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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

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

BEING SEIZED OF:

- (i) The “Extremely Urgent Defence Motion Seeking Protective Measures for Witnesses Pursuant to Article 21 of the Statute and Rule 75 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda”, filed on 30 April 2002, (the “Motion”);
- (ii) The “Prosecutor’s Response to Casimir Bizimungu’s Motion Seeking Orders for Protective Measures for Defence Witnesses”, filed by the Prosecutor on 22 May 2002;
- (iii) The “*Réplique à la “Prosecutor’s Response to Casimir Bizimungu’s Motion Seeking Orders for Protective Measures for Defence Witnesses” datée du 22 mai 2002*” filed on 2 September 2002;

NOTING the “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses”, Prosecutor v. Casimir Bizimungu, Case No. ICTR-99-50-T, 22 September 2000;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Articles 19, 20, and 21 of the Statute and Rules 69 and 75 of the Rules;

DECIDES the Motion solely on the basis of the written briefs of the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence requests, pursuant to Articles 19 and 21 of the Statute and Rules 69 and 75 of the Rules, that the Chamber order protective measures for persons who fall into four categories, as follows:
 - (1) Defence witnesses residing in or outside Rwanda who have not affirmatively waived their right to protective measures, and who will be called to testify at the hearing on the Motion for Provisional Release;
 - (2) Potential Defence witnesses residing in Rwanda who have not affirmatively waived their right to protective measures;
 - (3) Victims and potential Defence witnesses residing in other African countries who have not affirmatively waived their right to protective measures;
 - (4) Victims and potential Defence witnesses residing outside Africa who have requested such protective measures.

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2. The Defence requests the Chamber to issue the following orders:

- (a) An order requiring that the names, addresses, whereabouts, or other identifying data concerning victims or potential Defence witnesses described hereinafter be sealed by the Registry and not included in any public Tribunal records;
- (b) An order requiring that the names, addresses, whereabouts, or other identifying data concerning victims or potential Defence witnesses be disclosed only to the Witness and Victims Support Section (WVSS) in accordance with the established procedure and only in order to implement protective measures for these individuals;
- (c) An order requiring that to the extent that the names of or other identifying data concerning any of the victims and witnesses are contained in existing records of the Tribunal, those names and other identifying data be expunged from those records;
- (d) An order prohibiting the disclosure to the media or the public of the names, addresses, whereabouts, or other identifying data contained in the supporting material concerning any such persons, or any other information on file with the Registry, or other information which would reveal the identity of these individuals; and that this order remain in effect at the termination of this trial;
- (e) An order prohibiting the Prosecutor from disclosing, revealing or discussing directly or indirectly any documents or any other information which could lead to the identification of these persons to any person or entity other than those working on the immediate Prosecution team designated by the Prosecutor;
- (f) An order requiring the Prosecutor to provide the Trial Chamber and the Defence a designation of all persons working on the immediate Prosecution team who will have access to any information concerning Defence witnesses for whom protective measures are sought; to advise the Trial Chamber and the Applicant in writing of any changes in this team's composition; and to ensure that any members departing from the Prosecution team have remitted all documents and information that could lead to the identification of the said witnesses;
- (g) An order prohibiting the photographing, audio or video recording, or sketching of any Defence witnesses at any time or place without leave of the Trial Chamber and parties;
- (h) An order prohibiting the disclosure to the Prosecutor of the names, addresses, whereabouts of, or any other identifying data which would reveal the identities of these persons, and any information in the supporting material on file with the Registry, until such a time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and allowing the Defence to disclose in redacted form any material provided to the Prosecutor until such a mechanism is in place; and that the Defence is not required to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is to testify at trial, unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules.
- (i) An order requiring that the Prosecutor make a written request, on reasonable notice to the Defence, to the Trial Chamber, or to a Judge thereof, to contact any protected victim or potential Defence witness or any relative of such a person; that at the direction of the Trial Chamber or a Judge thereof, and with the consent of such a protected person or the parent or guardian of that person if that person is under the age of 18, the Defence shall undertake the necessary arrangements to facilitate such an interview; and the presence of the Accused and/or his counsel during the interview;
- (j) An order requiring that the WVSS ensure the safety of each person referred to in paragraph (i), and undertake the necessary arrangements in that regard;

