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UNITED NATIONS  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

**Registrar:** Mr. Adama Dieng

**Date:** 22 January 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

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DECISION ON DEFENCE MOTION FOR PROTECTIVE MEASURES FOR  
VICTIMS AND WITNESSES

*Articles 19 and 21 of the Statute and Rules 54, 69, 73  
and 75 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Richard Karegyesa  
Abdoulaye Seye  
Dennis Mabura  
Florida Kabasinga

**For the Accused:**

Allison Turner

## INTRODUCTION

1. On 27 November 2008, the Defence filed a motion seeking protective measures for Defence witnesses living in Rwanda, as well as any other witnesses the Defence may call.<sup>1</sup>
2. In his Response, the Prosecutor submits that he does not object to the protective measures, provided they are reasonable and similar to those granted for Prosecution witnesses. However, the Prosecutor objects to the request to disclose identifying information no more than 21 days before the witness is scheduled to testify. The Prosecutor further submits that the Defence should provide the Chamber with a list of witnesses' pseudonyms and identifying information, on an *ex parte* basis, so that the Chamber can make an informed decision.<sup>2</sup>
3. In its Reply, the Defence submits that it does not have a final list of witnesses, and that protective measures can be ordered for witnesses not yet identified by pseudonym.<sup>3</sup>
4. The Chamber also has pending before it two related Defence motions: one of which seeks to narrow the meaning of the phrase "family member,"<sup>4</sup> and another which seeks to vary the Chamber's Order of 24 November 2008 ("Protective Measures Order")<sup>5</sup> in respect of a family member of a protected Prosecution witness.<sup>6</sup> The Prosecutor objects to both motions.<sup>7</sup> To the extent that the issues raised in these related motions are not addressed by this Decision, they will be dealt with separately.

## DISCUSSION

### *The Applicable Law*

4. Articles 19 (1) and 21 of the Statute, and Rules 69 and 75 of the Rules of Procedure and Evidence ("Rules") provide for the protection of victims and witnesses.<sup>8</sup>

<sup>1</sup> *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91- PT, "Defence Motion for Protective Measures for Victims and Witnesses (Rules 54, 69, 73 and 75 ICTR Rules of Procedure and Evidence)", filed 27 November 2008.

<sup>2</sup> *Nshogoza*, "Prosecutor's Response to 'Defence Motion for Protective Measures for Victims and Witnesses (Rules 54, 69, 73 and 75 ICTR Rules of Procedure and Evidence)'," filed 2 December 2008.

<sup>3</sup> *Nshogoza*, Defence Reply to Prosecutor's Response to Defence Motion for Protective Measures for Victims and Witnesses," filed 11 December 2008.

<sup>4</sup> *Nshogoza*, "Urgent Application for Clarification of 24 November 2008 Witness Protection Order (Rules 54 and 73 ICTR R.P.E.)," filed 18 December 2008

<sup>5</sup> *Nshogoza*, Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008. This Order granted protective measures in respect of Prosecution witnesses.

<sup>6</sup> *Nshogoza*, "Urgent and Confidential Application for Variance of 24 November 2008 Witness Protection Order (Rules 54, 73 and 75 (I) ICTR R.P.E.)," filed 18 December 2008.

<sup>7</sup> *Nshogoza*, Prosecutor's Response to Defence 'Urgent Application for Clarification of 24 November 2008 Witness Protection Order', filed 22 December 2008; Prosecutor's Response to Defence 'Urgent and Confidential Application for Variance of 24 November 2008 Witness Protection Order (Rules 54, 73 and 75 (I) of ICTR R.P.E.', filed 22 December 2008.

