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SCSL-03-01-T  
(25167-25198)

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**THE SPECIAL COURT FOR SIERRA LEONE**

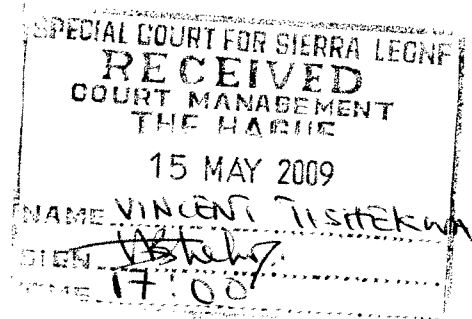
**Trial Chamber II**

**Before:** Justice Richard Lussick, Presiding  
Justice Teresa Doherty  
Justice Julia Sebutinde  
Justice El Hadji Malick Sow, Alternate

**Registrar:** Mr. Herman von Hebel

**Date:** 15 May 2009

**Case No.:** SCSL-2003-01-T



**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

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PUBLIC

**DEFENCE REPLY TO PROSECUTION RESPONSE TO URGENT  
DEFENCE APPLICATION FOR PROTECTIVE MEASURES  
FOR WITNESSES AND FOR NON-PUBLIC MATERIALS**

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**Office of the Prosecutor:**

Ms. Brenda J. Hollis  
Ms. Kathryn Howarth

**Counsel for Charles G. Taylor:**

Mr. Courtenay Griffiths, Q.C.  
Mr. Terry Munyard  
Mr. Andrew Cayley  
Mr. Morris Anyah  
Mr. Silas Chekera

## I. Introduction

1. This is the Defence Reply to the Prosecution's *Response to the Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials*, filed on 12 May 2009.<sup>1</sup> This Reply is filed on 15 May 2009 in accordance with the schedule set by the Trial Chamber.<sup>2</sup>
2. The Prosecution does not oppose the granting of protective measures to ex-combatant or insider witnesses residing in West Africa. Specifically, the Prosecution does not oppose the orders sought at paragraph 12, sub-paragraphs (a), (d), (g), (h), (i) and (j) of the Defence Application.<sup>3</sup>
3. However, the Prosecution does oppose the granting of protective measures to ex-combatant or insider witnesses residing outside of West Africa and to former or current political or other high-ranking officials involved in the conflicts in Sierra Leone and/or Liberia, claiming that the Defence has not justified its request in these regards.<sup>4</sup>
4. Additionally, the Prosecution opposes the language of, or the orders sought in, paragraph 12, sub-paragraphs (b), (c), (e) and (f) of the Defence Application.<sup>5</sup>
5. The Defence does not object to changing the language of paragraph 12(f) to include "cross examination and any rebuttal case" as the Prosecution has suggested. Yet as the Defence has made the requisite showing to justify all of the non-testimonial protective measures orders sought for both categories of witnesses, the Defence reiterates its request for the granting of the protective measures as otherwise specified in its Application.

## II. Submissions

6. When considering the Defence request for protective measures, which are minimal in nature, the Trial Chamber should keep in mind language from the ICTY, stating that "the more extreme the protection sought, the more onerous will be the obligation upon

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-778, Public with Confidential Annex A and Public Annex B Prosecution Response to Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 12 May 2009 ("Response").

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 7 May 2009, p. 24243.

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-776, Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 6 May 2009 ("Application").

<sup>4</sup> Response, para. 3.

<sup>5</sup> Response, paras. 3 and 4.

the applicant to establish the risk asserted”.<sup>6</sup> In this instance, the categories of witnesses in need of blanket protection and the orders sought are not extreme, and therefore the burden on the defence should not be onerous. The measures are non-testimonial and thus do not impact in any way on the public nature of the proceedings. The measures allow the Defence to finalize investigations and preparations for the Defence case without publicizing the names of witnesses to the public or the Prosecution before the Defence is able to talk to them about individualized protective measures that the witnesses may need for trial purposes. The measures would require the Defence to disclose the names of witnesses in sufficient time for the Prosecution to prepare for cross-examination.

7. Also, a guiding principle in protective measures jurisprudence is that the same protection should be provided to defence witnesses as prosecution witnesses.<sup>7</sup> At the ICTR, out of an abundance of caution, protective measures operative for prosecution witnesses were extended to the defence.<sup>8</sup> The protective measures requested in the Defence Application are almost identical to those requested by and granted on behalf of the prosecution for its witnesses.<sup>9</sup>

#### Categories of Witnesses to be Protected

8. The Prosecution’s opposition to extending non-testimonial protective measures to cover ex-combatants or insider witnesses residing outside of West Africa is short-sighted. Former fighters and insiders within the former Taylor government(s) may be temporarily residing abroad or outside the sub-region specifically on account of their fear of reprisals and risks to their security and well-being. Furthermore, these people may choose to come back to the sub-region at any time. Without the requested

<sup>6</sup> *Prosecutor v. Seselj*, IT-03-67-PT, Decision on Prosecution’s Third and Fourth Motion for Protective Measures for Witnesses During the Pre-Trial Stage with Confidential and Ex Parte Annex, 27 May 2005, pg. 4.

<sup>7</sup> *Prosecutor v. Ndindiyimana et al*, ICTR-2000-56-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 8 June 2004; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004; *Prosecutor v. Simba*, ICTR-2001-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 9; *Prosecutor v. Kalamanzira*, ICTR-2005-88-I, Decision on Defence Request for Protective Measures, 14 December 2007, para. 3; *Prosecutor v. Nsengimana*, ICTR-2001-69-T, Decision on Protective Measures for Defence Witnesses, 28 February 2008.

<sup>8</sup> *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Protection of Defence Witnesses, 2 February 2005, para. 13.

<sup>9</sup> Application, para. 11.

protective measures in place, which are minimal, this category of witnesses would consequently be at greater risk of additional stigmatization and insecurity.

