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ICTR-97-21-T  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Arlette Ramarosan  
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 1<sup>st</sup> March 2005

**The PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO**  
Case No. ICTR-97-21-T  
Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS/ARCHIVES  
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**DECISION**

**ON NYIRAMASUHUKO'S STRICTLY CONFIDENTIAL *EX-PARTE* - UNDER SEAL - MOTION FOR ADDITIONAL PROTECTIVE MEASURES FOR SOME DEFENCE WITNESSES**

**Office of the Prosecutor**

Ms. Silvana Arbia  
Ms Adelaide Whest  
Ms Holo Makwaia  
Ms Adesola Adeboyejo  
Mr Cheikh T. Mara  
Ms Altea Alexis  
Mr Michael Adenuga  
Ms Astou Mbow, Case Manager

**Defence Counsel**

Ms. Nicole Bergevin  
Mr. Guy Poupart

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

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

**BEING SEISED** of Nyiramasuhuko’s Strictly Confidential *Ex Parte* – Under Seal - Motion for Additional Protective Measures for Some Defence Witnesses (Article 21 and Rules 54, 69 and 75), filed on 19 January 2005 (the “Motion”);<sup>1</sup>

**NOTING** that, being *ex parte*, the Motion was not served to the Prosecution or any other Party in the case;

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the matter, pursuant to Rule 73 (B), on the basis of the *ex parte* written submissions of the Defence only.

### **SUBMISSIONS OF THE DEFENCE**

1. After recalling the Decisions rendered on 13 March 1998 and 20 March 2001 regarding witness protection, which ordered disclosure of witnesses’ identifying information no later than 21 days before their appearance, the Defence submits that some Defence witnesses have expressed fear for their security despite existing protective orders, should they come to testify.
2. The Defence submits that all witnesses mentioned in the Motion are informed of previous attempts made by the Rwandan authorities to have defence witnesses arrested and extradited to Rwanda, in particular in November 2003 in the *Ndindabahizi* case; they also know about the recent disappearance of a Defence witness in the *Simba* case. They therefore fear for their security.
3. The Defence makes the following submissions regarding witnesses it wishes to be granted additional protective measures:
  - Defence Witness WJN occupied an important position in Rwanda during the events of April-July 1994. He fears to be arrested and fears for the security of his close family, presently refugee in a country of southern Africa, as well as other members of his family who are still in Rwanda. He also fears for potential reprisals against him and his family, after his testimony and when the ICTR protection stops. The Defence submits that Defence Witness WJN has important information and that it would be in the interest of justice to hear his testimony. The Defence announces that his Will-Stay Statement is annexed to the Motion, when it is not;
  - Defence Witness BK refuses to come to the ICTR because he fears to be arrested by the OTP and by the Rwandan authorities. Defence Witness BK occupied an important position in Rwanda in 1994. He fears for the security of his immediate family, currently refugee in an African country, and other members of his family who are still

<sup>1</sup> The Motion was originally filed in French and entitled : “Requête strictement confidentielle *ex parte* sous scellés, de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à décharge”.

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in Rwanda. He also fears for potential reprisals against him and his family, after his testimony and when the ICTR protection will be over. BK currently lives under a false identity in an African country. He took this identity when he was a refugee in Congo in 1994-1995, because the RPF was tracking the former authorities and their family in Hutu refugee camps. After Congo, BK went to Tanzania in 1996, where the authorities returned Rwandan refugees by force to where the authorities returned Rwandan refugees by force to Rwanda, where they were either killed, tortured or imprisoned. The Defence annexes to the Motion a Report of the organization Amnesty International, which is entitled "Rwanda: Refugees must be protected". Defence Witness BK fled to an African country via Burundi and lives there under his false identity. He still fears to be arrested and returned by force to Rwanda. The Defence submits that the false identity of the witness does not affect his credibility, but is necessary for his life and the life of his family. Defence Witness BK has important information and it would be in the interest of justice to hear his testimony. The Defence announces that his Will-Say Statement is annexed to the Motion, when it is not;

