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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 2 September 2002

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JUDICIAL RECORDS SECTION
ICTR

The PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-T

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

The Office of the Prosecutor:

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Duty Counsel for Nsengimana:

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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");

BEING SEIZED of:

- (i) the "Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 15 May 2002 to which are attached fourteen (14) annexes (the "Motion");
- (ii) the "Reply to the Prosecutor's Motion for Protective Measures for Victims and Witnesses", of 14 June 2002 (the "Defence Response");
- (iii) The "Prosecutor's Response to Nsengimana's Reply to the Prosecutor's Motion for Protective Measures" filed on 20 June 2002 (the "Prosecutor's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), particularly Article 21 and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69, 75 and 79 of the Rules;

CONSIDERING that the Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Prosecutor's Submissions

1. The Prosecution seeks protective measures for its potential witnesses before they testify because there is real and substantial danger that victims and potential Prosecution witnesses will be threatened assaulted or killed if their identities are made known. The Prosecutor submits that the danger described threatens not only witnesses living in Rwanda, but also those living in other countries on the continent of Africa and outside of Africa. The Prosecution thus seeks protective measures for:

- (i) Victims and potential prosecution witnesses who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;
- (ii) 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
- (iii) Victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures as was the case in *Prosecutor v. Musabyimana*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002.

2. In support of its request, the Prosecution relies upon the documents attached to its Motion, which outline the security situation for victims and potential Prosecution witnesses. In the Affidavit of Commander Samuel Akorimo, dated 9 May 2002, the affiant attests that, "[w]itnesses [being residents of Butare Province and its environs] who have been selected to testify in the ICTR case of the *Prosecutor v. Hormidas Nsengimana* experience and continue to experience fear of reprisals for their impending testimony." On 25 March 2002, *Hirondelle*

Press reported that three witnesses who testified in the trial of *Prosecutor v. Kajelijeli* have received death threats causing them to seek refuge in Kigali where they have no homes, close relatives or means of survival. In a BBC News Online report of 2 March 1999, it is reported that, “[c]lose to five years on, the Interahamwe militia are still fighting their own war, sometimes inside Rwanda but now more often just across the border.”

3. In order to provide protection for these victims and potential prosecution witnesses, the Prosecutor requests the Trial Chamber to issue the following twelve (12) orders:

- [a] An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described herein after be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses bear the pseudonyms: **CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH** 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 prosecution witnesses described in measure [a] above, be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with established procedure and only in order to implement protective measures for these individuals;
- [c] An order requiring that any names, relations, addresses, whereabouts of and any other identifying information concerning such victims and potential prosecution witnesses contained in existing records of the Tribunal be placed under seal;
- [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 the 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 and any appeal;
- [e] An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or information contained in any documents, or any other information which could reveal or lead to the identification of any individuals specified in measure [a] above, to any person or entity other than the Accused, assigned Counsel or other persons the Registry designates as working on the Defence team;
- [f] An order requiring the Defence to provide to the Chamber and the Prosecutor a designation of all persons working for the Defence who, pursuant to measure [a] above have access to any information referred to in measures [a] through [d] above and requiring the Defence to advise the Chamber in writing of any changes in the composition of the Defence team and requiring the Defence to ensure that any member departing the Defence team has remitted all materials that could lead to the identification of persons specified in measure [a] above;
- [g] An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witnesses at any time or place without leave of the Chamber;
- [h] An order prohibiting that disclosure to the Defence of the names, addresses, relations, 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 times as the Trial Chamber is assured that the witnesses are protected. Provided that protective measures are put in place, all redacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to 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;

- [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 requiring 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 person working for the Defence 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 person working for the Defence from personally possessing any material which includes or might lead to discovery of the identity of any protected witness.

Defence's Submissions

4. The Defence objects to the Motion submitting that because the Accused is a Roman Catholic priest who is not affiliated with the military or the government, there is no real or substantial danger to victims and potential witnesses.

5. The Defence notes that the witnesses listed for whom the Prosecutor seeks protective measures all reside in Rwanda. The Defence submits that the material adduced by the Prosecution to support the volatile security situation is outdated insofar as it pertains to the period between 1997 and 2001. Other documents dated 2002 such as the 25 March 2002 *Hirondelle* Press article entitled "Survivors Accuse 14 Defence Investigators of Genocide Crimes" mentions people who occupied high positions in government, and the Accused is not mentioned among them. Similarly, the affidavit of Commander Samuel Akorimo does not give any description of the Butare region and the allegations of fear described therein are vague and without basis.

6. The Defence further submits that because the Accused has not been assigned Counsel and is thus represented by Duty Counsel, measures [e], [f], [g], [h], [i], [j] and [k] are improper and premature, and any order passed in that respect will be unfair and unjust.