9. While, as the Prosecution indicates, some Special Court protective measures decisions have excluded witnesses outside of West Africa, other Special Court protective measures decisions have specifically included such international witnesses.<sup>10</sup> The Prosecution itself recognised the risks even to international witnesses when requesting (and being granted) protective measures on behalf of its own witnesses which may have resided outside of Africa.<sup>11</sup>
10. As for political and high-ranking officials involved in the conflict, the Defence has submitted ample objective and subjective evidence in order to justify the request for blanket protective measures for this category of witnesses. Objectively, the Travel Ban and Assets Freeze are evidence of the real risks relating to alleged associates of former President Charles Taylor.
11. The Defence's concern has never been that the Security Council Resolutions would preclude witnesses for either the Prosecution or the Defence from travelling to The Hague for the limited purpose of giving testimony.<sup>12</sup> Instead, the Defence's concern has always been two-fold: first, individuals already on the Travel Ban and/or Assets Freeze are afraid that if they are seen to testify in defence of Mr. Taylor, they will never be removed from the lists (despite being allowed to travel to The Hague once in order to testify); secondly, individuals who are not already on the Travel Ban and/or Assets Freeze are afraid that after testifying in defence of Mr. Taylor, they will be added to either or both of the lists.
12. These subjective concerns are particularly poignant because of the secrecy surrounding additions to the lists. This lack of transparency on behalf of the international community is an objective, unfair, and unfortunate reality. The Guidelines of the Security Council Committee established pursuant to Security Council Resolution 1521

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<sup>10</sup> See, ex. *Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-04-15-T-788, Decision on the Second Sesay Defence Motion for Immediate Protective Measures for Witnesses, 16 May 2007.

<sup>11</sup> *Prosecutor v. Taylor*, SCSL-03-01-I-86, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 4 April 2006, para. 18.

<sup>12</sup> This is apparently what the Prosecution mistakenly understands to be the Defence's concern. See Response, para.13.

(2003) concerning Liberia<sup>13</sup> outline the contours of the Listing and Delisting Procedures at paragraphs 15 and 16 respectively. Additions can be made to the Lists simply when a UN member state circulates a name and information explaining how they believe an individual is associated with Mr. Taylor. If there are no objections after five days, the name is automatically added to the List.<sup>14</sup> Contrarily, to be delisted, an individual must follow a convoluted process of petitioning the Committee; if no member state indicates that it is in favour of delisting the individual after one month, the petition is automatically deemed denied, with no explanation given to the petitioner.<sup>15</sup> Clearly, it is easier to be put on and remain on the list than to be successfully removed from the list. The current Lists are in effect until 19 December 2009.<sup>16</sup>

13. The Prosecution points to the popularity of Mr. Taylor among some factions in Liberia and in the Diaspora purportedly as evidence that political and high-profile people will not be at risk if their private support of Mr. Taylor is made known publicly.<sup>17</sup> But the Prosecution must be aware that despite enjoying some popularity, the administration of President Ellen Johnson-Sirleaf in Liberia is anti-Taylor and her government's policies have had a detrimental impact on the livelihoods of many former political figures and government employees from the Taylor era. However, there are no public memoranda to this effect that the Defence can attach as objective evidence of the obvious.

*Specific Protective Measures Requested – Non-Disclosure to Public & Media – 12(b)*

14. The Defence deliberately chose the language it used in paragraph 12(b) of its Application.<sup>18</sup> Unlike pre-trial protective measures requests by the Prosecution and other defence teams, the Defence is not including a request for the use of a screening device and pseudonym at trial. The typical phraseology preferred by the Prosecution makes it appear as if the identities of Defence witnesses will never be disclosed to the

<sup>13</sup> See Guidelines of the Committee for the Conduct of its Work as consolidated, revised and adopted by the Committee on 12 June 2007 (“Guidelines”), available at: <http://www.un.org/sc/committees/1521/pdf/GuidelinesFinal.pdf>.

<sup>14</sup> Guidelines, para. 15.

<sup>15</sup> Guidelines, para. 16.

<sup>16</sup> See information regarding the Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia at <http://www.un.org/sc/committees/1521/index.shtml>.

<sup>17</sup> Response, para. 12.

<sup>18</sup> Response, para. 14.

public or the media, which is not necessarily the case. Instead, the measures requested are purely for pre-testimonial purposes, which should remain in effect (other than for purposes of disclosure to the Prosecution) until the witness testifies, or until protective measures are sought on an individualized basis for trial.

15. The idea is that people who are not called to testify would have their identity protected indefinitely. If this can be accomplished by the use of the phrase “the order shall remain in effect after the conclusion of the proceedings” then the Defence does not object to that amendment.

*Specific Protective Measures Requested – Delayed Disclosure to the Prosecution – 12(c)*

16. Trial Chamber II in the AFRC case allowed delayed disclosure to the Prosecution until 21 days before the witness’ anticipated testimony, on the basis of nothing more than generalized objective information about the security situation.<sup>19</sup> The Defence Application is in line with this precedent.
17. Furthermore, the Investigations division of the Office of the Prosecutor is far from beyond reproach. An August 2008 report from the Berkeley War Crimes Study Center titled, “Effective, Efficient, and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone,” brought to light disturbing irregularities within the Investigations division.<sup>20</sup> These underhanded tactics of Prosecution investigators are well known by Defence witnesses and in addition to the report’s objective analysis and the harassment reported by Defence witnesses through the affidavits annexed to the Defence Application, provide a basis for the delayed disclosure to the Prosecution.
18. Nothing in Rule 69(C) requires that the identity of all witnesses be disclosed at a certain time. A Trial Chamber has the discretion to delay disclosure even after the trial has commenced so long as such exercise of discretion is consistent with the right of the

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<sup>19</sup> *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006.

