

Case No. ICTR-97-21-T

UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

CHAMBER I

ICTR  
CRIMINAL REGISTRY  
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Before: Judge Laïty Kama, Presiding Judge  
Judge Lennart Aspegren  
Judge Navanethem Pillay

Registry: Mr. Antoine K. M. Mindua

Decision of: 13 March 1998

**THE PROSECUTOR**  
versus  
**PAULINE NYIRAMASUHUKO**  
et al.

Case No. ICTR-97-21-T

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**DECISION ON PROTECTIVE MEASURES  
FOR DEFENCE WITNESSES AND THEIR FAMILIES AND RELATIVES**

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The Office of the Prosecutor:

Mr. Udo Gehring

Counsel for the Accused:

Ms. Nicole Bergevin

Leg-97-21-T/Dec/Wit.Protection.



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

SITTING as Trial Chamber I of the Tribunal, composed of Judge Laity Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

HAVING RECEIVED from the Defence Counsel, Ms. Nicole Bergevin, who is assigned to the accused Pauline Nyiramasuhuko (“the accused”) in the present matter, a motion, filed on 4 December 1997, seeking orders for protective measures for defence witnesses and their immediate families,

CONSIDERING Prosecutor’s response, filed 19 February 1998, to the said Defence motion;

HAVING HEARD the representatives of the Prosecutor and of the Defence during the audience of 20 February 1998;

CONSIDERING Articles 20 and 21 of the Statute of the Tribunal (the “Statute”) and Rule 75 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”);

TAKING NOTE of the Decision rendered on 6 March 1997, by the Tribunal on the ‘Extremely Urgent Request made by the Defence for the Taking of a Teleconference Deposition’, in the case The Prosecutor versus Rutaganda (Case No. ICTR-96-3-T), the Decision of 8 September 1997 ordering measures for the protection of Defence witnesses in the case of The Prosecutor versus Ndayambaje (Case No. ICTR-96-8-T) and Decision of 5 November 1997 ordering measures for the protection of Defence witnesses and their families and relatives in the case of The Prosecutor versus Nsengiyumva (Case No. ICTR-96-12-I);

**AFTER HAVING DELIBERATED,**

1. In her motion seeking measures for the protection of ten defence witnesses and their immediate families, the Defence Counsel specifically requests the following eight measures:

“[1] TO ORDER the Defence to communicate to the Witnesses and Victims Support Unit the details relating to its witnesses, so that it may take the necessary measures;

[2] TO ORDER the United Nations High Commissioner for Refugees (UNHCR) to grant the ten potential witnesses hereinabove mentioned refugee status, or any other status that allows them to stay in Kenya or in any other country of their choice, until such time as the Witnesses and Victims Support Unit of the ICTR can put in place an adequate system to ensure their protection;

[3] TO SEEK the co-operation of the Government of Kenya, the UNHCR as well as any other organization that can assist in ensuring the security of the said witnesses; including the guarantee that they will not be detained, or expelled;

[4] TO ORDER that the names of these witnesses, their addresses, whereabouts, as well as any other information which would reveal their identities,

(a) not be divulged to the Office of the Prosecutor;

(b) be kept under seal and not be included in any public record of the Tribunal; or be expunged therefrom where such information exist;

(c) not be disclosed to the public or the media;

[5] TO PROHIBIT the public, or the media from taking photographs, making audio or visual recordings, or sketches of protected witnesses;

[6] TO ORDER that all these measures apply similarly to the families of these witnesses, viz: father, mother, spouse and children;

[7] TO ORDER that the Defence be authorized to use pseudonyms for each of its witnesses before the Tribunal, during discussions between the parties, and at all public hearings;

[8] TO AUTHORIZE the Defence to apply at any time to a Judge, or the Trial Chamber in order to amend, or supplement the protective measures."

2. The Defence submitted in the statement presented in support of the motion that, due to the arrests of two of its potential witnesses in Kenya and the probability of there being further such arrests and that six of its potential witnesses in Kenya are facing a real risk of being repatriated to Rwanda, it was now important that the defence motion be wide enough to cover all potential witnesses to be found in Kenya. During her interviews with all ten witnesses they have confirmed to her that they are very much afraid for the security of the their family members.