- Defence Witness BN also occupied an important position in Rwanda in 1994 and fears to be arrested by the OTP or the Rwandan authorities. He also fears for the security of his immediate family, who has taken refuge in an African country, as well as other relatives who are still in Rwanda. He fears for reprisals against him and his family after his testimony and when the ICTR protection will be over. Defence Witness BN has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
- Defence Witness NEM refuses to come to Arusha, because his testimony charges a Rwandan authority and he fears to be abducted, killed or extradited to Rwanda. He also fears to be extradited from the African country where he has requested the refugee status as a Burundian citizen. The Defence submits that the false information provided to the national authorities about his nationality does not affect his credibility, but was a necessity. NEM was detained, tried and acquitted in Rwanda for genocide. However, he fears to be re-arrested because his acquittal was challenged and members of the population are still accusing him. NEM fears for his security and the security of his relatives who are still in Rwanda. Defence Witness NEM has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
- Defence Witness WBKP refuses to come to Arusha, because his absence would be noticed by his wife, who is Tutsi and threatens to divorce if he testifies on behalf of the Defence. WBKP could testify from Brussels, where he currently lives, without his wife knowing about his testimony. WBKP has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
- Defence Witness WLNA was very close to one Prosecution Witness. WLNA gave false information on his nationality and identity to the Immigration authorities of the African country where he currently lives in order to be allowed in the country. He is living there with his family. WLNA does not want the ICTR to reveal his true particulars, but he is ready to reveal his identity and nationality in closed session. The Defence submits that the false information on his identity and nationality does not affect his credibility, but were necessary for his life and the life of his family. WLNA has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;

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- Defence Witness WLMF is in the same situation as Defence Witness WLNA. He has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
  - Defence Witness MAC left the African country where she lived alone and was a refugee, when she heard about enforced repatriation. She followed members of her family in another African country, unknown to the immigration authorities to avoid being forced to live in a refugee camp and because she feared to be sent back to Rwanda. MAC is 50 years old and ill. MAC has important information and it would be in the interest of justice to hear her testimony. Her Will-Say Statement is annexed to the Motion.
  - Defence witnesses WBNC, WHNC, WFMG, WBUC, WBND, WBNM and WLMF are all members of the Accused family who were present at Ihuriro Hotel between April and July 1994. The Defence was not able to meet these people before 31 December 2004. Those witnesses are currently met by Co-counsel for the Accused. Their will-say statements will be disclosed to the parties 21 days before their testimony, as fixed by the Chamber, but their will-say statements cannot be added to the Pre-Defence Brief, because their testimony would clearly identify them. Their will-stay statements are not annexed to the Motion.
4. Summarizing the relevant applicable law, case-law and the former decisions rendered in the present case, the Defence submits that Rwanda remains a very dangerous country for Hutu who are “voluntarily” repatriated there. The Defence relies on a Report made by the organization Amnesty International, which is annexed to the Motion.
  5. The Defence submits that the right of the Accused to have a fair trial is one of the elements to consider in ordering protective measures for witnesses. Therefore, these protective measures should *a fortiori* be granted when they are requested by the Defence, because they cannot jeopardize the right to have a fair trial.
  6. The Defence further submits that, for a proper defence to be granted, the identity of Defence witnesses must be protected. The outcome of the trial depends on the capacity and willingness of witnesses to testify. The Defence submits that it is particularly true as regards witnesses who occupied an important position in their country and/or possess sensitive information. The disclosure of the identity of the enumerated witnesses several days before their testimony creates actual and serious risks that they should not face. The Defence submits that the Witnesses and Victims Support Section (WVSS) informed the Counsel that, once the identity of the witnesses is disclosed, it could not guarantee that their identity would not be revealed to third persons, in particular the Rwandan authorities. The Defence’s purpose is not to accuse anybody within the OTP, but to underline the actual risk that information on the identity of the witnesses be revealed to third persons, as it occurred in November 2003 in the *Ndindabahizi* case.
  7. The Defence submits that, in the *Blaskic* and *Delalic* cases, the ICTY authorized the Defence to disclose the identity of its witnesses only seven open days before their testimony. In the *Milosevic* case, the Prosecution was authorized to disclose the identity of some witnesses possessing sensitive information to the Accused only ten days before their testimony.
  8. Therefore, considering the situation of Defence Witnesses WJN, BK, BN, NEM and WBKP, the Defence requests that their identity be disclosed to the Prosecution on the



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very day of their testimony only. This measure is the only one limiting to the minimum the risk that their identity be disclosed to third persons. The Defence submits that the information detained by those witnesses is crucial for the manifestation of truth, and that this type of witnesses never appear before the ICTR because safety risks.