<sup>20</sup> Penelope van Tuyl, “Effective, Efficient, and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone”, War Crimes Study Center, University of California at Berkeley, August 2008, pgs. 19-22 [http://socrates.berkeley.edu/~warcrime/SL-Reports/Effective\\_Efficient\\_andFair.pdf](http://socrates.berkeley.edu/~warcrime/SL-Reports/Effective_Efficient_andFair.pdf)

accused to have adequate time for the preparation of his defence.<sup>21</sup> Given the resources of the Prosecution and the time already invested in investigating the case, 21 days should be adequate time for preparation for cross-examination.

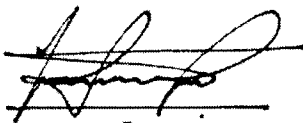
Specific Protective Measures Requested – Prosecution Contact with Defence Witnesses – 12(e)

19. The Defence notes that the Prosecution agrees that the appropriate way to contact any Defence witness is through WVS.<sup>22</sup> The Defence would like to be notified if such contact occurs so that it can later inquire from its witnesses as to the substance of the conversation and whether any inducements were offered to keep the witness from appearing to testify. Likewise, the Defence has requested that contact with Defence witnesses should not take place at the outset, or before, the witness' testimony in court. This is in line with orders and jurisprudence from the RUF Defence case.<sup>23</sup>

**III. Conclusion**

20. Consequently, on the basis of the objective and subjective information contained in the Defence Application and in this Reply, the Defence respectively requests that the Trial Chamber urgently grant the protective measures as listed in paragraph 12 of the Application for the category of witnesses in paragraph 9 of the Application.

Respectfully Submitted,



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**For Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**  
Dated this 15<sup>th</sup> Day of May 2009  
The Hague, The Netherlands

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<sup>21</sup> *Prosecutor v. Seselj*, IT-03-67-AR73.6, Decisions on Vojislav Seselj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008, para. 15.

<sup>22</sup> Response, para. 22.

<sup>23</sup> Response, footnote 28.

**List of Authorities**

**Prosecutor v. Taylor, SCSL-03-01-T**

*Prosecutor v. Taylor*, SCSL-03-01-T-776, Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 6 May 2009

*Prosecutor v. Taylor*, SCSL-03-01-T-778, Prosecution Response to Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 12 May 2009

*Prosecutor v. Taylor*, SCSL-03-01-I-86, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 4 April 2006

*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 7 May 2009

**Other SCSL Jurisprudence**

*Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-04-15-T-788, Decision on the Second Sesay Defence Motion for Immediate Protective Measures for Witnesses, 16 May 2007

*Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006

**ICTR**

*Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005

*Prosecutor v. Nsengimana*, ICTR-2001-69-T, Decision on Protective Measures for Defence Witnesses, 28 February 2008

*Prosecutor v. Muhimana*, ICTR-95-1B-T Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004

*Prosecutor v. Simba*, ICTR-2001-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004

**ICTY**

*Prosecutor v. Seselj*, IT-03-67-AR73.6, Decisions on Vojislav Seselj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008  
<http://www.un.org/icty/seselj/appeal/decision-e/080124.pdf>



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### **Other Documents**

Guidelines of the Committee for the Conduct of its Work as consolidated, revised and adopted by the Committee on 12 June 2007

<http://www.un.org/sc/committees/1521/pdf/GuidelinesFinal.pdf>

Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia at <http://www.un.org/sc/committees/1521/index.shtml>.

Penelope van Tuyl, "Effective, Efficient, and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone", War Crimes Study Center, University of California at Berkeley, August 2008

[http://socrates.berkeley.edu/~warcrime/SL-Reports/Effective\\_Efficient\\_andFair.pdf](http://socrates.berkeley.edu/~warcrime/SL-Reports/Effective_Efficient_andFair.pdf)

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**Authorities Provided**

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 2 February 2005

**THE PROSECUTOR**

v.

**CASIMIR BIZIMUNGU  
JUSTIN MUGENZI  
JÉRÔME-CLÉMENT BICAMUMPAKA  
PROSPER MUGIRANEZA**

*Case No. ICTR-99-50-T*

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**DECISION ON PROSPER MUGIRANEZA'S MOTION FOR PROTECTION OF  
DEFENCE WITNESSES**

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**Office of the Prosecutor:**

Mr Paul Ng'arua  
Mr Ibukunolu Babajide  
Mr Justus Bwonwonga  
Mr Elvis Bazawule  
Mr George William Mugwanya  
Mr Shyamlal Rajapaksa

**Counsel for the Defence:**

Ms Michelyne C. St. Laurent and Ms Alexandra Marcil for **Casimir Bizimungu**  
Mr Ben Gumpert for **Justin Mugenzi**

Mr Pierre Gaudreau and Mr Michel Croteau for **Jérôme-Clément Bicamumpaka**  
Mr Tom Moran and Mr Christian Gauthier for Prosper Mugiraneza

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

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding,  
Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Chamber”);

**BEING SEIZED** of

(i) “Prosper Mugiraneza’s Motion for Protection of Defence Witnesses”, filed on 14  
December 2004 (the “Motion”);

(ii) the “Confidential Exhibits to Prosper Mugiraneza’s Motion for Protection of Defence  
Witnesses”, filed on 14 December 2004 (the “Exhibits”);

**NOTING** the “Prosecutor’s Response to Prosper Mugiraneza’s Motion for Protection of  
Defence Witnesses”, filed on 20 December 2004 (the “Response”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Evidence  
(the “Rules”), particularly Rules 69 and 75 of the Rules;

**NOW DECIDES** the Motion solely on the basis of the written briefs of the Parties  
pursuant to Rule 73(A) of the Rules.

