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ICTR-96-14-T  
23-09-2002  
(5122-5117)

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

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**TRIAL CHAMBER I**

Before: Judge Andréia Vaz

Registry: Adama Dieng

Decision of: 14 August 2002

**THE PROSECUTOR**

v.

**ÉLIÉZER NIYITEGEKA**  
Case No. ICTR-96-14-T

JUDICIAL RECORDS  
1078  
2002 SEP 23 AM 11:11  
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**DECISION**  
**(DEFENCE MOTION FOR PROTECTIVE MEASURES**  
**FOR DEFENCE WITNESSES)**

Office of the Prosecutor:

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CI02-0004 (E)

**The International Criminal Tribunal for Rwanda (“The Tribunal”)**

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**Sitting** as Trial Chamber I in the person of Judge Andrésia Vaz, designated pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“the Rules”);

**Being** seized by the parties of:

(i) A Defence Motion for protective measures for Defence witnesses filed on 3 July 2002 (“the Motion”);

(ii) The Prosecution’s response to the Motion, filed on 8 July 2002 (“the Response”), and a corrigendum to the Response, filed on 16 July 2002;

(iii) Supplementary information filed by the Defence on 7 August 2002, to which is attached, *inter alia*, a copy of a letter dated 26 July 2002 from the Permanent Representative of Rwanda to the United Nations to the President of the Security Council (NU S/2002/842).

**Considers** the motion based on the briefs of the parties, pursuant to Rule 73(A) of the Rules.

**Deliberation**

1. Being concerned to ensure an expeditious and fair trial for the Accused, as well as the protection of victims and witnesses, the Chamber may, pursuant to Articles 14, 19, and 21 of the Statute, and Rules 69 and 75 of the Rules, order appropriate protective measures. Such measures must be justified by exceptional circumstances invoked by the requesting party.

2. The Defence submits that protective measures must be prescribed for Defence witnesses because of the insecurity resulting first, from the lack of cooperation with the Tribunal recently shown by the Rwandan authorities. It is alleged that the latter recently prevented Prosecution witnesses from testifying in Arusha through the introduction of new administrative procedures governing all individual travel abroad. The Defence recalls that it was that lack of cooperation that obliged the Chamber on 26 June 2002 to adjourn the present trial until 13 August 2002. The Defence also mentions the demonstrations that took place in Kigali at the time of the visit of the Registrar of the Tribunal and the Chief Prosecutor to Kigali during the last week of June, in relation to problems concerning the appearance of witnesses. The Defence adds that this situation affects Defence witnesses as much as, if not more than, those of the Prosecution. The Defence concludes that “for reasons not disclosed to the Defence, it appears that, the Rwandan Government is presently opposed to Rwandan Nationals testifying before the Tribunal”.<sup>1</sup>

3. For its part, the Trial Chamber considers that the Defence has not established a link between the recently raised issue of cooperation between the Government of Rwanda and the Tribunal regarding travel by witnesses to Arusha and the objective security of the witnesses that the Defence intends to call. In that respect, the Trial Chamber, endorses the argument

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<sup>1</sup> Motion, para. 9.

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advanced in the Prosecution's Response. That issue does not constitute grounds to justify the measures sought.

4. The Defence cited murders, threats and other acts of intimidation against witnesses that are to testify or have testified for the Defence in other cases before the Tribunal acts which witnesses contacted to appear may have cited to explain their fear to come and testify before the Tribunal. Apart from specified incidents (i) above, these potential witnesses may have cited the murder of Seth Sendashonga who, according to them and to the Defence, was due to testify for the Defence in the trial of Clément Kayishema and Alfred Ruzindana (ii) above, as well as "3 cases of witnesses who were imprisoned upon returning from Arusha, allegedly for having testified for the Defence in the trial of Akayesu" (iii) above.

5. The Chamber cannot rely on such general unspecified allegations as those indicated in (i) above. It is also of the opinion that the Defence has not shown that the murder referred to under point (ii) above, for which the Defence gives neither the date it was committed nor any factual circumstances whatsoever (other than it having been perpetrated in Nairobi, Kenya), was in connection with Mr. Sendashonga's alleged testimony before the Tribunal. Similarly, the allegation made in point (iii) above, apart from the fact that it has not been established, lacks precision. The Defence seems to have been content with citing allegations made by potential witnesses, without seeking to prove them; as they stand, such allegations are not sufficient to establish the merit of the Defence motion.

