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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ORIGIN. English

**TRIAL CHAMBER III**

Before: Judge Lloyd George Williams, Q.C., Presiding  
Judge Yakov Ostrovsky  
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 24 October 2002

JUDICIAL RECORDS  
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**THE PROSECUTOR**

**V.**

**EMMANUEL RUKUNDO**

**CASE NO. ICTR-2001-70-I**

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

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Office of the Prosecutor:

Silvana Arbia,

Jonathan Moses

Adelaide Whest

Gregory Townsend

Defence Counsel

Philippe Moriceau

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "TRIBUNAL")**

**SITTING** as Trial Chamber III, composed of Judges Lloyd George Williams, Q.C., Presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

**BEING SEISED** of the Prosecutor's "Motion for Protective Measures for Victims and Witnesses" filed 11 December 2001 (the "Motion"), the "Additional Authority in Support of the Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 21 May 2002, and the "Addendum to Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 10 September 2002;

**CONSIDERING** the "Mémoire en Réponse à la Requête du Procureur du 11 décembre 2001" filed 30 May 2002 (the "Response");

**NOW CONSIDERS** the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

**Prosecutor's Submissions**

1. The Prosecutor submits that the persons for whom protection is sought fall into three different categories, all of which require protective measures:

- (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 rights 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. For all these three categories of persons, the Prosecutor requests the following orders:

- a) An Order requiring that the names, relations, addresses, whereabouts and other identifying information described hereinafter, be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses, as well as any other additional witnesses, bear pseudonyms which will be used during the course of the trial;
- b) An Order that the names, relations, addresses, whereabouts and other identifying information described in paragraph 2(a), be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with the established procedure and only in order to implement protection measures for these individuals;
- c) An order requiring that any names, relations, addresses, whereabouts 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 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;

- 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 1, with or 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 Trial Chamber and the Prosecutor a designation of all persons working for the Defence who will, pursuant to the Motion, have access to any information referred to in paragraphs 2(a) through 2(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of the Defence 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 1 above.
- 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, addresses, relations, whereabouts and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any such information in the supporting material on file with the Registry, until twenty-one (21) days before the witness testifies 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, 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;
- m) An Order prohibiting the Accused individually from personally possessing any material which includes, but is 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 Defence Counsel, and instructing the United Nations

Detention Facility authorities to ensure compliance with the prohibition set out in this paragraph.

3. In support of her request, the Prosecutor submits an Affidavit by Alfred Kwende, the Commander of Investigations in the Office of the Prosecutor in Kigali, dated 7 December 2001 and other documents annexed to the Brief to demonstrate that there is a substantial threat to the lives of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed.

### **Defence Response**

4. The Defence submits that, due to delays in translation of the Prosecutor's documents, it has been unable to prepare its response, and requests an extension of time to respond to the Motion.

5. Addressing nevertheless the substance of the Motion, the Defence submits that under Rule 69(A), exceptional circumstances must exist before protection is granted to victims and witnesses. Consequently, such protection must not be used as a pretext to undermine the rights of the Defence. Further, the Defence stresses that Article 21 of the Statute provides for equal protection for all victims and witnesses, whether they are for the Defence or the Prosecution.

6. The Defence alleges that it was served with witness statements which were overly redacted, making them impossible to comprehend. Further, the Defence submits that witnesses cannot be completely anonymous as this would affect their credibility. In the absence of identification and reference to other identifying data of the witness, the Defence would not be able to prepare its case effectively.

7. The Defence submits that the protective measures sought by the Prosecutor should not be applied to all the witnesses, since it is up to the Chamber to assess the appropriate measures to be afforded to each witness on a case by case basis.

8. The Defence opposes the Prosecution's request to reduce to twenty-one (21) days the period of disclosure of the identity of witnesses, as it would be contrary to the Rules and this short period of time would not suffice for the Defence to carry out its investigations properly. Moreover, granting the Prosecution prayer in this respect would render the process inequitable and violate Article 21 of the Statute. The Defence requests the Chamber to maintain the period of disclosure of 60 days prior to the trial, in accordance with Rule 66 (A) (ii).

9. The Defence requests the Chamber to deny the Motion for lack of relevant information which would enable the Chamber to order protective measures adequate for each witness.

### **DELIBERATIONS**

#### *Defence Request for Extension of Time*

10. The Chamber notes that the Defence request of 27 May 2002 for extension of time to file its response to the Prosecutor's Motion was granted by the President of the Tribunal prior to the assignment of this case to Trial Chamber III. The Defence was

then required to file its response by 10 June 2002<sup>1</sup>. To date no such response has been filed. Moreover, since the Defence has been able to fully argue the substance of the Motion in its submissions wherein it was seeking a delay, there is no need to keep the proceedings on hold awaiting further Defence submissions.

*Substance of the Motion*

11. The Chamber recalls that Article 21 of the Statute, supplemented by Rule 69, provides for the protection of victims and witnesses when the circumstances so require. The Chamber is also mindful of Article 20 of the Statute which affords the accused the right to have adequate time and facilities to fully prepare his or her defence. Rule 75(A) states 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 Victims and Witnesses Support Unit, 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”.

12. The Chamber is sensitive to the need to safeguard both the rights of the Accused and the security and privacy of victims and witnesses who may be in danger or at risk. It is with this in mind that the Chamber considers the Motion.

13. In assessing the fear or the safety of witnesses, which constitutes the basis for the protection sought in the instant case, the Chamber adopts the reasoning of the ICTY<sup>2</sup> and other Chambers of this Tribunal<sup>3</sup> requiring an objective basis for the fear which can be expressed by persons other than the witness.