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(k) An order requiring that the WVSS recommend any other protective measures, as necessary, to ensure that the witness is present at the appropriate time;

(l) An order requiring that the Trial Chamber designate a pseudonym for each of the Defence witnesses, 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, until such time as the witness concerned chooses otherwise;

(m) An order instructing the Registrar to immediately designate a pseudonym suggested by Accused's Lead Counsel for each of the potential Defence witnesses;

3. The Defence reserves the right to apply to the Trial Chamber to amend the protective measures sought and to seek additional measures, if necessary.
4. The Defence contends that, at present, security for all Rwandans is precarious and that witnesses residing in Rwanda are likely to be affected by the climate of insecurity. The Defence relies on information contained in Annex I to the Motion, including an affidavit from Remi Abdulrahman, Chief of the Security and Safety Section of the Tribunal in Kigali, dated 3 December 1999. The aforementioned Annex also contains, *inter alia*, press and NGO reports on attacks on Tutsi refugee camps and other genocide survivors by Rwandan rebels, former Rwandan Armed Forces (ex-FAR) militiamen and Interahamwe in the northwestern Gisenyi prefecture and reports on the human rights abuses in the Great Lakes region of Africa.
5. The Defence also relies on Annexes II to V, including one statement from Filip Reyntjens, professor at the University of Antwerp, dated 15 July 1998. Relying on that statement, the Defence alleges that security threats affect not only victims and potential witnesses residing in Rwanda but also those living in other countries in the region, and even outside the continent, due to the presence in those areas of Interahamwe groups, ex-FAR and members of the former civilian government of Rwanda in those areas. Moreover, the Defence alleges that the perception that commandos working for the Rwandan regime are present in Europe is widespread within the Rwandan community residing outside the country, which prevents potential witnesses from accepting to testify.
6. The Defence further contends that, should potential Defence witnesses be reluctant to testify unless granted the same protection as Prosecution witnesses, the Accused would suffer serious prejudice.
7. Finally, the Defence relies on the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the Tribunal to demonstrate that similar orders to those requested have been granted in the past.
8. The Defence requests protective measures for "[d]efence witnesses residing in or outside Rwanda and who have not affirmatively waived their right to protective measures, and who will be called to testify at the hearing on the Motion for Provisional Release" (Category 1). The Defence further requests that the Chamber issue an order to "hear all the testimony of Category 1 witnesses in closed session" and that the WVSS "ensure that security mechanisms are in place and that the witnesses are present".

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The Prosecution's Response

9. The Prosecution challenges any protective measures for witnesses expected to testify at a hearing on a proposed Motion for Provisional Release.
10. The Prosecution notes that the Defence Motion refers to a separate motion, the Motion for Provisional Release, filed on 30 April 2002, which is not a joint motion with this Motion. The Prosecution argues that Rule 65 does not prescribe an oral hearing for provisional release applications. The Prosecution contends that the proper approach to provisional release is to append the affidavit of the witnesses to an application for release and that a hearing is required only if the Prosecutor challenges the affidavit evidence and requests a hearing to confront the sworn averments in the affidavits. The Prosecution further submits that the Defence has not presented the affidavits of the proposed witnesses
11. As regards the Motion, the Prosecution does not object in principle to lawful and appropriate orders for protective measures for witnesses who will appear on behalf of the Accused, but argues that there are insufficient grounds to grant the measures requested by the Defence insofar as there is no definitive proof to show that any of the witnesses or potential witnesses it intends to call are in any danger, real or perceived.
12. The Prosecution argues that the orders for protective measures requested are phrased in general terms such that compliance will be impossible for the Prosecution and unnecessary for the Trial Chamber.

The Defence's Reply

13. The Defence reiterates that it intended to call witnesses in support of the Motion for provisional release after those concerned witnesses were provided protective measures. The Defence adds that it will file heavily redacted affidavits of those witnesses in annex to this reply, but indicates that this would not be done before two weeks upon Counsel's return to Canada.
14. On the substance of the requested measures, the Defence submits that contrary to the Prosecution's assertions, the requested measures are detailed enough and that the Chamber has a discretionary power to reformulate those measures, even to harmonise them with those concerning the co-accused.
15. The Defence requests that, if the Chamber maintains its decision not to organise a hearing on the Motion for provisional release, it should decide on the Motion for protective measures prior to deliberating on the Motion on provisional release.