1444

HAVING DELIBERATED

7. The Chamber notes that the Prosecutor brings the Motion pursuant to Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules.

8. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely in Rules 69 and 75 of the Rules. Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber *proprio motu* or at the request of either party or of the victims or witnesses concerned or of the Tribunal's Witness and Victims Support Section (the "WVSS"), may order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

9. Rule 69 of the Rules *inter alia* provides that, 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.

10. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute, shall therefore order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

11. In order to establish the exceptional circumstances, the Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses" rendered on 13 July 1998 (the "Rutaganda Decision"), at para. 9, that, "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses." The Chamber further recalls its findings in *Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-T, "Decision on the Defence Motion for Protective Measures for Witnesses" of 18 September 2001, that to determine the appropriateness of each protective measure, the Chamber must be satisfied that, "[a]n objective situation exists whereby the security of the said witness is or may be at stake."

12. In this case, the Chamber takes note of the annexes to the Motion, which the Prosecutor uses to describe a particularly volatile security situation at present for victims and potential witnesses who may have, in one way or another, witnessed the events of 1994 in Rwanda. The Prosecutor submits that this situation affects victims and potential witnesses who reside in Rwanda, neighbouring countries such as Uganda, Burundi and the Democratic Republic of Congo (the "DRC"), other parts of Africa and outside of Africa. The Chamber notes that although the Defence maintains that documents attached in support of the Motion date between 1997 and 2001, nonetheless, the documents dating 2002 indicate that there is currently great risk. In particular the Affidavit of Commander Samuel Akorimo states in connection with this case that "[in] the provinces of Gisenyi, Ruhengeri, Kibuye, and Cyangugu [...] ICTR prosecution witnesses who reside in [those] provinces and ICTR prosecution witnesses who reside in other provinces of the Republic of Rwanda face a very high potential of reprisals [...] in the form of death threats and actual physical harm [...] for their participation in ICTR processes."

13. On the basis of the aforementioned affidavit, the Chamber considers that the Prosecutor has indeed demonstrated the volatile situation, which could affect victims and potential witnesses residing in Rwanda.¹ Similarly, the Chamber, after noting the attachments to the Motion, in particular the article of 7 June 2001 on the Rwandan Government's Official website entitled "Interahamwe Killers Launch New Attacks on Rwanda," is of the opinion that this volatile situation could also affect those victims and potential witnesses who reside in the neighbouring countries such as Uganda, Burundi and the DRC.

14. Regarding victims and potential witnesses residing in other parts of Africa and outside of Africa, the Chamber notes that the Prosecutor has not provided substantive evidence of threats to their lives. However, the Chamber reiterates its reasoning in a number of its Decisions and holds that, although the Prosecutor has not demonstrated the existence of threats or fears in regard to victims and potential witnesses residing in other parts of Africa and outside of Africa, the present security situation would affect any victim or potential witness even if residing outside the region.²

15. Bearing in mind the aforesaid, the Chamber shall consider the merits of the specific protective measures sought for victims and potential witnesses as requested in the Motion.

16. As a preliminary matter, the Chamber notes the Defence's specific objections to measures [e], [f], [g], [h] and [i] as being unfair because the Accused has yet to be assigned Defence Counsel. On this issue, the Chamber notes that the Defence has not demonstrated how, if at all, the granting of such measures would be in violation of the rights of an Accused who, though he has not yet been assigned Defence Counsel, has been assigned Duty Counsel. The Chamber thus dismisses the Defence objections to the granting of the above-mentioned measures on that basis specifically.

Regarding measures [a], [b], [c], [d], [e], [f] and [g] for anonymity of the victims and potential witnesses

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as those requested in the Motion in measures [a], [b], [c], [d], [e], [f] and [g].

18. On the issue of anonymity, the Chamber recalls the reasoning in *Prosecutor v. Nsabimana*, Case No. ICTR-97-29-I, "Decision on the Defence Motion to Obtain Protective Measures for the Witnesses of the Defence", rendered on 15 February 2000, (the "Nsabimana" Decision). In the said Decision, the Chamber highlights *inter alia* that, in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear." In the present case, the Chamber, following this reasoning, and considering the submissions of the Prosecutor, is of the opinion that there is sufficient

¹ See Para 11 of the Affidavit of Commander Samuel Akorimo, which specifies the following witnesses as deserving protective measures under the Rules; "CAN, AO, CAP, CAQ, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG and CBH being residents of Butare province and its environs."

² See "Decision on Pauline Nyiramasuhuko's Motion for Protective measures for Defence Witnesses and Family members," of 20 March 2001 in the case of *the Prosecutor v. Nyiramasuhuko, et al* (the "Nyiramasuhuko Decision"); "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002 in the case of *the Prosecutor v. Musabyimana* (the "Musabyimana Decision").

showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed.