## **SUBMISSIONS OF THE PARTIES**

### ***The Defence Motion***

1. The Defence for Prosper Mugiraneza seeks an order for measures for the protection of Defence witnesses on the ground that they fear retaliation or other harm as a consequence of the evidence they might give before this Tribunal.
2. In the interests of brevity and in support of its request for protective measures, the Defence for Mugiraneza seeks to adopt the Prosecution Motion for Protection of Witnesses filed on 9 March 2000 as well as the briefs and exhibits filed in support of the Prosecution Motion. The Defence for Mugiraneza adopts the Affidavit of Remi Abdulraham<sup>[1]</sup> which was filed in support of the Prosecution Motion and also files a copy of the affidavit of the investigator working in Mugiraneza’s Defence team (confidential Exhibit D), both of which pertain to the need for witness protection.
3. The Defence submits that although the documents filed by the Prosecution which it adopts in the present Motion are now more than four years old, the Chamber should presume that the circumstances described in these documents have not changed materially since the Prosecution has not brought any such change to its notice.

4. The Defence further points out that the Chamber has heard evidence showing that witnesses before this Tribunal may face adverse consequences which the Chamber must take seriously. The Defence also contends that witnesses were pressured to make public statements and faced adverse actions when they did not do so. The Defence also cites certain transcripts from this Trial in support of this contention.

5. According to the Defence, such protective measures are required not only for witnesses and potential witnesses residing in Rwanda and Africa but also for witnesses resident in other places such as Europe or any other continent. The Defence submits that although such witnesses who are not resident in Africa may themselves be immune from direct intimidation or danger, they have friends and relatives in more dangerous locations.

6. The Defence points out that the relief sought is reasonable and that the Prosecutor had been granted identical relief in a similar situation.

### ***The Prosecution Response***

7. The Prosecution submits that it does not oppose the Motion in principle, subject to a number of observations.

8. The Prosecution states that the Defence has sought to shift the burden of proof by alleging that the Prosecution must indicate whether circumstances have changed since 2000. The Prosecution contends that it discharged the burden of proving the prevailing circumstances when it filed its Motion for protective measures in 2000. Accordingly, the Prosecution argues that the burden of proving whether the same circumstances continue to exist at present is upon the Defence.

9. The Prosecution responds to paragraph 9(g) of the Motion by submitting that it is self-evident that the Chamber's permission will suffice to allow the photographing, audio and/or video recording, or sketches of any Defence witnesses.

### **HAVING DELIBERATED**

10. By virtue of Article 21 of the Statute and Rule 75 of the Rules, the Tribunal is under an obligation to order appropriate measures to protect victims and witnesses provided these measures do not compromise the rights of the accused.

11. The existing jurisprudence clearly mandates that the witnesses for whom protective measures are sought must have a real fear for their own safety or that of their family. This fear must have an objective basis and measures are therefore generally granted on a case-by-case basis.<sup>[2]</sup>

12. The Chamber notes that Confidential Exhibit D establishes that possibilities of retaliation or intimidation exist against Defence witnesses who have been contacted to testify before this Tribunal if protective measures are not put in place. The Chamber further notes that this Affidavit is dated 18 October 2004.

13. Nevertheless, the Chamber deems it necessary to comment upon the overall approach of the Defence for Mugiraneza to obtain an order for protective measures for Defence witnesses. The Chamber recalls that the burden of proving that circumstances exist which demand the protection of witnesses lies on the party seeking such protection. It is the Chamber's view that the Defence cannot merely adopt documents filed previously by the Prosecution in support of its own Motion and then shift the onus onto the Prosecution to show that the circumstances therein have changed. It is for the Defence to clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures. Decisions given by other Trial Chambers clearly indicate that the Defence must provide independent justifying elements attesting to the fears of its witnesses instead of merely relying on the specific circumstances of Prosecution witnesses.<sup>[3]</sup>

14. Having noted that Confidential Annex C establishes the existence of exceptional circumstances under Rule 69(A) of the Rules, the Chamber further notes that the Prosecution does not oppose the Motion in principle. The Chamber also notes that such measures have been granted by other Trial Chambers as a matter of abundant caution aimed at providing a secure environment for witnesses.<sup>[4]</sup>

15. With respect to the Defence request in paragraph 9(h) of its Motion not to be required to supply more information than the Prosecution is required to supply under the Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses dated 15 October 2003, the Chamber recalls the wording of its Order which differs from the Motion:

“Orders that the Witness information sheet or sheets, as the case may be, that are served to the Defence, along with the witness's statement, should contain the following identifying information, if such information is contained in the original witness information sheets:

- (i) Full Names (including family, first and nicknames and pseudonym)
- (ii) Date and place of birth
- (iii) Names of Parents
- (iv) Ethnic group
- (v) Religion
- (vi) Address in April in 1994
- (vii) Occupation in April 1994”

The Chamber decides that it is appropriate to use a similar formulation for purposes of deciding the current Motion.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**GRANTS** the Motion in the following terms:

The Chamber orders that:

(a) The names, addresses, whereabouts of or and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal.

(b) The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals.

(c) To the extent that any names, addresses, whereabouts of, and any other identifying information concerning such potential Defence witnesses currently existing in records of the Tribunal, such information should be expunged from those documents.

(d) The names, addresses, whereabouts of and other identifying data of potential Defence witnesses found in the supporting material or any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition.

(e) The Prosecution shall not share, discuss or reveal, 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 Defence witnesses to any person or entity other than persons working on the immediate Prosecution team.

(f) The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witnesses.

(g) No photographing, audio or video recording or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties.

(h) The disclosure to the Prosecution of the names, addresses, whereabouts of and other identifying data which reveals or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the

Prosecution in a redacted form until such a mechanism is in place and in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.

(i) The Defence is required to submit the following identifying data pursuant to Paragraph (h) if such information is contained in the original witness information sheets:

- (i) Full Names (including family, first and nicknames and pseudonym);
- (ii) Date and place of birth;
- (iii) Names of Parents;
- (iv) Ethnic group;
- (v) Religion;
- (vi) Address in April in 1994;
- (vii) Occupation in April 1994.

(j) The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Chamber or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber or a Judge thereof with the consent of such a protected person or the parents or guardians of that person if that person is under the age of 18.

(k) The Defence shall designate a pseudonym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications and discussions between the Parties to the Trial, and the public until such time as the Chamber decides otherwise.

