



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-01-63-T  
20-3-2007  
(1977-1972)

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Or: ENG

TRIAL CHAMBER III

**Before:** Judge Dennis C. M. Byron, Presiding  
*sitting pursuant to 73(A) of the Rules of Procedure and Evidence*

**Registrar:** Adama Dieng

**Date:** 20 March 2007

THE PROSECUTOR  
v.  
Siméon NCHAMIHIGO  
Case No. ICTR-2001-63-T

JUDICIAL RECORDS ARCHIVES  
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DECISION ON DEFENCE MOTION FOR PROTECTION OF DEFENCE  
WITNESSES

*Articles 19 and 21 of the Statute; Rules 69, 73 and 75 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Alphonse Van. Senior  
Madeleine Schwarz  
Lloyd Strickland  
Adama Niane  
Marilize Keefer

**Defence Counsel:**

Denis Turcotte  
Denoît Henry  
Yann Evima Vouma

## INTRODUCTION

1. The trial in this case began on 25 September 2006. After calling 24 witnesses, the Prosecution closed its case on 29 January 2007.<sup>1</sup> At the Prosecution's request, these witnesses were granted protective measures.<sup>2</sup>
2. The first session of the Defence case is scheduled to start on 23 April 2007.<sup>3</sup> The Defence moves the Chamber to grant protective measures to its potential witnesses.<sup>4</sup> The Prosecution opposes in part the Motion.<sup>5</sup>

## DISCUSSION

3. In accordance with Articles 19 and 21 of the Statute of the Tribunal, Rules 69 and 75 of the Rules of Procedure and Evidence, the Chamber will consider protective measures for witnesses that are appropriate to safeguard the privacy and security of the victims and witnesses, as well as the Accused's right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Measures for the protection of witnesses are granted on a case-by-case basis.<sup>6</sup>
4. The jurisprudence of this Tribunal requires that the moving party demonstrates that the witnesses for whom protective measures are sought have a real fear for their safety or that of their family, and that an objective justification exists for this fear.<sup>7</sup>
5. In the present case, the Defence seeks various protective measures for Defence potential witnesses living in Rwanda, other African countries and Europe. It asserts that the general context for security in and out of Rwanda for witnesses testifying for an accused justified the granting of protective measures.
6. To support its application, the Defence provides five documents consisting of one United Nations document and four reports published by Amnesty International.<sup>8</sup> The Defence

<sup>1</sup> The first trial session was held from 25 September 2006 to 20 October 2006. The second trial session started on 9 January 2007 and concluded on 29 January 2007. Twenty-four 24 witnesses were heard over a period of 32 trial days.

<sup>2</sup> *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-I ("Nchamihigo"), Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006.

<sup>3</sup> *Nchamihigo*, Decision on Defence Motion for Extension of Time for Complying with Chamber's Scheduling Order of 5 February 2007 and Scheduling the Presentation of the Defence Case (TC), 19 March 2007.

<sup>4</sup> « Requête de la défense en vue d'une ordonnance de mesures de protection pour les témoins à décharge conformément aux articles 19 et 21 du Statut et 54, 69, 73, 75, et 79 du RPP » (« Defence Motion »), filed on 5 March 2007.

<sup>5</sup> « Prosecutor's Response to the "Requête de la défense en vue d'une ordonnance de mesures de protection pour les témoins à décharge conformément aux articles 19 et 21 du Statut et 54, 69, 73, 75, et 79 du RPP » », filed on 9 March 2007.

<sup>6</sup> *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-I ("Muvunyi"), "Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 25 April 2001, para. 28; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, "Decision on Defence Motion for Protective Measures for Defence Witnesses", 6 July 2004, para. 17; *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I ("Simba"), "Decision on Defence Request for protection of Witnesses", 25 August 2004, para. 5; *Nchamihigo*, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, para. 4.

<sup>7</sup> *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 2; *Bagosora, et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 2.

<sup>8</sup> Annexes in support of the Defence Motion, filed on 13 March 2007: Annex 1: "Lettre datée du 26 juillet 2002, adressée au Président du Conseil de sécurité par le Représentant permanent du Rwanda auprès de

for Nchamihigo submits that potential Defence witnesses do fear for their safety and that these fears are justified by the dangers and insecurities described in the Defence motion and the reports attached as annexes.