9. The Defence submits that the exceptional circumstances described as regards Defence Witnesses WJN, BK, BN, NEM and WBKP meet the criteria for the organization of their testimony by way of video-link. In support of this request, the Defence relies on the Decision rendered by Trial Chamber I on 8 October 2004 in the *Bagosora et al.* case, which ruled that a request for testimony by means of video-link should be considered under the "interests of justice" standard set forth in the *Nahimana et al.* case, namely taking into account such considerations as the materiality of the testimony, the complexity of the case, the prejudice to the Defence including elements of surprise, on-going investigations, and replacement and corroboration of evidence.
10. The Defence further submits that the exceptional circumstances described as regards Defence Witnesses WJN, BK, BN and NEM meet the criteria for maximal protection measures and therefore requests, beyond other protective measures, the alteration of their image and voice during their testimony. The Defence submits that such measures were used in several cases before the ICTY.
11. At last, the Defence submits that Defence Witnesses WJN, BK, BN and NEM and their family live in very precarious conditions in refugee camps, which make them particularly vulnerable to retaliation and murder. The Defence reminds that Mr Seth Sendashonga, was murdered in Nairobi by RPF agents a few days before his testimony in the *Kayishema/Ruzindana* case and submits that there is a high risk that the mentioned witnesses be killed as well. The Defence submits that a Chamber can order a State to arrest a person and it can, pursuant to Article 28 of the Statute, order a State to welcome a person if necessary. Such measures are taken by some European and North-American tribunals. In some instances, a new identity is also granted to the re-installed witness. The Defence believes that such measures were used for Prosecution Witness ZC who testified in the *Media* and *Military I* cases. The Defence submits that Defence Witnesses WJN, BK, BN and NEM meet the criteria for their relocalisation, together with their family, in a European country after their testimony.
12. Therefore, the Defence prays the Chamber to grant the following additional measures for the protection of the mentioned Defence witnesses:
  - To order that, should the Motion and its annexed be translated, the Motion be translated by a person chosen by the Defence and paid by the Registry;
  - To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he currently lives or any other authorities, that Witness NEM declared that he was Burundian when he is actually Rwandan;
  - To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where she currently lives or any other authorities, that Witness MAC never presented herself to the national authorities of that State;



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- To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where they currently live or any other authorities, that Witnesses WLNA and WLMF gave false information on their identity and nationality to the authorities of that country;
- To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he currently lives or any other authorities, that Witness BN gave false information on his identity;
- To order that the identity of Witnesses WJN, BK, BN, NEM, and WBKP not be disclosed to the Prosecution and to other Parties in the case before the very day of their testimony;
- To order that the information contained in the will-say statements of Witnesses WJN, BK, BN, NEM and WBKP remain redacted until the day of their testimony;
- To order that witnesses WJN, BK, BN and NEM testify by video-link from Paris or Brussels;
- To order that Witness WBKP testify by video-link from Brussels;
- To order that appropriate measures be used to alter the face and the voice of Witnesses WJN, BK, BN and NEM;
- To order that Witnesses WJN, BK, BN and NEM be localised with their family in an European country.

#### DELIBERATIONS

13. The Chamber recalls that all Parties are, pursuant to Article 20(1) of the Statute, equal before the Tribunal<sup>2</sup> and that the Chamber must take appropriate measures to ensure that the truth is ascertained in a fair and expeditious trial.<sup>3</sup>
14. The Chamber also notes that, since the filing of the Motion, the Defence has disclosed the will-say statements of Witnesses WBNC, WHNC, WFMG and WBND in its revised Pre-Defence Brief filed on 31 January 2005 without the additional protective measures requested in the Motion. Consequently, the Chamber considers the Motion moot as regards Defence Witnesses WBNC, WHNC, WFMG and WBND.

#### *Applicable Law*

15. Pursuant to Article 21 of the Statute:

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

16. Accordingly, Rule 69 states:

<sup>2</sup> See *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Motion for the Protection of Defence Witnesses(TC), 6 October 1997; *Prosecutor v. Bagambiki et al.*, ICTR-97-36-T, Decision on the Defence Motion for the Protection of Witnesses(TC), 30 September 1998.

<sup>3</sup> See ICTY, *Prosecutor v. Blaskic*, IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements(TC), 3 September 1998.

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- (A) 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.
- (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.
- (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.

