwanda, in the rest of Africa and beyond.

9. In support of its allegations, the Prosecution submits the following documents, under seal, for consideration by the Trial Chamber:

(i) Two written statements dated 27 March 2002 and submitted respectively by Maxwell Nkole, Head of the Investigations Section at the Office of the Prosecutor in Kigali, (Rwanda) and Remi Abdulrahman, Chief of Security, at the Office of the Prosecutor in Kigali;

(ii) Several reports from United Nations agencies as well as from Amnesty International; the Non-Governmental Organization; and

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(iii) Various newspapers articles.

10. The Defence does not dispute the grounds of justification advanced by the Prosecution.

11. In light of the documents attached together with the submissions made in the Prosecution's Motion, the Chamber is satisfied that exceptional circumstances do exist to warrant the enforcement of protection measures for Prosecution witnesses.

(b) Protection measures specifically sought by the Prosecution

1. Measures sought by the Prosecution not objected to by the Defence and usually granted by the Tribunal

12. The Prosecution requests that the Chamber issues orders:

(a) **Requiring** that the names, addresses, whereabouts and any other identifying information concerning all persons covered by these measures be sealed by the Registry and not included in any records of the Tribunal;

(b) **Requiring** that the names, addresses, whereabouts and any other identifying information concerning all persons covered by these measures 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;

(c) **Requiring** that the names, addresses, whereabouts and any other identifying information concerning all persons covered by these measures contained in existing records of the Tribunal be expunged from those documents;

(d) **Prohibiting** the disclosure to the public or the media, of the names, addresses, whereabouts of and any other identifying data in the supporting material 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) Prohibiting the Defence and the Accused from revealing to anyone or from discussing directly or indirectly any documents or any other information which could lead to the identification of any individual covered by these measures 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**, on the one hand, that the Defence provides to the Trial Chamber and the Prosecution a designation of all persons working on the immediate Defence team who will have access to any information referred to in orders (a) to (e) above, and, on the other, that Defence advise the Chamber in writing of any changes in the composition of this team, and, lastly require that Defence Counsel should ensure that any members departing from the Defence team has remitted all documents and information that could lead to the identification of persons affected by the measures;

(j) **Requiring** the Prosecution to designate a pseudonym for each person covered by these measures which will be used whenever referring to each person in Tribunal proceedings, communications and discussions between the parties to the trial and the public;

(k) **Prohibiting** any member of the Defence team referred to in paragraph 12 (f) above from attempting to make an independent determination of the identity of any person covered by these measures or encouraging or otherwise aiding any persons to attempt to determine the identity of such person(s).

13. The Chamber notes that these measures are consistent with those usually granted by the Tribunal and are appropriate in view of the obligation to protect witnesses and victims on the one hand and the rights of the Accused on the other. Moreover, as the Defence does not object, the Chamber hereby grants the said measures.

2. Other measures

Measure (g): photographing, recording and sketches of protected witnesses

14. The Prosecution requests that the following order, to which the Defence does not object, be issued:

(g) **Prohibiting** the photographing, audio and/or video recording or sketching of any person covered by these measures at any time or place without leave of the Trial Chamber and parties;

15. The Chamber recalls that Rule 81(D) of the Rules provides that “*photography, video-recording or audio-recording of the trial, otherwise than by the Registry, may be authorized at the discretion of the Trial Chamber.*” The Chamber holds that out of court, the Trial Chamber’s

authorization should also suffice to suspend the application of paragraph 14(g) above.² The preceding proviso notwithstanding, this measure conforms to what is routinely adopted by the Tribunal for protected witnesses. The Chamber therefore grants the measure sought which shall then read as follows:

(h) *Prohibits the photographing, audio and/or video recording, or sketching of any person covered by these measures at any time or place without leave of the Trial Chamber;*

measure (h): disclosure date of unredacted statements of protected witnesses and of identifying data

16. The Prosecution further requests the adoption of an order which:

(h) Prohibiting the disclosure, to the Defence, of the names, addresses whereabouts and any other identifying data which would reveal the identities of persons covered by these measures and any other information in the supporting material on file with the Registry until such a time as the Trial Chamber is assured that such persons have been afforded an adequate mechanism for protection; having authorized the Prosecution not to disclose any material provided to the Defence in a redacted form until such a mechanism is in place and in any event, that the Prosecution is not required to reveal the identifying data to the Defence sooner than twenty-one (21) days before such persons are ready to testify at trial.