6. Lastly, the Defence recalls that in various decisions on protective measures for both Prosecution and Defence witnesses,<sup>2</sup> the Trial Chambers of the Tribunal have noted the general situation of insecurity affecting Rwandan witnesses.

7. The Chamber notes that decisions on the protection of witnesses which are more recent than those cited by the Defence have established the persistence, if not an escalation in violence against the victims and witnesses for the Prosecution or the Defence. The cause thereof is attributed, in particular, to infiltrations by *ex-Interahamwe* or *ex-FAR* rebels in Rwandan territory, where they are waging a guerrilla war against the Government forces. Witness insecurity also has its impact among emigrant Rwandan circles in Africa or elsewhere.<sup>3</sup>

8. The Defence adds that Radio Rwanda has recently reported serious unrest in the west of Rwanda, which includes Butare *préfecture*, where the crimes charged in the instant Indictment were allegedly committed. That communiqué is understood to have also reported the establishment of a night-time patrol intended to curb the aggravated insecurity. However, the Defence merely refers to that communiqué, supposedly broadcast on 6 August 2002, without producing any document establishing the broadcast and the content thereof.

9. That having been said, the Trial Chamber notes that the Prosecution is not opposed to the granting of certain measures requested. It deduces therefrom that the Prosecution

<sup>2</sup> The Defence cites the following decisions: *The Prosecutor v. Semanza*, Case No. 97-20-I, Decision on the Prosecution Motion for the Protection of Witnesses, 10 December 1998; *The Prosecutor v. Jérôme-Clément Bicamumpaka*, Case No. ICTR-99-50-T, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses*, 12 July 2000; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 22 March 2001.

<sup>3</sup> See, for example, *The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, *Décision (Requête du Procureur aux fins de protection des témoins à charge)*, [Decision, Prosecution motion for protection of Defence witnesses] 29 May 2002, paras.8-11.

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considers that Defence fears in the face of a situation of precarious security objectively affecting the witnesses are legitimate.

10. Further, the Defence refers to a letter dated 26 July 2002 from the Permanent Representative of Rwanda to the President of the Security Council (UN doc. S/2002/842), wherein it is stated that “the [Rwandan] Government has had frequent reports of deaths of witnesses in unexplained circumstances after their testimony at ICTR” and that “the Government of Rwanda is gravely concerned that ICTR witnesses are being targeted”.<sup>4</sup> The Permanent Representative of Rwanda to the United Nations also mentions therein, by way of illustration, “the recent death of a witness in the Kamuhanda case”.

11. Consequently, the Trial Chamber is satisfied that the persistent situation of insecurity that affects potential witnesses justifies that protective measures be prescribed in the instant case in respect of Defence witnesses.

12. The Trial Chamber declines to consider only some of the measures requested, as proposed by the Prosecution, relying in that respect on the alleged failure by the Defence to justification for the measures requested.

13. Out of concern for fairness, the Trial Chamber hereby automatically grants to the Defence the requested measures the content of which is the same as that for the measures granted to the Prosecution in the present matter.<sup>5</sup> Certain adjustments have been made in the light of specific Defence obligations to disclose concerning the defence of alibi. Accordingly, the Trial Chamber:

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

(b) **Orders** that the names, addresses, whereabouts of, and other identifying information concerning persons covered by the present measures be communicated by the Registry only to the Victims and Witnesses Support Unit personnel, in accordance with established procedure, and for the sole purpose of implementing the protective measures for the said persons;

(c) **Orders** that the names, addresses, whereabouts of, and other identifying information concerning any persons covered by the present measures and contained in existing records of the Tribunal be deleted from the documents in question;

(d) **Prohibits** disclosure to the public or the media, even after the trial has ended, of the names, addresses and whereabouts of any persons covered by the present measures, and of any other identifying information in the supporting materials, as well as any other information contained in the files with the Registry, or any other information which could reveal the identities of the persons in question;

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<sup>4</sup> ...: “The [Rwandan] Government has had frequent reports of deaths of witnesses in unexplained circumstances after their testimony at ICTR. (...) the Government of Rwanda is gravely concerned that ICTR witnesses are being targeted”.