And Rule 75(A) further states:

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.

17. The Chamber recalls the 13 September 1999 Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr Bernard Ntuyahaga, rendered in the *Prosecutor v. Bagosora* case:<sup>4</sup>

To grant protective measures to a witness, pursuant to Rule 75, the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. See *Prosecutor v. Tadic*, Case IT-94-1-T (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses)(10 August 1995).

18. In addition to those three criteria, some decisions rendered by the Tribunal or the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") have mentioned additional criteria, such as the fact that there must be no *prima facie* evidence that the witness is untrustworthy,<sup>5</sup> the length of time at which the identity of the victims and witnesses must be disclosed to the Parties,<sup>6</sup> the fact that the Parties must be in a fair position to confront the witness,<sup>7</sup> the lack of efficient witness protection program<sup>8</sup> and

<sup>4</sup> *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28.

<sup>5</sup> ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (TC), 10 August 1995, para. 64; ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Partly Confidential and *Ex Parte* Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69 (TC), 19 February 2002, para. 25.

<sup>6</sup> ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7.

<sup>7</sup> *Prosecutor v. Nahimana*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001, para. 35; *Prosecutor v. Karemera*, ICTR-98-44-I, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure (TC), 20 October 2003, para. 13.

<sup>8</sup> *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66(C), 69(A) and 75 (TC), 5 June 2002, para.29; ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69 (TC), 19 February 2002, para. 25.

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others. It is the view of the Chamber that, while keeping these additional criteria in mind, the Motion shall be determined on the basis of the three principal above-mentioned criteria.

19. The Chamber recalls that the burden of proof for the fulfilment of the applicable criteria lies with the Party requesting additional protective measures. As stated in the 8 October 2004 Decision rendered in the *Military I* case:<sup>9</sup>

[T]he applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness' security.

20. The Chamber will consider the three above mentioned criteria and determine whether the Defence has demonstrated that they are fulfilled for each and every witness for whom additional protection is requested. The Chamber notes that the third criterion is relevant to the choice of protective measures to apply to those witnesses who fulfil the first two criteria. Therefore, the Chamber will first apply the first two criteria to determine whether the witnesses are eligible to additional protective measures and, secondly, will apply the third criterion to determine which protective measures shall be applied to them.

#### *Relevance and Importance of the Testimony*

21. The jurisprudence of both Tribunals holds that, for special protective measures to be granted to a witness, his or her testimony must be relevant and important to the case of the requesting Party. As stated in the 10 August 1995 Decision rendered by the ICTY in the *Tadic Case*:<sup>10</sup>

[T]he testimony of the particular witness must be important to the Prosecutor's case: '[T]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it.' (*R. v. Taylor*, Ct. App. Crim. Div. 22 July 1994). In this respect, it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical.

22. The Chamber notes that the Defence has annexed will-say statements of some witnesses for whom additional protection is sought. On the basis of the annexed will-say statements, the following distinction can be made:

- Defence Witnesses MAC, NEM and WLMF are expected to testify on facts they say they have directly seen and which are directly connected to the Accused;
- Defence Witness WLNA says that he was in close relation with a Prosecution Witness;

<sup>9</sup> *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 8; see also *Prosecutor v. Rutaganda*, ICTR-96-3-T, Decision on the Urgent Motion Filed by the Defence for the Immediate Transfer and Appearance of a Detained Witness, Froduald Karamira (TC), 26 March 1998, para.7-10; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para.19; ICTY, *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on Motion by Prosecution for Protective Measures (TC), 3 July 2000, para. 16-17.

<sup>10</sup> ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 63; See also *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 29.