Arusha, 2 February 2005

Khalida Rachid Khan	Lee Gacuiga Muthoga	Emile Francis Short
Presiding Judge	Judge	Judge

*(Seal of the Tribunal)*

<sup>[1]</sup> This is part of the record as RP-784-86.

<sup>[2]</sup> *Prosecutor v. Aloys Simba*, ICTR-01-76-I, “Decision on Defence Request for Protection of Witnesses (TC)”, 25 August 2004, para. 5. (“*Simba*”).



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<sup>[3]</sup> *Simba*, para. 6.

<sup>[4]</sup> *Prosecutor v. Bagosora*, “Decision on Bagosora Motion for Protection of Witnesses (TC)”, 1 September 2003, para. 3.

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**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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ORIGINAL: ENGLISH

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding

**Registrar:** Adama Dieng

**Date:** 28 February 2008

**THE PROSECUTOR**

v.

**Hormisdas NSENGIMANA**

*Case No. ICTR-2001-69-I*

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**DECISION ON PROTECTIVE MEASURES FOR DEFENCE WITNESSES**  
*Rules 69 and 75 of the Rules of Procedure and Evidence*

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**The Prosecution**

Wallace Kapaya  
Sylver Ntukamazina  
Charity Kagwi-Ndungu  
Brian Wallace  
Iskandar Ismail  
Jane Mukangira

**The Defence**

Emmanuel Altit  
David Hooper

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber under Rule 73 (A) of the Rules of Procedure and Evidence;

**BEING SEIZED OF** the Defence Motion for Protective Measures, filed on 6 February 2008;

**CONSIDERING** the Prosecution Response, filed on 11 February 2008;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. The Defence case is scheduled from 2 June to 11 July 2008. The present motion seeks protective measures for all Defence witnesses. The Prosecution are in agreement, requesting an order that all identifying information concerning the witnesses be disclosed no later than twenty-one days before the commencement of the Defence case.

**DELIBERATIONS**

2. Pursuant to Article 19 of the Statute, the Tribunal must conduct its proceedings with due regard for the protection of victims and witnesses. Article 21 obliges the Tribunal to provide in its Rules 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. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Prosecution in adequate time for preparation.

3. Measures for the protection of witnesses are granted on a case-by-case basis. The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. Trial fairness, also an important consideration, favours similar or identical measures for Defence and Prosecution witnesses.<sup>1</sup>

4. The Defence has submitted that its witnesses do fear for their safety and that these fears are justified by the dangers and insecurities described in the reports attached as annexes to its motion. The Chamber follows previous decisions regarding protective measures and accepts the existence of these fears amongst Defence witnesses, and their objective justification.<sup>2</sup> Accordingly, the Chamber finds that the conditions for ordering witness protection measures are satisfied.

5. The measures sought by the Defence are substantially identical to those previously

<sup>1</sup> *Prosecutor v. Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006; *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Prosecutor v. Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses) (TC), 14 August 2002, p. 4.

<sup>2</sup> See the decisions referred to in footnote 1. See also *Prosecutor v. Semanza*, Decision on the Defence Motion for Protection of Witnesses (Rule 75) (TC), 24 May 2001, p. 3; *Prosecutor v. Ruggiu*, Decision on the Defence's Motion for Witness Protection (TC), 9 May 2000, p. 3.

ordered in respect of Prosecution witnesses in the present case. The interests of trial fairness and administrative simplicity strongly favour the adoption of identical measures, including the requirement to disclose redacted witness information twenty-one days prior to the commencement of the Defence case.<sup>3</sup>

**FOR THE ABOVE REASONS, THE CHAMBER**

**ORDERS** that:

1. The Defence shall designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, and that pseudonyms shall be used in Tribunal proceedings, communications and discussions, both between the parties and with the public.
2. The names, addresses, whereabouts, and other identifying information concerning the protected witnesses shall be sealed by the Registry and not included in any public or non-confidential Tribunal records, or otherwise disclosed to the public.
3. In cases where any identifying information of the protected witnesses appears in the Tribunal's public records, this information shall be expunged from the records and placed under seal.
4. The names and identities of the protected witnesses shall be forwarded by the Defence to the Registry in confidence, to be communicated to the Witnesses and Victims Support Unit only to implement protective measures for such witnesses.
5. No person shall make audio or video recordings or broadcastings or take photographs or make sketches of the protected witnesses, without leave of the Chamber and the parties.
6. The Prosecution and any representative acting on its behalf, shall notify the Defence in writing prior to any contact with any of its witnesses and, if the witness consents, the Defence shall facilitate such contact.
7. The Prosecution shall keep confidential to itself all information identifying any protected witness, and shall not, directly or indirectly, share, discuss or reveal any such information.
8. The Defence shall temporarily withhold disclosure to the Prosecution of the identifying information of the protected witnesses and temporarily redact that information from material disclosed to the Prosecution. However, such information shall be disclosed by the Defence to the Prosecution twenty-one days prior to the commencement of the Defence case, in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69 (C) of the Rules.

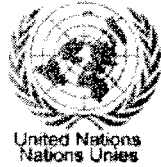
Arusha, 28 February 2008

Erik Møse  
Presiding Judge  
[Seal of the Tribunal]

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<sup>3</sup> The witness protection orders governing Prosecution witnesses are contained in the Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002.