7. After reviewing the information provided by the Defence, the Chamber is satisfied that there is subjective and objective fear on the part of the Defence witnesses such that witnesses, wherever they may reside, do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.<sup>9</sup> Additionally, the Chamber recalls that it granted protective measures for the Prosecution witnesses on the basis of similar fears and finds that some protective measures for potential Defence witnesses are warranted in the present case, which ensures equality amongst the parties.<sup>10</sup>

8. It must now determine what would be the best protective measures, taking into consideration that the Prosecutor must have adequate time for the preparation of his case.<sup>11</sup>

9. The first set of measures sought by the Defence, which are not opposed by the Prosecutor, relates to the protection of the identity of potential witnesses, by assigning pseudonyms to the witnesses, sealing any identifying information of the witnesses in the Tribunal's records, expunging names and identifying information of the witnesses from any existing public record of the Tribunal, non-disclosure to the public and media of this information, prohibiting photographing, audio and/video recording, or making of sketches of any Defence witness without leave of the Chamber and the Parties, temporary non-disclosure to the Prosecutor of any identifying information which would reveal the identities of potential witnesses until such time the witnesses have been afforded an adequate mechanism for protection, using the good offices of the Witnesses and Victims Support Section ("WVSS") in implementing these protective measures.

10. The Chamber notes that those proposed measures are either explicitly envisioned in the Rules<sup>12</sup> or generally accepted by the Tribunal in order to safeguard the privacy and security of victims and witnesses.<sup>13</sup> In the Chamber's view, such measures are appropriate when considering the risk for the safety of potential Defence witnesses in the present case.

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*l'Organisation des Nations Unies*", Doc. UN. S/2002/842, 26 July 2002; Annex 2: Amnesty International Report entitled: "Rwanda. The hidden violence", 1998; Annex 3: Amnesty International report entitled: "Le Fil d'Ar", April 2004; Annex 4: Amnesty International Public Statement entitled: "Burundi: Rwandan asylum seekers should have access to fair and satisfactory refugee determination procedures", 19 May 2005; Amnesty International Report entitled: "Burundi/Rwanda/Tanzanie: Violations des droits des réfugiés et des rapatriés", 27 June 2005.

<sup>9</sup> *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 6; *Nchamihigo*, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, para. 6.

<sup>10</sup> *Prosecutor v. François Karera*, Case No. ICTR-01-74-T ("Karera"), Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006, para. 3; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T ("Rwamakuba"), Decision on Defence Motion for Protective Measures (TC), 21 September 2005, para. 10; *Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-T, Decision on Protection of Defence Witnesses (TC), 4 May 2005, para. 2; *Prosecutor v. Théoneste Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 2; *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A Decision (Defence Motion for Protective Measures for Defence Witnesses (TC), 14 August 2002, para. 13; *Prosecutor v. Elizaphan et Gérard Ntakirutimana*, Case No. ICTR-96-10-T and Case No. ICTR-96-17-T, Decision on Witness Protection (TC), 22 August 2000, paras. 2-4.

<sup>11</sup> This is in accordance with the principle set out by Rule 6(C) of the Rules of Procedure and Evidence: "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 the preparation of the Prosecution and the Defence".

<sup>12</sup> See Rule 69, Rule 75, and Rule 79.

<sup>13</sup> *Nchamihigo*, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006; *Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006; *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses (TC), 20 October 2005; *Rwamakuba*, Decision on Defence Motion for Protective Measures (TC), 21 September 2005; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003.

11. The Prosecutor suggest adding a protective measure for the Defence witnesses in order to limit the exposure by the Prosecutor, when investigating, of witness identifying information and avoid disclosure to any person the fact that the witness has testified or will be a witness before the Tribunal. The Chamber agrees to include this measure in the protective measures for the Defence witnesses. Nonetheless, the Chamber recalls that should any person insist upon information that would reveal the status of the individual as a witness, the investigation would cease.<sup>14</sup>

12. The Chamber also finds appropriate to allow the disclosure of non-redacted statements and identifying information to the Prosecution no sooner than thirty days prior to the day the witness is scheduled to testify. The Prosecutor does not oppose that request. This also conforms with the prior Chamber's orders granting protective measures to Prosecution witnesses.<sup>15</sup>

13. The Defence requests that the Prosecution team in this case shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information. The Appeals Chamber, however, held that such a restriction interferes with the Prosecutor's discretion to delegate to his Office. The Appeals Chamber indeed found that the Prosecutor's obligation to disclose was not limited to specific teams within the Office of the Prosecutor, but was extended to his or her entire office as "a whole, undivided unit".<sup>16</sup> This finding has been interpreted to mean that the Prosecutor is endowed by the Rules with an unfettered discretion to give anyone within the Office of the Prosecutor access to any confidential information to which he is entitled to have access. Witness protection orders which purport to constrain or qualify the exercise of this unfettered discretion are, accordingly, contrary to the Rule.<sup>17</sup> Consequently, this part of the Defence request is rejected.