<sup>5</sup> See *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-I, Decision on the Prosecutor’s Motion for protective measures for witnesses, 12 July 2000.

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(e) **Prohibits** the Prosecution from communicating and revealing to, or discussing with any person other than the immediate members of the Prosecution team in the instant case, whether directly or indirectly, any document, or any other information which could reveal or lead to the identification of the persons covered by the present measures;

(f) **Orders**, on the one hand, that the Prosecution designate to the Chamber and to the Defence all the members on the immediate Prosecution team in this case who will have access to the information referred to in Orders (a) to (e) above, and on the other hand, that the Prosecution advise the Chamber in writing of any changes in the composition of this team, and lastly, that the Prosecution ensure that any member who has been asked to withdraw from the Prosecution team returns all documents and information that could lead to the identification of persons covered by the present measures;

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

(h) Subject to the provisions of Rule 67(A)(ii)(a) of the Rules: **prohibits** disclosure to the Prosecution of the names, addresses, whereabouts of, and any other detail which could reveal the identities of persons covered by the present measures, until such time as the Chamber is assured that the said persons have been afforded an adequate mechanism for protection; **authorizes** the Defence to disclose to the Prosecution only materials in redacted form, until the said mechanism is in place and **orders** that the Defence disclose to the Prosecution the identifying information of the persons covered by the present measures at the latest 21 (twenty-one) days before such protected persons testify at trial;

(i) **Orders** that the Prosecution shall submit a request in writing to the Chamber or to one of the Judges thereof, when it seeks to contact any person covered by the present measures or any member of their family, upon the Defence being given reasonable notice thereof and **orders** the Defence to take all necessary measures to facilitate the holding of the interview so granted;

(j) **Orders** that the Defence designate a pseudonym for each of the persons covered by the present measures, and that the pseudonym be used whenever referring to each such person in the proceedings, communications and discussions between the parties to the trial, and *vis-à-vis* the public.

14. Similarly to the measures applicable to Prosecution witnesses and as requested by the Defence, such measures shall apply to:

(i) Victims and Defence witnesses or victims and potential Defence witnesses presently residing in Rwanda or in other African Countries other than Rwanda who have not affirmatively waived their right to protective measures;

(ii) Victims and Defence witnesses or victims and potential Defence witnesses outside the continent of Africa and who have requested that they be granted such protective measures.

15. Other measures were requested by the Defence that had not been granted to the Prosecution:

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(i) In (g)(sic), the Defence requested that the Victims and Witnesses Support Section be ordered to provide the same level of protection to Defence witnesses as that given to Prosecution witnesses;

The Chamber considers that it is needless to remind the said Section of the need to respect with the principle of non-discrimination between the witnesses in its care, which is crucial to its mandate. That request is therefore rejected.

(ii) In (h)(sic), the Defence requested that the said Section be ordered to limit to the minimum the number of persons with access to identifying information pertaining to the Defence witnesses, once such information has been communicated to it;

The Chamber considers that there is not reason to doubt that the measures taken by the said Section and the way such measures are applied in the exercise of its duties do not satisfy the requirement of safeguarding the confidentiality of identifying information pertaining to witnesses protected by the Tribunal. The request is hence rejected.

(iii) In (i)(sic), the Defence requested that the Government of Rwanda be enjoined to facilitate the outward and return travel of witnesses residing in Rwanda (a) and to guarantee their anonymity and the confidential nature of their status as witnesses before the Tribunal (b).

The Chamber considers that measure (a) is beyond the scope of the present Motion. Regarding measure (b), the Chamber considers that it is needless to remind the Government of Rwanda of its obligation to cooperate with the Tribunal by virtue of Article 28 of the Statute. The said requests are therefore rejected.

**For the foregoing reasons,**

**The Tribunal**

**I. Grants** the Motion as stipulated above;

**II. Denies** the Motion in all other respects.

Arusha, 14 August 2002

(Signed)

Andrésia Vaz  
Judge

[Stamp of the Tribunal]

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