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

Or: ENG

**TRIAL CHAMBER III**

**Before: Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short**

**Registrar: Mr. Adama Dieng**

**Date: 6 July 2004**

**The PROSECUTOR**

**v.**

**Mika Muhimana**

**Case No. ICTR-95-1B-T**

**DECISION ON DEFENCE MOTION FOR PROTECTIVE MEASURES  
FOR DEFENCE WITNESSES**

Office of the Prosecutor:  
Mr. Charles Adeogun-Philips  
Mr. Wallace Kapaya  
Mr. Peter Tafah  
Ms. Renifa Madenga  
Ms. Florida Kabasinga  
Ms. Maymuchka Lauriston

Counsel for the Defence:  
Professor Nyabirungu mwene Songa  
Me Kazadi Kabimba

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the Tribunal ),

SITTING as Trial Chamber III, composed of Judge Khalida Rachid Khan, Presiding,  
Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the Trial Chamber );

BEING SEIZED of the Requête de la Défense aux fins de la protection des témoins , filed on 29 June 2004, (the Motion );

CONSIDERING the Statute of the Tribunal (the Statute ) particularly Articles 14, 19, 20 and 21 of the Statute and the Rules of Procedures and Evidence (the Rules ), specifically Rules 69 and 75 of the Rules;

NOTING that during the Status Conference held on 2 July 2004, the Prosecution indicated to the Chamber that it does not oppose the Motion;

#### SUBMISSIONS

1. The Defence seeks an Order from the Chamber granting protective measures for its potential witnesses. It justifies this request on the basis of fears for their safety and also the safety of their families should it be known that they have traveled to Arusha to give testimony. The Defence cites insecurity in Rwanda, particularly threats it claims many witnesses have faced because they testified before the Tribunal.
2. The Defence notes that on 9 March 2000 the Trial Chamber (composed differently) granted protective measures for Prosecution witnesses, and does not think that the safety of witnesses has since improved. In making this assessment, the Defence takes into consideration the current situation in the eastern part of the Democratic Republic of Congo (DRC) and the Rwandan border, specifically the militia groups active there, including the Interahamwe. Rwandan refugees fear for their lives when they think about all those who have been threatened or killed whilst living abroad. According to the Defence, it is the feeling of many potential witnesses that testifying before the Tribunal will complicate their return to Rwanda. They also fear for the lives, safety and well-being of their family members currently living in Rwanda.
3. The Defence, therefore requests the Chamber to order, in essence, the following measures:
  - [1] The names, addresses and other identifying information concerning Defence witnesses and their whereabouts be kept under seal and not included in any records of the Tribunal;
  - [2] A prohibition on the disclosure to the public or the media of the names and addresses of Defence witnesses as well as their whereabouts and other identifying information;
  - [3] A requirement that the Prosecution and the Witness and Victims Support section limit to a minimum the numbers of persons with access to information concerning protected witnesses once their names have been communicated by the Defence;
  - [4] The Defence should only have to disclose the identifying and other relevant information concerning its protected witnesses twenty-one days prior to Trial;
  - [5] A prohibition on the Office of the Prosecutor revealing to anyone whomsoever the names and addresses as well as other identifying information concerning their protected witnesses;

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[6] A requirement that the Prosecutor and his representatives, acting on his instructions, shall notify the Defence of any request to contact Defence witnesses and for the Defence to make the necessary arrangements to that end;

[7] A prohibition on the photography and/or video recording, or sketching of any Defence witnesses at any time or place without leave of the Trial Chamber;

[8] A requirement that the Defence should designate a pseudonym to each Defence protected witness, and use this pseudonym whenever referring to such protected witness in proceedings, communications and discussions between the parties to the trial, and to the public;

[9] That the Defence witnesses shall be entitled to protection by the Victims Witness Support Section under the same conditions as those granted to Prosecution witnesses;

#### HAVING DELIBERATED

4. The Trial Chamber notes that the Defence brings the Motion on the basis of Articles 20 and 21 of the Statute and Rules 69 and 75 of the Rules.

5. Pursuant to Article 21 of the Statute, the Tribunal provides provision for the protection of victims and witnesses, articulated in Rules 69 and 75 of the Rules. Such protection measures include, but are not limited to the conduct of in camera proceedings and the protection of witness's identity. Thereupon, Rule 75 of the Rules provides inter alia that a Judge or the Chamber may, proprio motu or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the Accused.

6. The Trial Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.

7. Rule 69 of the Rules provides inter alia that 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.

8. The Trial Chamber recalls the findings in Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses" rendered on 13 July 1998, at para. 9, 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.

9. The Trial Chamber takes notice of the facts cited by the Defence in support of the Motion, which describe the particularly volatile current security situation in Rwanda and in neighboring countries such as the DRC.

10. The Trial Chamber understands the fears that potential witnesses and their families may hold in relation to the effects of testifying before the Tribunal without protective measures, and takes note that the Prosecution was granted similar measures upon request, and also that the Prosecution has not objected to this Motion.

11. The Trial Chamber considers that the Defence has indeed demonstrated fears, which pertain to the safety of potential witnesses residing in Rwanda, insecure African countries such as the DRC and elsewhere. The Trial Chamber is therefore convinced that the Defence request is justified.

12. Pursuant to Rule 75(B) of the Rules, the Trial Chamber is empowered to order the measures as requested by the Defence (numbered above as [1]-[9]).

13. The Trial Chamber is of the view that there is a sufficient showing of a real fear for the safety of potential Defence witnesses were their identity to be disclosed. Consequently, the Chamber grants measures [1], [2], [3], [4], [5], and [7] as requested in the Motion.

14. As regards measure [6], the Trial Chamber notes the Tribunal's jurisprudence in this regard, notably in Prosecutor v. Nahimana and grants the said measure, requiring the Prosecutor and his representatives to notify the Defence of any request for contacting the protected Defence witnesses, and the Defence shall make arrangements for such contacts.

15. As regards measure [8], the Trial Chamber recalls the Decision in Prosecutor v. Bicamumpaka in which the measure was granted, requiring the Prosecutor to designate a pseudonym for each protected Prosecution witness. Similarly, with respect to the present Motion, the Trial Chamber grants measure [8] as requested.

16. As regards measure [9], the Trial Chamber, mindful of Article 20(1) of the Statute that all Parties are equal before the Tribunal, considers the Defence request in Measure [9] to be justified and proper. Therefore, to the extent possible, Defence witnesses should be accorded the same conditions as those granted to Prosecution witnesses whilst under the protection of the Victims and Witness Support Section.