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- The expected testimonies of Defence Witnesses BN and WBKP are limited to the general background of the Rwandan situation in 1994 and make no mention of any specific element related to the acts and conduct of the Accused.
23. It is the view of the Chamber that the relevance of Defence Witnesses MAC, NEM, WLMF and WLNA cannot be disputed. As regards the expected testimonies of Defence Witnesses BN and WBKP, the Chamber considers that the Defence is free to design its strategy and that, since the elements contained in the expected testimonies of these witnesses present some relevance and some importance to the Defence case, the criterion is fulfilled.
24. The Chamber further notes that, for other witnesses, namely BK, WBNM, WBUC and WJN, additional protection is requested without any will-say statements being disclosed to the Chamber. The will-say statements of Witnesses BK and WJN are said to be annexed to the Motion, but are not. The Defence submits that it lacked time to contact Witnesses WBNM, WBUC and WLMF and that their will-say statements will be disclosed to the Parties 21 days before their appearance; the Defence only submits that those witnesses are family members of the Accused who were present at the Ihuriro Hotel in Butare between April and July 1994. However, the will-say statement of Witness WLMF is annexed to the Motion and it does not appear that this witness was a family member of the Accused or that he stayed at Ihuriro Hotel between April and July 1994.
25. Failure to provide the Chamber with the will-say statements of those witnesses prevents the Chamber from assessing the relevance and importance of their testimonies. It results that the Defence has failed to demonstrate the relevance and importance of the testimonies of Witnesses BK, WBNM, WBUC and WJN and that the first criterion for the application of additional protective measures is not met. Since the first two criteria are cumulative, it is the view of the Chamber that there is no need for further determination on the fulfilment of the second criteria for these witnesses who are not eligible to additional protective measures. The Chamber therefore denies the Motion as far as Witnesses BK, WBNM, WBUC and WJN are concerned.

*Real Fear Underscored By an Objective Basis*

26. The Chamber now considers the second criterion to Defence Witnesses BN, MAC, NEM, WBKP, WLMF and WLNA. As mentioned in the above-cited *Bagosora* Decision of 13 September 1999, subjective fear is insufficient and must be underscored by objective considerations. In the *Prosecutor v. Milosevic* case, the ICTY further ruled:<sup>11</sup>

[F]ears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk.

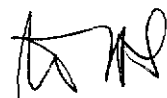
27. The Chamber recalls that the security situation of witnesses for whom additional protection is sought, as submitted by the Defence, can be summarized as follows:
- Witnesses BN and NEM fear to be arrested by the Office of the Prosecutor (the "OTP") or the Rwandan authorities, fear for the security of their family and fear reprisals once the protection provided by the Tribunal ends;

<sup>11</sup> ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002, para. 7.

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- Witnesses NEM, WLNA and WLMF have given false information on their particulars to the authorities of the State where they are currently living and fear that their coming to the Tribunal or the disclosure of their identity may reveal the irregularity of their situation to those national authorities;
  - Witness MAC did not declare herself to the authorities of the State where she lives;
  - Witness WBKP fears that his wife may divorce him if he testifies.
28. In support of the fear of Witnesses BN and NEM for their security and the security of their family, especially the risk of retaliation, the Defence submits that the witnesses are aware of a former attempt to arrest a defence witness in the *Ndindabahizi* case, that they are also aware of the recent disappearance of a defence witness in the *Simba* case and produces in annex to the Motion a 2004 Report of Amnesty International on the protection of Rwandese refugees in the Great Lakes region. The Chamber considers that those elements constitute an objective basis underscoring the fears expressed by those witnesses that their security or the security of their family may be threatened, should they come to testify.
29. As regards the fear to be arrested by either the OTP or the Rwandan authorities expressed by Witnesses BN and NEM, the Chamber notes that it results from the will-say statements of Witnesses BN and NEM that they held important positions in Rwanda in 1994 and that their fear therefore appears to be justified. The Chamber further notes that this risk is objectively underscored by the report of Amnesty International annexed to the Motion. However, the Chamber recalls the Parties that, as stated in the 13 September 1999 Decision in the *Bagosora* case:<sup>12</sup>
- [T]he phrase “in danger or at risk” does not include being subject to lawful acts of a State, e.g., prosecution. For a person to be in danger or at risk, the threat must be of an unlawful act.
30. Therefore, the Chamber considers that the risk to be legally arrested and/or prosecuted is out of the scope of protective measures, with the limited exception of the granting of safe-conduct. This exception is discussed below.
31. In support of the fear of Witnesses MAC, NEM, WLMF and WLNA as regards their irregular situation on the territory of the State where they currently live, the Defence produces no element supporting those assertions. In particular, the Defence does not provide any document permitting to verify the genuineness of their alleged current situation. The sole assertions by the Defence Counsel do not constitute evidence and the Chamber notes, in particular, that those assertions are not even reflected in the will-say statements of the witnesses. The Chamber therefore considers that the Defence has failed to adduce evidence of the situation of Witnesses MAC, NEM, WLMF and WLNA on the territory of the States where they currently live.
32. Moreover, would those assertions be supported by evidence, it is the view of the Chamber that, as stated in the above-mentioned Decision of 13 September 1999 in the *Bagosora* Case, the risks connected to the illegal situation of the witnesses on the territory of a State are risks of “being subject to lawful acts of a State” and are no ground for protective measures. The Chamber finds that there is no measure within its power that would be

<sup>12</sup> *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Bernard Ntuyahaga (TC), 13 September 1999, para. 34.