14. To determine the appropriateness of the protective measures sought, the Chamber has evaluated the security situation affecting the concerned witnesses in light of information annexed to the Prosecutor’s Brief. Having considered the objections of the Defence, the Chamber has reviewed the afore-mentioned Affidavit of Alfred Kwende, dated 7 December 2001, which tends to demonstrate the complexity of the security situation in Gitarama Préfecture. The Affidavit emphasises the level of threat in Gitarama and other regions in Rwanda due to the presence and activities of armed infiltrators, composed mainly of elements of *ex-Forces Armées Rwandaises* (EX-FAR) and Interahamwe Militia (in July 2001). As a consequence, potential witnesses experience fear for their lives and have expressed unwillingness to testify, unless appropriate protection measures are put in place by the Tribunal.

15. The Chamber is satisfied that, on the basis of this Affidavit and the other additional information annexed to the Brief, a volatile security situation exists in Rwanda and in neighbouring countries, which could endanger the lives of victims and potential Prosecution witnesses who may be called to testify at trial. The Chamber concludes therefore, that as far as the victims and witnesses living in Rwanda and in

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<sup>1</sup> On 27 June 2002, the Court Management Section informed Mr. Rukundo’s Defence Counsel, through e-mail communication, that the Judge President had granted the Defence a time extension of 2 weeks, requiring him to file his response by 10 June 2002.

<sup>2</sup> *Prosecutor v. Tadic*, IT-94-I-T “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses” (10 August 1995)

<sup>3</sup> *Prosecutor v. Kajelijeli*, ICTR-98-44-I, “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses” (6 July 2000)

neighbouring countries are concerned, there are exceptional circumstances which warrant non-disclosure orders.

16. In relation to witnesses not residing in Rwanda or in neighbouring countries, the Chamber considers that the Prosecutor has not provided evidence of threats to their lives nor has she proposed any explanation whatsoever to justify their protection even under the wide scope of Rule 75. The Chamber is therefore constrained to deny the Prosecutor's request for protection of victims and witnesses not living in Rwanda or in neighbouring countries due to lack of sufficient grounds.

17. Dealing now with the orders sought by the Prosecutor in paragraphs (a), (b), (c), (d), and (i) of the Motion, the Chamber considers that these are normal protective measures which do not affect the rights of the Accused and which accordingly, may be granted as they stand. The Chamber grants also the orders sought in paragraphs (e) and (k), with the understanding that they are not meant to prevent the Defence from carrying out normal investigations to prepare its case, in so far as the investigations are not intentionally designed to reveal the identity of witnesses known to be protected.

18. In relation to paragraph (j), the Chamber takes the view that this request is already covered by the prayer in paragraph (a) which has been granted with the assumption that the pseudonyms are to be applied throughout the Tribunal proceedings. There is therefore no need to grant this order separately.

19. Regarding the Prosecutor's request in paragraph (f) of the Motion, the Chamber finds it to be more suitable if notice of the relevant information is given to the Registry rather than to the Chamber or the Prosecutor, as proposed by the Prosecution. The Chamber therefore, grants this order in an amended form as follows: An order requiring the Defence to provide to the Registry a designation of all persons working on the immediate Defence team who will have access to any information which identifies, or could lead to the identification of any Protected Person and to advise the Registry in writing of any change in the composition of this team.<sup>4</sup> Additionally, the Chamber amends, in the latter half of paragraph (f), the term "all documents and information" to be remitted by any member leaving the Defence team, replacing it with "all materials", because the term "information" can be interpreted to include intangibles, which cannot of course be remitted.

20. In relation to paragraph (g), the Chamber finds the formulation of this measure to be so broad that it would make it difficult to enforce as worded. Consequently, the Chamber grants this measure in an amended form as follows: An order prohibiting the photographing, audio and video recording, or sketching of any Prosecution witness in connection with his or her participation in Tribunal investigations or proceedings, at any time or place without leave of the Trial Chamber.

21. In respect of rolling disclosure requested by the Prosecutor, the Chamber notes the need to strike the balance between the protection of victims and witnesses and the rights of the Accused for a full and unfettered defence. The Chamber recalls that the Defence, pursuant to Rule 66(A)(ii), has already or will receive from the Prosecutor a

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<sup>4</sup> The Chamber is relying on its decision in: *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, 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) p.3 at paragraph 2.

copy of the statements of witnesses intended to be called, at least 60 days prior to the date set for trial. Only the identifying data of those witnesses will be redacted. The Defence will therefore already have some material on the basis of which to prepare, pending the disclosure of un-redacted statements.

22. The Chamber also recalls that the recently amended Rule 69(C) now affords it the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper. There would therefore be no violation of the Rules in ordering a rolling disclosure of the identifying data of witnesses, contrary to the Defence contention. The Chamber does not however propose any time frame for the rolling disclosure at this point in time where the details of the trial are not yet known. Accordingly, the Chamber orders that: the names, addresses and other identifying information of the victims and witnesses, as well as their locations shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further order.

**FOR THESE REASONS, THE TRIBUNAL:**

For the victims and witnesses living in Rwanda and in neighbouring countries:

**GRANTS** the orders requested in paragraphs (a), (b), (c), (d), and (i) of the Motion as they stand;

**GRANTS** the orders requested in paragraphs (e) and (k) within the scope set out in paragraph 17 *in fine*;

**GRANTS** the orders sought in paragraphs (f), (g) and (h) as amended in paragraphs 19, 20 and 22 respectively;

**DENIES** the Motion in all other respects.

Arusha, 24 October 2002



Lloyd George Williams, Q.C.



Yakov Ostrovsky



Pavel Dolenc

Presiding Judge

Judge

Judge

Seal of the Tribunal