

ICTR-97-21-T  
27/02/2001  
(7375-7371)

7375  
ambgs



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding  
Judge William H. Sekule  
Judge Mehmet Güney

Registrar: Agwu U. Okali

Date: 27 February 2001

JUDICIAL RECORDS/ACTES  
REÇUS  
ICTR  
2001 FEB 27 P 5:38

THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO

And

Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

DECISION ON THE PROSECUTOR'S MOTION TO RE-FILE MOTION TO  
ORDER PROTECTIVE MEASURES FOR THE VICTIMS AND WITNESSES

The Office of the Prosecutor:

Japhet Mono  
Ibukunolu Alao Babajide  
Manuel Bouwknecht

Counsel for Nyiramasuhuko:

Nicole Bergevin  
Guy Poupart

Counsel for Ntahobali :

René Saint Léger  
Michael Bailey

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: <i>Dr. MINDUA K. - M. Antoine</i>
SIGNATURE: <i>[Signature]</i> DATE: <i>28.02.2001</i>

*[Handwritten signature]*

27.02.2001

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

SITTING as Trial Chamber II (the "Chamber"), composed of Judge Laïty Kama, presiding, Judge William H. Sekule, and Judge Mehmet Güney;

BEING SEIZED of the "Motion to re-file motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in Indictment No. ICTR-97-21-I", filed on 15 November 2000 (the "Motion");

WHEREAS the Prosecutor filed on 11 December 1997 a "Motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in the Indictment No. ICTR-97-21-I" (the "original Motion", Annex I to the Motion), a Brief (Annex II to the Motion) and an Affidavit of Mr. Olsen (Annex III to the Motion) in support of the said Motion;

WHEREAS former Counsel for Ntahobali filed a reply to the original Motion on 20 February 1998 (Annexes IV and V to the Motion);

WHEREAS Trial Chamber I composed of Judge Laïty Kama, Judge Lennart Aspegren and Judge Navanethem Pillay heard the Parties on the said original Motion on 20 February 1998 but that, despite these proceedings, no decision could be found to date in the judicial record of the Tribunal, pertaining to that matter;

WHEREAS, acting on the instruction of the Chamber, Court Management Section advised the Parties on 24 November 2000 that the Motion would be reviewed on briefs only, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"), and informed Counsels for the Defence of the setting of a 10 days deadline to reply to the Motion;

CONSIDERING the Response, to the Prosecutor's Motion seeking an order for protective measures in respect of victims of witnesses, by Pauline Nyiramasuhuko filed on 28 November 2000, (the "Reply");

NOTING that Counsel for Ntahobali did not file any reply to the Motion;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules, specifically Articles 19 and 21 of the Statute and Rules 69 and 75 of the Rules;

**SUBMISSIONS OF THE PARTIES**

***The Prosecutor***

1. As a preliminary matter, the Prosecutor requests the Chamber to consider the Motion to re-file the original Motion for protective measures for victims and witnesses, and then moves for the Chamber to adopt the original Motion, so as to issue the protective orders requested therein, on the basis of supporting documents dating from the time when it was originally filed, that is in 1997.



2. The Prosecutor then requests the Chamber to adopt the Prosecutor's original Motion and to decide on the original Motion.

3. In the original Motion (Annex I to the Motion), the Prosecutor submitted that Rule 69(A) of the Rules provides for the security of the victims and witnesses and allows an application before the Chamber to order the non disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

4. The Prosecutor put an emphasis on the prominent political role held by the Accused Pauline Nyiramasuhuko and her potential influence in Rwanda upon FAR infiltration and upon the return of former Interahamwe to Rwanda.

5. The Prosecutor submitted, in the Brief in support of the original Motion (Annex II to the Motion), that according to a number of concordant United Nations and Human rights reports dated November 1997, there had been at the time, an increase in the acts of violence against genocide survivors and witnesses. Certain witnesses had been killed for their alleged co-operation with the Tribunal, and others had refused to attend trials after receiving threats.

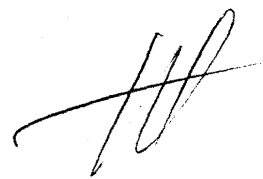
6. The Prosecutor refers to the Affidavit of Oyvind Olsen, Commander of Investigations at the Office of The Prosecutor in Kigali, to underscore the necessity for protective measures for potential witnesses due to the degrading security situation in Rwanda as of November 1997 (Annex III to the Motion).

7. Finally, the Prosecutor submitted that the protective measures would not be extended to all witnesses but to those who are genuinely in need of protection "due to the insecurity prevailing in Rwanda and in view of the specific requirements of the present case". These witnesses would be those residing in Rwanda, unless they waive their right to protection (Category A), or any person residing outside Rwanda but likely to be called to testify, including those who were interviewed during the examination in Belgium, or whose name appear in the Belgium records, who have expressed fear for their safety (Category B) as defined in the Brief (Annex II to the Motion). This definition of Category B of the witnesses is more precise than the one mentioned at paragraph 12 of the original Motion (Annex I to the Motion) which refers broadly to "any person residing outside Rwanda [...]" likely to be called as a prosecution witness and who has expressed fear for his or her safety.