14. The Defence also seeks to limit the content of the identifying information concerning its witnesses it must disclose to the Prosecutor. The Chamber does not find any good reason for such limitation. In order to allow the Prosecution to prepare its case and considering the need to maintain the equality between the parties, the Chamber is of the view that the Defence must provide the Prosecutor with the same information that was provided for each Prosecution witness, namely:<sup>18</sup> first name of each Defence witness; date of birth; sex; nationality, ethnic status, occupation in 1994; current occupation, place of birth (*cellule, secteur, commune, préfecture*); address in 1994 (*cellule, secteur, commune, préfecture*), current address (*cellule, secteur, commune, préfecture*); names of both parents; marital status; names of spouse and children; languages spoken and written; periods of time outside Rwanda/country of residence at that time/reason for leaving Rwanda, membership in political or social association, name of a friend, relative, or acquaintances/updated contact number.

15. The Defence seeks that the Prosecution issue written requests to the Chamber to meet their witnesses and that it be given an opportunity to respond to such a request. The Chamber recalls that according to the Appeals Chamber, each party has the right to interview potential

<sup>14</sup> *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005, para. 11.

<sup>15</sup> *Nchamihigo*, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, para. 8: "[...] an appropriate deadline is that witnesses identities, and non-redacted witness statements be disclosed to the defence thirty days before the start of trial."

<sup>16</sup> *Bagosora et al.*, Decision on Interlocutory Appeals Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46.

<sup>17</sup> *Bagosora et al.*, Decision Amending Defence Witness Protection Orders (TC), 2 December 2005, para. 4; *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses (TC), 20 October 2005, para. 12.

<sup>18</sup> "Prosecutor's Response to the "Requête de la défense en vue d'une ordonnance de mesures de protection pour les témoins à décharge conformément aux articles 19 et 21 du Statut et 54, 69, 73, 75, et 79 du RPP" », filed on 9 March 2007, para. 21.

witnesses.<sup>19</sup> Witnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them.<sup>20</sup> The right to contact and interview a potential witness is, however, not without limitation.<sup>21</sup> The Chamber must ensure that there is no interference with the course of justice and that the witness does not feel coerced or intimidated. To this end, Trial Chambers have required that a witness formally consent to meet with the requesting party.<sup>22</sup> In light of these principles, the Chamber is therefore of the view that there is no need to impose that the Prosecutor waits for a Defence's response when seeking to meet a Defence witness. It is sufficient for the Prosecutor to give adequate notice of its intention. The Chamber furthermore stresses out that, where appropriate, WVSS, as the Tribunal's organ specifically competent for monitoring witnesses, may be requested to facilitate such meeting and interview between Prosecutor's representatives and Defence witnesses.

## FOR THOSE REASONS, THE CHAMBER

**GRANTS** in part the Defence Motion, and

**I. ORDERS** the following protective measures for all Defence witnesses or potential Defence witnesses wherever they reside and who have not affirmatively waived their right to protective measures ("Protected Witness"):

1. The Defence shall designate a pseudonym for each of the Protected Witnesses, which be used whenever referring to such witnesses in the proceedings, communications, and discussions between the Parties to the trial and with the public. The use of such pseudonyms shall last until such time as the Chamber, or any other Chamber according to Rule 75(G) of the Rules, orders otherwise.
2. The names, addresses, whereabouts of, and other identifying information concerning the Protected Witnesses shall be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals, and shall not be disclosed to the Prosecution unless otherwise ordered.
3. The names, addresses, whereabouts, and other information that might identify or assist in identifying any Protected Witness ("identifying information") shall be sealed by the Registry and not included in public or non-confidential Tribunal records.
4. To the extent that any names, addresses, relations, whereabouts or other identifying information is contained in existing records of the Tribunal, such identifying

<sup>19</sup> *Prosecutor v. Mile Mrksic*, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; see also, *Prosecutor v. Sefer Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, paras. 12-15.

<sup>20</sup> *Ibidem*.

<sup>21</sup> *Prosecutor v. Mile Mrksic*, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003.

<sup>22</sup> See: *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda (TC), 24 August 2004; *Prosecutor v. Nindiliyimana et al.*, Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in the Military I Case (TC), 3 November 2004, paras. 21-23; *Bizimungu et al.*, Decision on Prosper Mugiraneza's Extremely Urgent Motion To Vary Conditions Of Interview With Jean Kambanda, (TC) 19 January 2005; *Prosecutor v. Bugosora et al.*, Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him (TC), 31 October 2005, para. 6. See also Rules of Procedure and Evidence, Rules 33 and 34.

information must be expunged from the public record of the Tribunal and placed under seal.