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appropriate to prevent such a risk. For the foregoing reasons, the Chamber is not satisfied that this threat fulfils the second criterion for the application of additional protective measures.

33. As regards the fear expressed by Witness WBKP that his wife may divorce him if he comes to testify, the Chamber similarly notes that the Defence produces no element underscoring this fear. In any event, the Chamber considers that the marital situation of the Witness and the threat to get divorced could not be considered as sufficient ground for additional protective measures. Consequently, in the view of the Chamber, Witness WBKP does not meet the second criterion for the application of additional protective measures.
34. For the foregoing reasons, the Chamber considers that the Defence has failed to demonstrate that the testimonies of Witnesses BK, WBNM, WBUC and WJN were sufficiently relevant and important to the Defence case to justify the application of additional protective measures. The Chamber further considers that the Defence has also failed to demonstrate that Witnesses MAC, WBKP, WLMF and WLNA are confronted with objective risks for their security or the security of their family. The Chamber finds that Witnesses BN and NEM are the only witnesses who meet the criteria for the application of additional protective measures.

*Strictly Necessary Protective Measures*

35. The Defence prays the Chamber to apply the following protective measures to Witnesses BN and NEM:
- (i) To order that, should the Motion and its annexed need to be translated, the Motion be translated by a person chosen by the Defence and paid by the Registry;
  - (ii) To order the Prosecution and other parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he lives or any other authorities, that Witness NEM declared that he was Burundian when he was Rwandan;
  - (iii) To order that the identity of Witnesses BN and NEM be not disclosed to the Prosecution and to other parties in the case before the very day of their testimony;
  - (iv) To order that the information contained in the will-say statement of witnesses BN and NEM remain redacted until the day of their testimony;
  - (v) To order that witnesses BN and NEM testify by video-link from Paris or Brussels;
  - (vi) To order that appropriate measures be used to alter the face and the voice of witnesses BN and NEM;
  - (vii) To order that witnesses BN and NEM be reinstated with their family in an European country.
36. As regards measure (i), the Chamber reminds the Defence that, pursuant to Rule 32 of the Rules and Article 7 of the Directive for the Registry of the International Criminal Tribunal for Rwanda – Judicial and Legal Services Division, staff members of the Registry are bound by a Solemn Declaration made before commencing their duties not to reveal any non-public information which they have access to in the course of the work



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performed on behalf of the Tribunal. This duty of confidentiality is specifically recalled as regards interpreters and translators in Rule 76 of the Rules. In accordance with Rule 3(E) of the Rules, the translation of the working languages is under the responsibility of the Registrar. Therefore, the Chamber sees no basis to order a measure such as measure (i).

37. As regards measure (ii), the Chamber repeats its finding that the Defence failed to provide the Chamber with evidence that Witness NEM was at risk on the territory of the State where he currently lives. Therefore, the Chamber sees no ground for the requested measure to be granted.
38. As regards measures (iii) and (iv), the Chamber is aware that short time-limits for disclosure of the identity of witnesses and non redacted statements have been previously granted before the ICTY. In its 3 September 1998 Decision rendered in the *Prosecutor v. Blaskic* case, the Chamber ordered the Defence to disclose to the Prosecutor the names and identifying information of witnesses, as well as the summary of all facts about which they would testify, at least seven (7) days prior the date of their appearance.<sup>13</sup> In the 18 June 2002 Decision rendered in the *Prosecutor v. Milosevic* case, the Prosecution was granted its request to delay the disclosure to ten (10) days before the appearance of the witness.<sup>14</sup>
39. However, in the present case, the Chamber notes that the fear for which those measures are aimed at preventing, namely the risk of pressure or retaliation on the witness or his family, is only evidenced by the Amnesty International Report annexed to the Motion. The Chamber considers that the risks underscored by this Report are already addressed by the current protective measures that apply to all Defence witnesses in the present case pursuant to the 13 March 1998 Decision on Protective Measures for Defence Witnesses and Their Families and Relatives<sup>15</sup>, namely the use of a pseudonym and confidentiality of identifying information which can be addressed in closed session only. Moreover, the Chamber notes that Witness NEM also mentions a co-Accused of Pauline Nyiramasuhuko and that there is a need to strike a balance between the opposite interests of the Parties with regard to the preparation of their case, in accordance with Rule 75(A). In the view of the Chamber, the current dispositions for the disclosure of identifying information and unredacted statements of Defence witnesses, as resulting from the 18 October 2004 Oral Ruling, do strike this balance. Therefore, the Chamber considers that the risks addressed by measures (iii) and (iv) are already addressed by current protective measures and that there is no ground to reconsider the time-frame for disclosure of identifying information and unredacted statements of Witnesses BN and NEM.
40. As regards measure (v), the Chamber notes that, although the testimony of witnesses via video-link has been granted in other cases,<sup>16</sup> such measure was granted under absolute