3. Although the Prosecutor did raise several arguments in response to the above submissions of the Defence, she did not expressly oppose the request for protections of defence witnesses. The Prosecutor submitted in her written response to the motion as to measure 2 that it is not within the powers of the Tribunal to order the UNHCR or any State whatever to grant refugee status to a witness. Further, she argued that measure 4 must be subject to the condition that the Prosecutor be authorized upon request to obtain the names, addresses and information covered by the protection shortly before trial, so that it can prepare its response to the defence pleas presented by the Defence.

### *The Arguments*

4. The Defence, by its motion sought protective measures for its witnesses and their immediate families. The request for these measures is motivated, *inter alia*, by the threat of arrest in Kenya and the imminent forced repatriation back to Rwanda of potential defence witnesses. The Defence Counsel submitted, in support of these motivations, that:

- two of its potential witnesses have been arrested for some time by the authorities in Kenya, as well as others who have been arrested no less than twice by the same authorities, and released against payment of sums of money to the said authorities;



- other potential witnesses have serious reasons to fear that they will either be deported to Rwanda, or summarily expelled from Kenya.

5. As a consequence of the above, the Defence Counsel asserts that, given the present political climate in Rwanda, the arrest and repatriation of the potential witnesses would greatly prejudice the defence of the accused. Indeed, the Defence Counsel affirmed that the said affected witnesses are most unlikely to turn up for trial, if so arrested and repatriated to Rwanda.

6. The Prosecutor has in general terms recalled as regards witnesses located in Nairobi, that there must be a genuine fear for the security of the witnesses and their families based on objective grounds, and this in accordance with jurisprudence established by this Tribunal.

7. As to this point it is the view of the Tribunal 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.

8. In this case, notice is taken of the United Nations High Commissioner for Human Rights Field Operation in Rwanda Status Report as at 28 August 1997 (HRFOR/STRPT/56/1/28 August 1997/E) and many other concordant reports, issued by various sources. All tend to describe a particularly volatile security situation at present in Rwanda and in neighbouring countries. This volatile security situation appears to be endangering the lives of those persons who may have, in one way or another, borne witness to the events of 1994 in Rwanda.

9. The Tribunal sees the fears of the Defence Counsel as being well founded. Therefore, taking into account the representations of the parties and being aware of the present security situation affecting the potential witnesses, it considers there to be sufficient factual grounds for the protective measures sought by the Defence.

10. The protective measures sought by the Defence concerns anonymity and other protective measures and the Tribunal will deal with these issues separately.

#### *Measures on anonymity of witnesses*

11. By measures 4, 5, 6 and 7 contained in its motion, the Defence seeks anonymity for its potential witnesses and their immediate relatives (father, mother, spouse and children).

12. Pursuant to Rule 75(B) of the Rules, the Tribunal is empowered to order such measures.

13. The Prosecutor submitted, in response to the request of anonymity, *inter alia*, that it should be subject to the condition that the Prosecutor be authorized upon request to obtain the names, addresses and information covered by the protection shortly before trial, so that it can prepare its response to the defence pleas presented by the Defence.



14. On the question of anonymity, the Tribunal takes note of the reasoning of the Trial Chamber in its Decision of 5 November 1997 ordering measures for the protection of Defence witnesses and their families and relatives in the case of The Prosecutor versus Nsengiyumva (Case No. ICTR-96-12-I). It was held therein that for a witness to qualify for protection of his identity from disclosure to the public and media, there must be real fear for the safety of the witness or her or his family, and that there must always be an objective basis to underscore this fear.

15. In the present case, the Tribunal, following this reasoning, and considering the submissions of the Defence and the Prosecutor, is of the opinion that there is sufficient evidence to justify the non disclosure of the identities of the potential witnesses of the Defence. Consequently, it accedes to measures 4, 5, 6 and 7 requested in the motion of the Defence.

16. The protective measures set out below are in accordance with precedents of this Tribunal for the reason of ensuring the same security to all witnesses to appear before the Tribunal.

*Other protective measures*

17. In her written motion the Defence Counsel requested in measure 2 that the Tribunal do issue an order requiring the UNHCR to grant ten potential witnesses refugee status that would facilitate their uninterrupted stay in the host country Kenya or other country of their choice. This status would be maintained until such time as the Tribunal's Victims and Witness Protection Unit puts in place adequate mechanisms for their protection. During the her oral pleading of the motion the Defence Counsel submitted that the Tribunal cannot order neither the UNHCR nor any state to grant refugee status and therefore she requested the Tribunal to solicit the co-operation on the protection of the witnesses.

