

ICTR-01-76-T  
25-08-2004  
(2809-2803)

2809  
Ivan



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

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**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;

**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.

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

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 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.

<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.

*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 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

<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.

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 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.

<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.

<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.

**FOR THE ABOVE REASONS, THE CHAMBER**

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

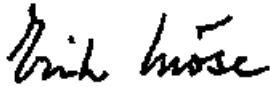
**HEREBY ORDERS** that:

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 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.

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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  
Presiding Judge



Sergei Alekseevich Egorov  
Judge



Dennis C. M. Byron  
Judge

(Seal of the Tribunal)





# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

## I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Homelouu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burries
<b>From:</b>	<input checked="" type="checkbox"/> Chamber <i>G. Duhon</i> (name)	<input type="checkbox"/> Defence (name)	<input type="checkbox"/> Prosecutor's Office (name)	<input type="checkbox"/> Other: (name)
	<b>Case Name:</b> The Prosecutor vs. <i>Sika</i>		<b>Case Number:</b> ICTR-01-76- <del>1071</del>	
<b>Dates:</b>	Transmitted: <i>25/9/04</i>		Document's date: <i>25/9/04</i>	
<b>No. of Pages:</b>	<i>7</i>		Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<i>Person au Defense Keyser - Protection &amp; Release</i>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
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		<input type="checkbox"/> Accused particulars		

## II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

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Target Language(s):

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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## III - TRANSLATION PRIORITISATION (For Official use ONLY)

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