<sup>13</sup> ICTY, *Prosecutor v. Blaskic*, IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements(TC), 3 September 1998.

<sup>14</sup> ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002.

<sup>15</sup> *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 13 March 1998.

<sup>16</sup> For example, *Prosecutor v. Nahimana*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66(C), 69(A) and 75 (TC), 5 June 2002; ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Decision

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necessity only and the Tribunal regularly recalled that it had a clear preference for testimony in court.<sup>17</sup> The Chamber further notes that, each time the security concerns of the witness could be satisfied by a less restrictive measure, this measure was favoured. As observed in the 13 September 1999 Decision rendered in the *Prosecutor v. Bagosora* case:<sup>18</sup>

Thus it is seen that Bagosora's right to a fair trial, pursuant to Articles 19 and 20, could be secured by use of a less restrictive measure than that proposed by the Defence, and without interference in matters of national jurisdiction and interaction between States.

41. In the present case, the Defence prays the Chamber to organize the testimony via video-link from Paris or Brussels of witnesses, who are allegedly currently living in African countries. As regards Witness NEM, the Defence more specifically submits that he is currently living under a false identity, but, as noted earlier, no evidence is adduced in support of that allegation. The only fears expressed by Witnesses BN and NEM which are evidenced by some objective elements are the threat of pressure or retaliation on the witnesses or their family and the potential arrest and extradition to the Rwandan authorities.
42. As regards the fear of pressure or retaliation on the witnesses or their families, the Chamber recalls that those risks are already addressed by the measures ordered in the above-mentioned Decision on Protective Measures for Defence Witnesses and Their Families and Relatives of 13 March 1998.<sup>19</sup> It is the view of the Chamber that the organization of their testimony via video-link would not be an appropriate answer to the problem: this measure would not diminish the risks before and after the protection by the Tribunal ends; neither would it diminish the risks for the witness' relatives who are still in Rwanda. Confidentiality of the witnesses' particulars and identifying information appears to be the most appropriate measures to prevent the risk of pressure or retaliation on the witnesses or their families.
43. As regards the fear of criminal prosecution expressed by Witnesses BN and NEM, the Chamber has already noted that this risk is not a ground for protective measures, with the exception of the granting of a safe conduct, which has been admitted by the jurisprudence.<sup>20</sup> The Chamber reminds the Parties that "protective measures for witnesses

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on Confidential With an *Ex-Parte* Annexure Prosecution's Motion for Video-Conference Link And Protective Measures For Witness Named Herein (TC), 19 March 2003; *Prosecutor v. Karemera*, ICTR-98-44-I, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ndirumpatse and Karemera, and Defence's Motion for Immediate Disclosure (TC), 20 October 2003; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses X/006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75 (TC), 4 June 2004...

<sup>17</sup> *Prosecutor v. Nahimana*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 37; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004, para. 15.

<sup>18</sup> *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 38.

<sup>19</sup> *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 13 March 1998.