18. Similarly, by measure 3, the Defence intends that the Tribunal seeks the co-operation of the Government of Kenya, the UNHCR as well as any other organization that can assist in ensuring the security of the witnesses; including the guarantee that they will not be detained, or expelled.

19. The Prosecutor has submitted that the Tribunal does not have jurisdiction under Rule 75 of the Rules to request the UNHCR and States to accord potential witnesses the necessary asylum that would facilitate their stay in those countries. She further contended that the granting of refugee status is beyond the scope of Article 21 of the Statute and Rule 75 of the Rules and is a matter that falls instead within State sovereignty.

20. The Tribunal is aware that it is not empowered to order the UNHCR or any State to grant refugee status to a witness. However, taking into account its above mentioned decisions in the cases of The Prosecutor versus Rutaganda (Case No. ICTR-96-3-T), and of The Prosecutor versus Ndayambaje (Case No. ICTR-96-8-T), the Tribunal is of the opinion that it is mandated to solicit the co-operation of States and the UNHCR in the implementation of protective measures for witnesses.

21. Therefore, in light thereof, the Tribunal accedes to measures 2 and 3 inasmuch as the assistance of the Government of Kenya and the UNHCR be sought in implementing measures



of protection for defence witnesses so as to guarantee the right of the accused, pursuant to Article 20(4)(e) of the Statute, to obtain the attendance and examination of witnesses on her behalf under the same conditions as the witnesses against her.

22. *In fine*, the Defence Counsel requests in measure 8 that it be at liberty to apply to a Judge or a Chamber for amendment or modification of the requested measures or for other related or additional measures. Thereupon, the Tribunal reminds the Defence Counsel that under Rule 75 of the Rules a party may request a Judge or a Chamber to amend or add to any of the aforesaid measures, and therefore does not need to give a specific ruling thereto.

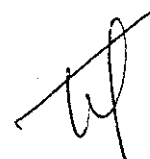
23. In accordance with precedents of this Tribunal, the co-operation with the Government of the Republic of Kenya, the United Nations Organization, including the UNHCR, and any other organization that could be of help in the matter is solicited.

**FOR ALL THE ABOVE REASONS,**

**THE TRIBUNAL**

**HEREBY DECIDES** the following:


1. The Defence Counsel shall furnish the Registrar with all the particulars pertaining to its witnesses, and that appropriate measures as set forth below be taken.
2. The Registrar, after receiving the information concerning the witnesses from the Defence Counsel, shall take all possible measures to ensure the availability of the said witnesses to the Tribunal.
3. The co-operation of the Government of the Republic of Kenya, the United Nations Organization, including the United Nations High Commissioner for Refugees, and any other organization that could be of help in the matter is solicited.
4. The names and identities of the affected potential witnesses shall be forwarded by the Defence to the Registrar only in confidence, and they shall not be disclosed to the media, the public or the Prosecutor until such time as the said witnesses are under the protection of the Tribunal.
5. The Registrar shall not reveal the names and identities of these witnesses either to the Prosecutor, or to any Government, or the media, or the public without the express consent of the Defence.
6. In cases where the names, addresses, locations and other identifying information of the affected defence witnesses appear in the Tribunal's public records, this information shall be expunged from the said records.




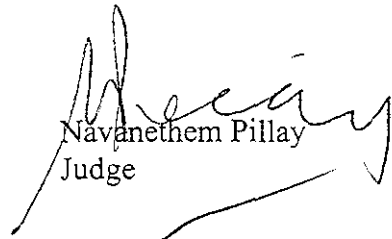
7. The names, addresses, locations and other identifying information of the defence witnesses contained in the supporting materials of the defence shall not be disclosed to the public or media.
8. The public and the media shall not make audio or video recordings or broadcastings and shall not take photographs or make sketches of the defence witnesses who are under the protection of the Tribunal, without its authorisation.
9. The Defence shall be permitted to designate pseudonyms for each of its witnesses for use in the proceedings of the Tribunal, during discussions between the parties, in public and official proceedings.
10. The affected potential witnesses whose particulars have been forwarded by the Defence to the Registrar shall be considered, for all intents and purposes, under the protection of the Tribunal.
11. These protective measures above be extended to the potential witnesses' immediate family members (father, mother, spouse and children only);

**DIRECTS** the Registrar to execute this decision immediately and to report back to the Chamber I on its implementation.

Decision of 13 March 1998  
Signed: Arusha 20 March 1998

  
Laity Kama  
Presiding Judge

  
Lennart Aspegren  
Judge

  
Navanethem Pillay  
Judge