17. The Defence objects to the deadline set for the disclosure of the identity of the witnesses sought by the Prosecution. It is of the view that such information must be communicated before the commencement of the Accused's trial in conformity, mainly, with Rule 69 (c) of the Rules. It further submits that once the witnesses are effectively under the protection of the Tribunal, non-disclosure of their identity and of an unredacted version of their prior statements to the Defence is no longer justified.

18. Consequently, it requests that paragraph 16(h) be varied as follows:

(i) *"unless otherwise decided by the Trial Chamber pursuant to Rule 69 (A)."*

In that regard, the Chamber agrees with the Prosecution and holds that in conformity with Rule 69(A) it is obvious that the Chamber can at any moment, if the situation so warrants, decide to

² See *The Prosecutor v. Musabyimana* Case No. ICTR-2001-62-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 19 February 2002 26 ("the Musabyimana Decision of 2002")

vary an order on the non-disclosure of the identity of witnesses, or, under Rule 75 of the Rules, vary an order on witness protection in general. Therefore it need no longer be mentioned in the operative provisions of this decision.

(ii) *That the Prosecutor shall act with due diligence to ensure that the witnesses she intends to call are placed under the protection of the Tribunal as rapidly as possible and that as soon as this is done, the identities of the said witnesses as well as unredacted versions of their written statements are communicated to the Defence.*

The Prosecution seems to believe that it is not bound to act with due diligence to ensure that witnesses are placed under the protection of the Tribunal as soon as possible.

For its part, the Chamber considers that the Prosecution is obliged to ensure that the witnesses it intends to call are placed under the protection of the Tribunal as soon as possible. Once the protective measures are put in place, the Prosecution must be able to proceed with the disclosure before the expiration of the time-limit in order to enable the Defence to prepare itself effectively for the appearance of the witness in question. The Chamber therefore makes the following order:

(h) **Prohibits** the disclosure, to the Defence, of the names, addresses, whereabouts and other identifying data which would reveal the identities of these persons and any other information in the supporting material on file with the Registrar until such a time as the Trial Chamber is assured that the persons covered by these measures have been afforded an adequate mechanism for protection.

Authorizes the Prosecution to disclose to the Defence only material in redacted form until such a mechanism is in place; and

Orders the Prosecutor to disclose, to the Defence, identifying data to the extent possible before the commencement of trial and, in any event, no later than twenty one (21) days before the appearance of such person(s) to testify at trial.³

(iii) That the Prosecution shall inform the Chamber and the Defence on the measures it has taken to place witnesses under the protection of the Tribunal.

³ A similar formulation was adopted, among others in similar decisions rendered in *The Prosecutor v. Karemera* (No. 98-44-I) of 6 July 2000 and *The Prosecutor v. Kamuhanda* (No. 99-54-I) of 7 July 2000. Regarding this principle see the Musabyimana Decision of 19 February 2002 paras. 27-30

The Prosecution objects to this request on the grounds that only the Witness and Victims Support Section is responsible for putting in place the protection measures upon receiving the names and particulars of the witnesses to be protected from the Prosecution.

The Prosecution's objection is sustained and the requests of the Defence on this point accordingly rejected.

Measure (i), Defence Contact with Prosecution witnesses

19. The Prosecution requests that any contact between Defence Counsel and Prosecution witnesses be subject to prior authorization by the Chamber. The Defence does not object to the proposal which shall then read as follows:

(i) The Defence Counsel and the Accused shall make a written request to the Trial Chamber or a judge thereof and, on reasonable notice to the Prosecutor, to contact any persons covered by this measure or any relative of such persons. At the direction of the Trial Chamber or a judge thereof, and with the consent of such a person or of the parent 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.

20. Be that as it may, the Chamber is of the opinion that except in cases of dispute that the parties have been unable to settle by themselves, contacts with witnesses of the opposing party should remain (*inter partes*). Order (i), as granted by the Chamber, shall therefore be as follows:

(i) **Orders** the Defence Counsel and the Accused to give the Prosecution reasonable notice of their desire to contact any person covered by these measures or any relative and **orders** the Prosecutor to undertake the necessary arrangements to facilitate such contact once the consent of the person concerned or of the parent or guardian of the said person if he or she is under the age of 18 is received.