<sup>20</sup> ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996; ICTY, *Prosecutor v. Dokmanovic*, IT-95-13a-T, Decision Regarding Defence Motion to Protect Witness (TC), 27 August 1997;

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should not hinder due process or be used as a way of providing immunity to the witnesses against possible prosecution”<sup>21</sup> and that “the only type of immunity which falls within the jurisdiction of this Tribunal is the kind provided for under Rule 90(E) whereby witnesses will not be prosecuted by this Tribunal for giving compelled evidence which may incriminate them, excluding perjury”.<sup>22</sup> However, these considerations do not prevent from granting, in accordance with Rule 54, a safe conduct to the witness whose appearance is necessary and who fears to be arrested. The Chamber concurs with the statement made by the ICTY in the 27 August 1997 Decision rendered in the *Prosecutor v. Dokmanovic*,<sup>23</sup> that ‘an order for safe conduct grants only a very limited immunity from prosecution’ and only ‘with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for purpose of giving testimony’. Therefore, and considering the fear expressed by the witnesses that they may be arrested and extradited to the Rwandan authorities, the Chamber deems appropriate to issue, pursuant to Rule 54, an order of safe conduct for Defence Witnesses BN and NEM.

44. As regard measure (vi), namely the distortion of voice and image of witnesses BN and NEM, the Chamber recalls the measures already ordered for the protection of the identity of Defence witnesses and notes that the Defence did not demonstrate that those measures are insufficient to prevent the alleged risks of identification. Neither did the Defence make a demonstration of the reason why the requested distortion should be ordered. Therefore, it is the view of the Chamber that there is no point ordering the distortion of the witness’ voice and image.
45. As regards measure (vii), namely that Witnesses BN and NEM be reinstated with their family in an European country, the Chamber recalls the finding made in the 25 November 1997 Decision rendered in the *Prosecutor v. Kanyabashi* case.<sup>24</sup>

The Trial Chamber is, however, of the view that the granting of refugees status falls within the ambit of domestic law, in this case under Kenyan Law and Kenyan Authorities hold the sovereign right to prosecute criminal offenders within their territory.

46. It results from this finding that the Tribunal has no authority and no jurisdiction to grant the refugee status to a witness in any State.

#### FOR THE ABOVE REASONS,

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ICTY, *Prosecutor v. Mrksic et al. ("Vukovar Hospital")*, IT-95-13/1-T, Order on Defence Motion for Safe Conduct (TC), 12 June 1998; ICTY, *Prosecutor v. Blaskic*, IT-95-14-T, Order Granting Safe-Passage to Defence Witness “D/G” (TC), 7 September 1998.

<sup>21</sup> *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Motion for Protection of Defence Witnesses (TC), 6 October 1997; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 34-35.

<sup>22</sup> *Prosecutor v. Ntagerura*, ICTR-96-10A-I, Decision on the Defence Motion for the Protection of Witnesses (TC), 24 August 1998.

<sup>23</sup> ICTY, *Prosecutor v. Dokmanovic*, IT-95-13a-T, Decision Regarding Defence Motion to Protect Witness (TC), 27 August 1997.

<sup>24</sup> *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and Their Families (TC), 25 November 1997.

**THE TRIAL CHAMBER**

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**DECLARES** the Motion moot as regards requested protective measures for Defence Witnesses WBNC, WBND, WFMG and WHNC,

**DENIES** the Motion in its entirety,

**ORDERS** pursuant to Rule 54 that Defence Witness BN shall not be prosecuted, detained or subjected to any other restriction of his personal liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during his presence in Tanzania and his travel between that country and his place of residence and, accordingly:

- **DECIDES** that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven (7) days following the completion of the testimony of Witness BN;
- **DECIDES**, moreover, that should illness prevent Witness BN from leaving Tanzania or should Witness BN be detained for an offence he may have committed during his stay in Tanzania, the seven days time-limit shall start to run from the time he is again able to travel or has been released;
- **DECIDES** that Witness BN may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal;

**ORDERS** pursuant to Rule 54 that Defence Witness NEM shall not be prosecuted, detained or subjected to any other restriction of his personal liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during his presence in Tanzania and his travel between that country and his place of residence and, accordingly:

- **DECIDES** that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven (7) days following the completion of the testimony of Witness NEM;
- **DECIDES**, moreover, that should illness prevent Witness NEM from leaving Tanzania or should Witness NEM be detained for an offence he may have committed during his stay in Tanzania, the seven days time-limit shall start to run from the time he is again able to travel or has been released;
- **DECIDES** that Witness NEM may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal.

Arusha, 1<sup>st</sup> March 2005



William H. Sekule  
Presiding Judge



Arlette Ramarson  
Judge  
[Seal of the Tribunal]



Solomy Balungi Bossa  
Judge