HAVING DELIBERATED

On Protective Measures for Category I Witnesses (Witnesses called to testify at a hearing requested by the Defence on the Motion for provisional release)

16. The Trial Chamber considers that the issue of protective measures for witnesses for the Defence at a hearing for Provisional Release must be treated as a question separate from the issue of protective measures for witnesses for the Defence at the Accused's trial. The Trial Chamber notes that it has not yet considered the Defence's Motion for Provisional Release, but that it has

decided to review the Motion for protective measures on the basis of written briefs only, pursuant to Rule 73(A) of the Rules, as indicated to the Parties by the Registry on 13 May 2002.

17. Accordingly, the Trial Chamber will not consider protective measures requested for Category 1 witnesses for the purpose of this Decision.

On Protective Measures for Category 2, 3 and 4 Witnesses (Non-disclosure of the identity of witnesses appearing at the Trial: Measures (a), (b), (c), (d), (e), and (g) of the Motion)

18. 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 notes that, pursuant to Article 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 the victim’s identity.”
19. The Chamber recalls the provisions of Rule 69(A) of the Rules, which stipulate that in exceptional circumstances, each Party may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from danger. Such order will be effective until the Chamber determines otherwise, and without prejudice, requires the disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case, pursuant to Rule 69(C) of the Rules. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures to protect anonymity.
20. To determine the existence of exceptional circumstances which warrant the non-disclosure of witness identity and other protective measures, the Chamber has studied the parties’ submissions and has reviewed the Tribunal’s jurisprudence. The Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, 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 finding in *Prosecutor v. Nteziryayo*, Case No ICTR-97-29-T, Decision on the Defence Motion for Protective Measures for Witnesses, 18 September 2001, that to determine the appropriateness of each protective measure, the Chamber must be satisfied that “an objective situation exists whereby the security of the said witnesses is or may be at stake.”
21. The Chamber notes that the Prosecutor does not object, in principle, to lawful and appropriate orders to provide protective measures for witnesses for the Accused. In the Chamber’s view, the Defence has provided limited current evidence to demonstrate that the security concerns of all its potential witnesses are well founded. Nevertheless, the Chamber notes that similar measures for protection have been granted on behalf of Prosecution witnesses whose security concerns are comparable to those of the Defence’s witnesses in the present case. The Chamber finds that, in the interests of justice, it is fair and prudent to provide similar protective measures for Defence witnesses. Accordingly, the Chamber grants Measures (a), (b), (c), (d), (e), and (g).

On Measure (f) of the Motion

22. In accordance with the jurisprudence in *Prosecutor v. Bagambiki and Imanishimwe*, Case No ICTR-96-36-I and 36-T, Prosecutor’s Motion for Protective Measures for Victims and Prosecution Witnesses, 3 March 2000, the Chamber modifies Measure (f) which provides that

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any member leaving the Prosecution team remit “all documents and information” that could lead to the identification of protected individuals. Insofar as the term “information” may be understood to include intangibles which cannot be remitted, the Chamber substitutes the words “all materials” for “all documents and information”, as in the aforementioned Decision.

23. Further regarding Measure (f), mindful of its “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses of 22 September 2000”, *Prosecutor v. Bizimungu*, the Chamber modifies part of the Measure by replacing the words “to advise the Trial Chamber and the Applicant in writing of any changes in this team’s composition” with the words “to advise the Trial Chamber of any changes in this team’s composition.”

On Measure (h) of the Motion:

24. Recalling its “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses of 22 September 2000”, *Prosecutor v. Bizimungu*, the Chamber grants the Measure, but modifies it by striking the words “unless the Chamber decides otherwise, pursuant to Rule 69(A) of the Rules.” The Chamber thereby orders the Defence to disclose to the Prosecution the identity of the Defence witnesses no later than twenty-one (21) days before the testimony of said witness.