Measure (l) prohibiting the Accused from keeping in their possession statements, even in redacted form, by Prosecution witnesses or any other material containing data which would reveal their identity

21. Lastly, Defence objects to order (l) which:

(l) **Prohibits** the Accused individually from personally possessing any material which includes or might lead to discovery of the identity of any persons covered by these measures,

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including 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 in possession, in the presence of Counsel, and **instructs** the United Nations Detention Facility authorities to ensure compliance with the prohibition set out in this paragraph.

22. The Defence is of the view that the rights of the Defence will be violated by such a measure as an Accused is, as a matter of principle, entitled to defend himself. Furthermore, Defence submits that a similar measure was denied the Prosecution in other cases before the Tribunal because it was viewed as inconsistent with the Accused's right to adequate facilities for the preparation of his defence as set forth in Article 20(4)(b) of the Statute.⁴

23. The Prosecution concedes in part but cites another decision⁵ in a similar vein. It argues, however, that a different approach is required in view of the incident which occurred in the case of *The Prosecutor v. André Ntagerura, Samuel Imanishimwe and Emmanuel Bagambiki* (No. ICTR-99-46-T) where unredacted witness statements changed hands among Accused at the Tribunal's Detention Facility in Arusha and, on which matter Judge Williams, the Presiding Judge of Trial Chamber II observed that: "[Such] interchange of statements among various accused in the Detention Centre does not seem to be a desirable practice. And [that] we will have to find some method to prevent this sort of thing from occurring. [...] It destroys the whole principle of witness protection."⁶

24. The Chamber holds that in light of these facts, Defence Counsel should personally ensure that the Accused does not communicate to anyone else any document containing the identity of a protected witness nor any information that would disclose their identity. An order to that effect is not necessary as we understand from what precedes, that it forms part of measure (e) already granted the Prosecution.⁷

3. Persons covered by the measures

4 Defence cites the Decision on a Prosecutor's Motion for Protective measures for Prosecution witnesses rendered by Trial Chamber II in *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo* (No. ICTR-97-29-T) of 21 May 1999.

5 Musabyimana Decision of 19 February 2002, para. 31.

6 *The Prosecutor v. Andre Ntagerura, Samuel Imanishimwe, and Emmanuel Bagambiki*, Case No. ICTR-99-46-T, Transcript of 12 September 2001 pp. 8 and 9.

7 A similar conclusion was adopted with respect to the same request for an order by Trial Chamber III in *The Prosecutor v. Gratién Kabiligi and Alois Ntabakuze*, Case No. ICTR-97-34-I Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, 19 May 2000.

25. Defence does not object to the distinction proposed by the Prosecutor regarding those to benefit from the protection measures which shall therefore be as follows:

(m) Victims and Prosecution witnesses or victims and potential Prosecution witnesses presently residing in Rwanda or in other African countries and who have not expressly waived their right to protective measures;

(ii) Victims and Prosecution witnesses or victims and potential Prosecution witnesses residing outside Africa who have sought protection.

The Chamber deems such categorization appropriate in view of the difference in status of the said Prosecution witnesses. It notes further that the rights of the Defence are not impaired as a result. It accordingly grants the said measures to the various categories of persons under the conditions set out above.

DISPOSITION

For these reasons

The Chamber

I. **Grants** the protection measures contained in order II to the victims and Prosecution witnesses or victims and potential Prosecution witnesses currently in Rwanda or in other African countries who have not expressly waived their right to benefit from protective measures as well as to those residing outside Africa who have sought to benefit from protection measures;

II. **Adopts**, as presented, orders (a), (b), (c), (d), (e), (f), (j) and (k) above (para. 12 of the present Decision);

III. **Adopts** the varied versions of the following orders above: (g) (para. 15 of the present Decision), (h) (para. 18(ii)) of the present Decision) and (i) (para. 20 of the present Decision);

IV. **Rejects** the Motions on its other points

V. **Rejects** the Defence's Counter Motion

Arusha 29 May 2002

Andrésia Vaz
Judge

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