- 5. Any identifying information concerning a Protected Witness shall not be disclosed to the public or the media; this order shall remain in effect after the termination of the trial.
- 6. The Prosecution shall not attempt to make any independent determination of the identity of any Protected Witness or encourage or otherwise aid any person to attempt to identify any such Protected Witness.
- 7. Nowhere and at no time shall the public or the media make audio or video recordings or broadcasts, or take photographs or make sketches of any Protected Witness, in relation to their testimony, without leave of the Trial Chamber.
- 8. The Prosecutor and any representative acting on his behalf shall provide reasonable notice in writing to the Defence, prior to contacting any Protected Witness. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, the Defence shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.
- 9. The Prosecutor, in making investigations and inquiries, will limit the exposure of witness identifying information and not disclose to any person the fact that the witness has testified or will be a witness before the Tribunal.
- 10. The Prosecution shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any Identifying Information to any person or entity other than the Prosecution.
- 11. The Defence may withhold disclosure to the Prosecution of the identity of the Protected Witnesses and temporarily redact their Identifying Information from material disclosed to the Prosecution. The Identifying Information shall be disclosed by the Defence to the Prosecution no later than thirty (30) days prior to commencement of the trial session during which the concerned Protected Witnesses are scheduled to testify.

II. DENIES the remainder of the Motion.

Arusha, 20 March 2007, done in English.



Dennis C. M. Byron

Presiding Judge

[Seal of the Tribunal]





# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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<b>Case Name:</b>	The Prosecutor vs. Siméon Nchamihigo		<b>Case Number:</b>	ICTR-2001-63-T
<b>Dates:</b>	Transmitted: 20/03/2007		Document's date: 20/03/2007	
<b>No. of Pages:</b>	6		<b>Original Language:</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	DECISION ON DEFENCE MOTION FOR PROTECTION OF DEFENCE WITNESSES Articles 19 and 21 of the Statute; Rules 69, 73 and 75 of the Rules of Procedure and Evidence			
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Date: **20 March 2007** Case Name / *Affaire*: **The Prosecutor vs. SIMEON NCHAMIHIGO**

Case No / *Affaire No.*: **ICTR-01-63-I**

	<input type="checkbox"/> <b>TC1</b>	<b>received by / reçu par:</b>	<b>ALO:</b>	<b>received by / reçu par</b>
To:	<input type="checkbox"/> Judge E. Mose, President	.....	<input type="checkbox"/>	.....
A:	<input type="checkbox"/> Judge J. R. Reddy	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge S. A. Egorov	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge D. C. M. Byron ( <i>Simba</i> ) Co-ordinator	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> <b>TC2</b>			
	<input type="checkbox"/> Judge W. H. Sekule	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge A. Ramaroson	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge K. R. Khan ( <i>Bizimungu et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge A. J. N. de Silva	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge S. B. Bossa ( <i>Nyiramasubuku et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge L. G. Muthoga ( <i>Bizimungu et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge F. R. Arrey ( <i>Muvunyi</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge E. F. Short ( <i>Bizimungu et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge T. Hikmet ( <i>Nkundiyimana et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge S. K. Park ( <i>Nkundiyimana et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> A. Leroy, Co-ordinator	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> A. Marong ( <i>Nkundiyimana et al</i> )	.....	<input type="checkbox"/>	.....
	<input checked="" type="checkbox"/> <b>TC3</b>			
	<input type="checkbox"/> Judge K. R. Khan	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge D. C. M. Byron	.....	<input type="checkbox"/>	.....
	<input checked="" type="checkbox"/> Judge L. G. Muthoga ( <i>Mutimana</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge F. R. Arrey ( <i>Rutagaska</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge E. F. Short ( <i>Muhimana &amp; Karemera et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge G. G. Kam ( <i>Seromba &amp; Karemera et al</i> )	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> Judge R. Fremr	.....	<input type="checkbox"/>	.....
	<input type="checkbox"/> E. O'Donnell, SLO	.....	<input type="checkbox"/>	.....
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	<input checked="" type="checkbox"/> H. Gogo, Co-ordinator ( <i>Seromba</i> )	.....	<input type="checkbox"/>	.....

**OTP / BUREAU DU PROCUREUR**

Trial Attorney in charge of case:..... **A. Van** received by .....

**DEFENSE** *[Signature]* **20/03/07**

Accused / *Accusé*:..... **S. Nchamihigo** complete / remplir CMS4 FORM

Lead Counsel / *Conseil Principal*:..... **D. Turcotte**

In / à Arusha Arusha ..... (signature)  by fax complete / remplir CMS3bis FORM

Co-Counsel / *Conseil Adjoint*:..... **B. Henry**

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**WSS** *[Signature]* **21/03/07**  R. Amoussouga  E. O'Donnell  DCOMS  P. Enow

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