#### ***The Reply from Nyiramasuhuko***

8. The Defence for Nyiramasuhuko does not object to the filing, *de novo*, of the Prosecutor's motion seeking protective measures for witnesses under the circumstances even if the said motion is supported by documents dated over three years ago. The Defence submits that there has been, on the contrary, no sign of improvement of the security situation in Rwanda since then.

9. Due to the exceptional circumstances of the case, the Defence raises no objection to the issuance of protective measures for all potential Prosecution witnesses.



**AFTER HAVING DELIBERATED**

***On the admissibility of the filing de novo of the original Motion (Annex I to the Motion)***

10. The Chamber notes the specific circumstances of the case whereby the Prosecutor's original Motion asking for protective measures for victims and witnesses was filed over three years ago and a hearing was subsequently held by former Trial Chamber I on 20 February 1998 as proved by the transcripts. Nevertheless, due to unexplained circumstances, a decision on the matter cannot be found in the judicial record of the Tribunal.

11. Considering that these circumstances qualify as exceptional and, taking into account that Defence counsel raised no objection to the Prosecutor's Motion, the Chamber grants leave to the Prosecution to file a motion for protective measures for victims and potential witnesses.

***On the evidence adduced in support of the original Motion for protective measures (Annex I to the Motion).***

12. The Chamber notes that the evidence adduced in support of the description of the security situation in Rwanda as annexed to the original Motion is more than three years old. For instance, an Affidavit (Annex III to the Motion) describes the complexity of the situation in Rwanda and a global instability supporting the view that this precarious security situation could endanger the lives of the witnesses called to testify at trial as assessed in November 1997.

13. The Chamber notes that, in response to the Motion, the Defence for Nyiramasuhuko acknowledged that it is most unlikely that the said security situation in Rwanda has changed for the better since reports describing the security situation in 1997.

14. However, on the need to demonstrate the existence of exceptional circumstances, the Tribunal has required that the Parties provide updated evidence when seeking the granting of these protective measures, in *inter alia*, the matter of the *Prosecutor versus Ntagerura*, case No. ICTR-96-10A-I on 27 June 1997, and has recalled this principle in the Decision of 3 March 2000 in the *Prosecutor versus Bagambiki and Imanishimwe*, case No. ICTR-97-36-T.

15. The Chamber concurs with the findings of the Decision of 13 December 2000 in the *Prosecutor versus Nteziryayo*, Case No. ICTR-97-29-T, whereby the Defence motion for protective measures for witnesses was dismissed on the ground, *inter alia*, that insufficient evidence was brought in support of the motion and that the material annexed to the motion demonstrated a series of incidents that occurred back in 1996, and that the Defence had thereby failed to demonstrate that such a security situation was still prevailing at the date of the decision.



***On the categories of protected witnesses referred to in the original Motion (Annex I to the Motion) and in the Brief in support (Annex II to the Motion)***

16. The Chamber notes that the definition of Category B of potential witnesses varies between the original Motion (Annex I to the Motion) and the Brief in support of the Motion (Annex II to the Motion) and seeks clarification as to the definition of these categories of potential witnesses in relation to their location in the new motion to be filed.

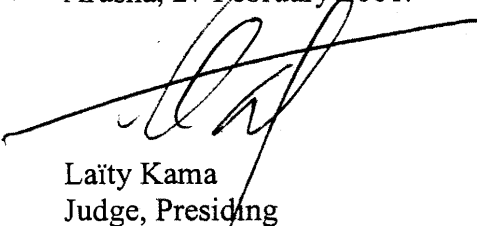
17. On the degree of particularity, the Chamber wishes to recall that in the Decision of 13 December 2000 in the *Prosecutor versus Nteziryayo*, Case No. ICTR-97-29-T, the Chamber noted that the Defence had relied upon supporting evidence found by a Prosecutor's investigator in a particular Commune in Rwanda but that the Defence had failed to indicate in which region of Rwanda would be residing Defence witnesses. Consequently, the Chamber decided that the Defence could not base its request solely on the statements by the investigators, all the more considering that they were out of date.

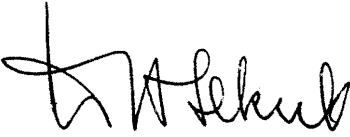
**CONSIDERING** the exceptional circumstances of the case and having admitted the Prosecutor's preliminary request to re-file a motion, the Chamber therefore directs the Prosecutor to file anew, a motion on protective measures for victims and witnesses with updated elements or documents in support of the measures requested for the witnesses she intends to call at trial, demonstrating that the security situation could constitute exceptional circumstances and bearing in mind the need to clarify the categories of these potential witnesses, depending on their location.

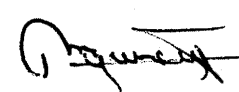
**THE TRIBUNAL**

**DIRECTS** the Prosecutor to file anew a motion on protective measures for victims and potential witnesses with supporting documents, **no later than 7 days from the date of this Decision.**

Arusha, 27 February 2001.

  
Laity Kama  
Judge, Presiding

  
William H. Sekule  
Judge

  
Mehmet Güney  
Judge