19. The Chamber notes that under measure [a] the Prosecutor seeks the Chamber's order to provide the pseudonyms "CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH [and that] any other additional witnesses should also be assigned pseudonyms, which will be used during the course of the trial." Considering the Chamber's opinion at para. 18 above that there is sufficient showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed, the Chamber finds it proper to grant the Prosecutor's further request to provide the above-mentioned pseudonyms to prosecution witnesses and any other additional witnesses.

20. Consequently the Chamber grants measures [a], [b], [c], [d], [e], [f] and [g], as requested.

Regarding measure [h] on disclosure of the identity of the victims and potential witnesses

21. In regard to measure [h], the Chamber notes that the Prosecutor requests that disclosure of identifying data, which would reveal *inter alia* the identity of potential witnesses, be prohibited to the Defence. However, the Prosecutor further submits "[p]rovided that protective measure are put in place all the redacted statements and identities of witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of trial and no later than 21 days before the testimony of the witness to allow adequate time for preparation of the Defence."

22. The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and conditioned to the implementation of protective measures, as has been some of the jurisprudence of the Tribunal on the timing of disclosure.³ The Chamber further notes that the Prosecution submits that "21 days before the testimony" is adequate time for the preparation of the Defence.

23. In light of the necessity to strike a balance between the rights of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily withhold identifying information concerning its witnesses and grants the order sought under measure [h].

Regarding measure [i] on the notification to the Prosecution of any contact between Defence and a victim or potential witness

24. As regards measure [i], the Chamber notes the Tribunal's jurisprudence,⁴ notably in *Prosecutor v. Nahimana*, "Decision on Defence's Motion for Witness Protection" of 25 February 2000, and grants the said measure requiring the Defence and its representatives who are acting under its instructions to notify the Prosecutor of any request to contact the victims

³ See *Kamuhanda*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 7 July 2000; *Kajelijeli*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 6 July 2000; the *Nyiramasuhuko* Decision; *Nzirorera*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 12 July 2000; the *Musabyimana* Decision.

⁴ See also the *Rutaganda* Decision and the *Nyiramasuhuko* Decision.

and potential Prosecution witnesses, and that the Prosecutor shall make arrangements for such contacts. Nevertheless, the Chamber finds that it is not necessary for the Defence to notify the Trial Chamber when requesting to contact victims or potential witnesses.

25. Accordingly, the Chamber grants the said request but modifies it by deleting the words, “[t]o the Trial Chamber or a Judge thereof.”

Regarding measure [j] on assignment of pseudonyms to victims and potential witnesses

26. As regards measure [j], the Chamber recalls that such a request has been made under measure [a]. The Chamber therefore denies this measure as it has already been requested and granted.

Regarding measure [k] on prohibiting the Defence and the Accused from making a determination of the identity of a victim or potential witness

27. As regards the requests made in measure [k], the Chamber recalls its jurisprudence⁵, to the effect that granting the said measure will not in any way lessen either party’s ethical obligations. The Chamber, therefore, grants the order stipulated in measure [k].

Regarding measure [l] on prohibiting the Accused from possessing material which might lead to the discovery of the identity of a victim or potential witness

28. As regards the request made in measure [l], the Chamber notes that this measure conflicts with measure [e]. Measure [e] assumes that the Accused and the Defence have in their possession documents or information which could reveal the identity of victims or potential witnesses and prohibits their sharing these documents with anyone other than members of the Defence and the Accused. Measure [l], however, prohibits the Accused and the Defence from possessing documents that reveal the identity of victims and potential witnesses. The Chamber notes that measure [l] does not specify what should be done by the Accused and the Defence once they have in their possession the documents. Accordingly, the Chamber denies the request made in measure [l].

As to When the Requested Protective Measures Take Effect

29. The Chamber decides, in conformity with the Tribunal’s well-established jurisprudence, that such protective measures are to be granted on a case by case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded to the WVSS. The Chamber adds that the Prosecutor shall provide the WVSS with all the particulars pertaining to the affected witnesses.

⁵ See “Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses,” of 17 June 1999 in the *Prosecutor v. Nsabimana and Nteziryayo*; the *Nyiramasuhuko* Decision; the *Musabyimana* Decision.

1440

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Prosecutor's requests and orders that:


- I Measures [a], [b], [c], [d], [e], [f], [g], [h] and [k] of the Motion be made for victims and potential prosecution witnesses.
- IV **MODIFIES** measure [i] as follows, "An order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, 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."

DENIES the orders sought in measures [j] and [l].

Arusha, 2 September 2002




William H. Sekule,
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarison
Judge



(Seal of the Tribunal)