On Measure (i) of the Motion:

25. Following the jurisprudence in *Prosecutor v. Nahimana*, Case No ICTR-96-11-T, “Decision on the Defence’s Motion for Witness Protection”, 25 February 2000, the Chamber grants the Measure with a modification, insofar as the Chamber orders that the Prosecutor and any representative acting on its behalf shall notify the Defence, and only the Defence, prior to any contact with any protected Defence witness, and that the Defence shall make arrangements for such contacts. Further, and in line with its “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses of 22 September 2000”, *Prosecutor v. Bizimungu*, the Chamber also strikes the words requiring “the presence of the Accused and/or his counsel during the interview.”

On Measures (j) and (k) of the Motion:

26. The Chamber dismisses Measures (j) and (k) insofar as Measure (b) already covers the operational aspects of the protections sought.

On Measure (l) of the Motion:

27. In line with its “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses of 22 September 2000”, *Prosecutor v. Bizimungu*, the Chamber grants the requested Measure, but modifies it by replacing the words “the Trial Chamber designate a pseudonym” with the words “the Defence designate a pseudonym” as, in the opinion of the Chamber, it is the Party’s responsibility to designate a pseudonym. The Chamber further modifies the Measure by striking the words, “until such time as the witness concerned chooses otherwise” because the Chamber alone should determine how long a pseudonym is to be used in reference to witnesses in Tribunal proceedings, communications and discussions between the Parties and with the public.

On Measure (m) of the Motion:

28. The Chamber denies the Measure because, in accord with Measure (l), *supra*, the Defence – and not the Trial Chamber – is responsible for the designation of a pseudonym for each Defence witness.

As to When the Requested Protective Measures Take Effect

29. The Chamber decided, in conformity with the Tribunal's well-established jurisprudence, that protective measures are granted on a case by case basis, and shall take effect only when the particulars and locations of the witnesses have been provided to the WVSS of the Registry.
30. Finally, in line with its jurisprudence in *Prosecutor v. Kajelijeli*, Case No ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses, 3 April 2001, the Chamber recalls that pursuant to Rule 75 of the Rules, the Defence is at liberty to apply to the Trial Chamber to amend the protective measures sought and seek additional measures, when necessary and there is no need for an order to that effect.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS Measures (a), (b), (c), (d), (e), and (g) of the Motion;

MODIFIES Measure (f) and **GRANTS** it as follows:

Orders the Prosecutor to provide the Trial Chamber and the Defence a designation of all persons working with the immediate Prosecution team who will have access to any information concerning Defence witnesses for whom protective measures are sought; orders the Prosecutor to advise the Trial Chamber in writing of any changes in the composition of this team; and orders the Prosecutor to ensure that any members departing from the Prosecution team have remitted all materials that could lead to the identification of the protected witnesses.

MODIFIES Measure (h) and **GRANTS** it as follows:

Prohibits the disclosure to the Prosecutor of the names, addresses, whereabouts of, or any other identifying data which would reveal the identities of these persons, and any information in the supporting material on file with the Registry, until such a time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and allows the Defence to disclose in redacted form any material provided to the Prosecutor until such a mechanism is in place; and requires the Defence to disclose to the Prosecution the identity of the Defence witnesses no later than twenty-one (21) days before the testimony of said witness

MODIFIES Measure (i) and **GRANTS** it as follows:

Orders that the Prosecutor and any representative acting on its behalf, notify the Defence, and only the Defence, prior to any contact with any of the protected Defence witnesses, and that the Defence shall make arrangements for such contacts.



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MODIFIES Measure (l) as and **GRANTS** it as follows:

Orders the Defence to designate a pseudonym for each Defence witness, which will be used whenever referring to each witness in Tribunal proceedings, communications, and discussions between the Parties to the trial and the public.

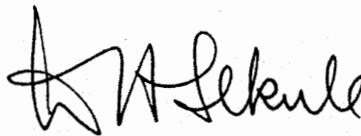
DENIES Measures (j), (k), and (m).

DENIES the Motion in all other respects.

Arusha, 5 September 2002



Winston C. Matanzima Maqutu
Presiding Judge



William H. Sekule



Arlette Ramaroson
Judge