17. Finally, the Trial Chamber notes that, in conformity with the Tribunal's well-established jurisprudence, protective measures are granted on a case-by-case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Defence should furnish to the Victims and Witnesses Support Section of the Registry as soon as possible all the particulars pertaining to the affected witnesses.



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FOR THE ABOVE REASONS, THE TRIAL CHAMBER  
GRANTS the Defence requests in measures [1], [2], [3], [4], [5], [6], [7], [8] and [9] of  
the Motion, as outlined above, for its witnesses residing in Rwanda, neighboring  
countries such as the DRC, and for those potential witnesses residing in other areas of  
Africa and Europe.

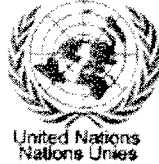
ORDERS that the Defence shall disclose to the Prosecution, no later than 21 days prior to  
the start of the Defence case scheduled for 16 August 2004, all relevant information  
concerning its witnesses, so as to allow the Prosecution adequate time to prepare its case,  
pursuant to Rule 69 (C) of the Rules.

Arusha, 6 July 2004

Khalida Rachid Khan Lee Gacuiga Muthoga Emile Francis Short  
Presiding Judge Judge Judge

(Seal of the Tribunal)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Sergei Alekseevich Egorov  
Judge Dennis C. M. Byron

**Registrar:** Adama Dieng

**Date:** 25 August 2004

**THE PROSECUTOR**

v.

**Aloys SIMBA**

*Case No. ICTR-01-76-I*

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**DECISION ON DEFENCE REQUEST FOR PROTECTION OF WITNESSES**

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**Office of the Prosecutor:**

Richard. Karegyesa  
Sulaiman Khan  
Ignacio Tredici  
Amina Ibrahim

**Counsel for the Defence**

Sadikou Ayo Alao  
Beth Lyons

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

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**BEING SEIZED OF** the Defence Motion for Protection of Defence Witnesses, filed on 12 August 2004, as well as a motion for an extension of time to file a reply, filed on 19 August 2004;

**CONSIDERING** the Prosecution's response to the motion, filed on 17 August 2004, and the corrigendum thereto filed on 18 August 2004;

**HEREBY DECIDES** the motion.

## **INTRODUCTION**

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial is scheduled to commence on 30 August 2004. On 4 March 2004, the Chamber, at the request of the Prosecution, ordered protective measures for Prosecution witnesses.<sup>1</sup> The Defence filed the present motion for protection of its witnesses on 12 August 2004. On 17 August 2004, the Prosecution filed a response. A copy was made available to the Defence and the Accused during the Status Conference on 18 August 2004. At the same time, the Prosecution read, at the request of the bench, the text of its response, which was simultaneously interpreted into French. On 19 August 2004, the Defence filed a motion requesting a time frame of five days from receipt of a French translation of the Prosecution's motion within which to respond to the motion. On the same day, the Defence sent a written response to the Prosecution in English. A copy was addressed to the Chamber.

## **SUBMISSIONS**

2. The Defence claims that its witnesses have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries as well as outside Africa. In support of its request, the Defence relies upon the general security situation, an article from the *Hirondelle* News Agency, the Prosecution's motion filed on 16 February 2004 and its supporting material, and the decision of the Chamber of 4 March 2004 granting protective measures to Prosecution witnesses. The Defence requests thirteen protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses, including seventeen potential alibi witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecutor on the basis of a "rolling disclosure" no sooner than 21 days before the testimony of each witness. The Defence alleges that the granting of those measures is consistent with the Accused's rights and the interests of a fair trial.

3. The Prosecution asserts that the Defence's motion fails to establish the existence of "exceptional circumstance" showing the existence of a danger or risk for the Defence witnesses. Nevertheless, if the Chamber determines that protective measures are appropriate, the Prosecution agrees that measures 12 (a), (b), (c), (d), (e) and (h) should be granted. The Prosecution objects to measures (f), (g), (i), (j), (k) and (l), submitting that these measures exceed

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<sup>1</sup> *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004.

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what the Rules of Procedure and Evidence (“the Rules”) allow and will impede the Prosecution’s power to adequately investigate or interview witnesses.

## **DELIBERATIONS**

### *Extension of Time for Reply*

1. The present Defence motion requests a time frame of five days from receipt of a French translation of the Prosecution’s response to the Defence motion. The Chamber reiterates that according to Article 20 of the Statute, Rule 3 of the Rules, and established jurisprudence, the Accused is entitled to be provided with the Indictment, the supporting material and all evidentiary material which will be used in the adjudicative process in a language he understands. There is no entitlement to have translated all documents in the case.<sup>2</sup> The practice of the Tribunal is that Lead and Co-Counsel, who between them have command of both official languages of the Tribunal, co-operate with one another.<sup>3</sup> The Chamber has previously stated that it will consider ordering or facilitating the translation of specific documents on a case-by-case basis.<sup>4</sup>

2. In the present case, the composition of the Defence team is bilingual: Lead Counsel is French speaking but conversant in English, whereas Co-Counsel is an English speaker but conversant in French. One of the legal assistants is a bilingual qualified attorney. During the status conference of 18 August 2004, the written submissions of the Prosecution were read out and interpreted into French, the language of the Accused, who was present. A copy of the Prosecution’s response was also made available to the Accused and the Defence. The unofficial French transcripts of the proceedings have been made available. Furthermore, Co-Counsel sent a written reply to the Prosecution’s response.

3. In the particular circumstances, the Chamber is satisfied that Lead Counsel and Co-Counsel have been duly able to address the questions raised by the Prosecution’s response. The information to which the motion is directed does not fall within that covered by Article 20 (4) (a) of the Statute, and translation is therefore not guaranteed by its provisions. The Rules do not provide for a right of reply to a party’s response, and a further pleading on this matter would not materially assist the Chamber. The request for extension of time is therefore denied.

### *Measures of Protection*

4. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for protection of victims and witnesses. Under Rules 69 and 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of

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<sup>2</sup> See in particular, *Delalic et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (TC), 25 September 1996; *Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (TC), 6 November 2001.

<sup>3</sup> *Simba*, Oral Decision, T. 13 May 2004 p. 1; Decision on Aloys Simba’s Motion for An Extension of Time (AC), 27 July 2004 (“Considering that, to the extent that the Appellant or any members of his defence team are not proficient in English, the essential elements of the Impugned Decision may be effectively conveyed to them without waiting for an official translation”).

<sup>4</sup> Oral Decision, T. 13 May 2004, p. 1.

victim's identity. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Pursuant to Rule 69 of the Rules:

(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.

...

(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.

5. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis. In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties.<sup>5</sup>

6. The Chamber considers that the Defence has not provided independent justifying elements that clearly demonstrate that the fears of its potential witnesses are well founded. The main documents relied on by the Defence pertain to the specific situation of the Prosecution witnesses. Nevertheless, the Chamber is mindful of its previous decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.<sup>6</sup> The Chamber notes also that, in its motion filed on 16 February 2004, the Prosecution recognized that Defence witnesses also faced risks.<sup>7</sup> Accordingly, exceptional circumstances have been established.

7. The Chamber notes that the Prosecution objects only to some of the requested measures. Regarding the "rolling disclosure" (paragraph i), namely the disclosure of the identifying information to the Prosecution not sooner than 21 days before the testimony of each witness, the Chamber relies upon its deliberation in its Decision of 4 March 2004 granting protective measures to Prosecution witnesses.<sup>8</sup> The present case is to be short in comparison with some of the longer trials before the Tribunal in which rolling disclosure has been ordered.<sup>9</sup> As a practical matter, rolling disclosure would not, under these circumstances, significantly enhance the protection afforded to witnesses. Based on a concrete evaluation of the present case, the

<sup>5</sup> *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

<sup>6</sup> *Bagosora*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

<sup>7</sup> The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54, 69, 73 and 75), 16 February 2004, para. 29.

<sup>8</sup> *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, paras. 6 and 7; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 10.

<sup>9</sup> *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 2; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

Chamber shall order complete disclosure of the witness statements to the Prosecution, without redactions to protect the identity of the witness, thirty days prior to the commencement of the Defence case.

8. The Chamber considers that the Defence request for the closed session testimony for each of its protected witnesses (paragraph l) is not necessary at the present stage and goes beyond those in effect for Prosecution witnesses. It is recalled that protective measures may be amended, at any time and when necessary. The measures requested by the Defence at paragraphs (i) and (l) of its motion are therefore denied. The Defence's request that the Prosecution shall make a written request prior to contacting any relative of a potential Defence witness (paragraph j) also exceeds what is normally granted as protective measures in similar cases and should be granted only as regards the potential Defence witnesses.

9. As regards the other protective measures requested by the Defence and to which the Prosecution objects (paragraphs (f), (g) and (k)), the Chamber notes that those measures have normally been granted in previous cases.<sup>10</sup> They do not conflict with the Prosecution's mandate nor impede the Prosecution's power to investigate adequately possible witnesses. Most of the measures sought by the Defence are substantially identical to those previously ordered in respect of the Prosecution witnesses in the present case. The interests of trial fairness strongly favour the adoption of identical measures, which are enumerated below in language customarily adopted in such orders.<sup>11</sup>

10. Finally, in the view of the Chamber, the Defence's request that confidential information only be transmitted by the Registry to officials of the Witness and Victims Support Section (paragraph (c)) is unworkable and unnecessary and consequently denied.<sup>12</sup> Members of the Registry who are not part of the Witness and Victims Support Section may well be called upon to provide assistance for these witnesses in respect of their appearance and protection. Confidential information is handled by the Registry in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence motion for an extension of time to file a reply; and

**HEREBY ORDERS** that:

1. The names, addresses, whereabouts, and other identifying information ("identifying information") of any witness for whom the Defence claims the application of this order ("protected witness") shall be kept confidential by the Registry and not included in any

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<sup>10</sup> *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

<sup>11</sup> *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004.

<sup>12</sup> *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 5.

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non-confidential Tribunal records, or otherwise disclosed to the public. If any such information does appear in the Tribunal's non-confidential records, it shall be expunged.

2. The Defence shall assign a pseudonym to each protected witnesses for whom it claims the application of this order. The identifying information of each protected witness, with a corresponding pseudonym, shall be forwarded by the Defence to the Registry in confidence, and shall not be disclosed by the Registry to the Prosecution unless otherwise ordered. Where necessary to ensure non-disclosure of identifying information, the pseudonym shall be used in trial proceedings, discussions between the Parties in proceedings, and in statements disclosed in redacted form to the Prosecution.
3. Making or publicizing photographs, sketches, or audio or video recordings of protected witnesses without leave of the Chamber or the protected witness, is prohibited.
4. The Prosecution shall not contact, or attempt to contact or influence, whether directly or indirectly, any protected witness in any manner, or encourage any person to do so, without first notifying the Defence which shall, if appropriate, make arrangements for such contacts.
5. The Prosecution shall provide the Registry with a designation of all persons working on the Prosecution team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any persons leaving the Prosecution team and to confirm in writing that such person has remitted all material containing identifying information.
6. The Prosecution shall not attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.
7. The Prosecution shall keep confidential to itself all identifying information of any protected witness, and shall not distribute or disseminate to any person not designated as part of the Prosecution team in accordance with paragraph 5 above, or make public, identifying information in any form.
8. The Defence is authorised to withhold disclosure of identifying information to the Prosecution, and to temporarily redact their names, addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Prosecution.
9. The identifying information withheld by the Defence in accordance with this order shall be disclosed by the Defence to the Prosecutor no later than thirty days before the commencement of the Defence case.

Arusha, 25 August 2004

Erik Møse

Sergei Alekseevich Egorov

Dennis C. M.

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Presiding  
Judge

Judge

Byron

Judge

(Seal of the Tribunal)