<sup>8</sup> Article 19 (1) of the Statute provides, "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the Accused and due regard for protection of victims and witnesses." Article 21 of the Statute reads "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection

5. Rule 69 allows either party to apply to a Trial Chamber, in exceptional circumstances, for measures to prevent the disclosure of the identity of a victim or a witness who may be in danger. Under Rule 75 (A):

A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

6. Measures for the protection of witnesses are to be determined on a case-by-case basis.<sup>9</sup> It is established in the jurisprudence of the Tribunal that witnesses for whom protective measures are sought must have a real fear for their safety or the safety of their family, and that there must be an objective justification for this fear.<sup>10</sup> These fears may be expressed by persons other than the witnesses themselves.<sup>11</sup>

7. In determining whether this fear is justified, the representations made by the parties must be examined in the context of the broader security situation affecting the concerned witnesses.<sup>12</sup> Generalised fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate these fears.<sup>13</sup>

8. Furthermore, the protective measures must be strictly necessary for the protection of the relevant witness, and it is preferable to adopt a less restrictive measure if that measure can secure the desired level of protection.<sup>14</sup> Finally, the adoption of protective measures requires a careful balancing between the need to secure the safety and security of victims and witnesses, and the rights of the Accused to a fair and public hearing as enshrined in Article 20 of the Statute.<sup>15</sup>

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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."

<sup>9</sup> *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Defence Motion for Protection of Witnesses, 9 February 2006, para. 2; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006 para. 7; *Prosecutor v. Juvenal Rugambarara*, Case No. ICTR-00-59-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006, para. 12; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, 25 February 2000, para 4.

<sup>10</sup> *Nahimana*, para. 11 (citing *Prosecutor v. Bagosora*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Nutyahaga (TC), 13 September 1999, para. 28); *Rugambarara*, para 9; *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses, 26 July 2006, para. 5; *Bikindi*, para. 7.

<sup>11</sup> *Bikindi*, para. 7.

<sup>12</sup> *Kamuhanda*, Protective Measures Decision, para 12 (citing *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses, 13 July 1998, para. 9); *Nahimana*, para 4.

<sup>13</sup> *Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 10 (citing *Prosecutor v. Milosević*, Case No. IT-02-54, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7).

<sup>14</sup> *Renzaho*, para. 28.

<sup>15</sup> *Rugambarara*, para. 10; *Bikindi*, para. 7.

9. Once protective measures have been ordered in respect of a witness, such measures remain in force until they are rescinded, varied, or augmented by a Chamber.<sup>16</sup>

*Are Protective Measures Appropriate in this Case?*

10. The Defence seeks protective measures for witnesses living in Rwanda whom, it submits, have expressed grave concerns in respect of their personal safety and security. According to the Defence, some witnesses have agreed to testify only if their anonymity can be assured.<sup>17</sup> The Defence submits that the witnesses fear that they will be accused of harbouring "genocidal ideology."<sup>18</sup>

11. The Defence did not provide any materials in support of its Motion. Instead, the Defence refers to recent decisions from this Tribunal regarding the transfer of cases to Rwanda pursuant to Rule 11 *bis* of the Rules. The Defence cites an excerpt from one decision where that Chamber accepts that witnesses may have a real fear, regardless of whether or not their fears are well founded.<sup>19</sup> In addition, the Defence refers to a Human Rights Watch ("HRW") brief which was submitted in opposition to a Rule 11 *bis* transfer in another case.<sup>20</sup>

12. The Chamber recalls that the witnesses must have a subjective fear which is objectively justified, and that protective measures must be granted on a case-by-case basis. The Chamber further recalls that generalised fears are not sufficient to establish a real likelihood of danger in the absence of an objective basis to substantiate these fears.

13. In this regard, the Chamber considers that the Rule 11 *bis* decisions are of little assistance. In the Rule 11 *bis* decisions referred to, those Chambers assessed the possibility of a particular accused person receiving a fair trial in a specific country. It does not follow from those decisions that witnesses in this case have a subjective fear which can be objectively justified. Moreover, the Chamber notes that the excerpt the Defence relies upon acknowledges that the fears some witnesses have, while real, may or may not be well founded.

14. Further the Chamber does not consider an excerpt from an *amicus curiae* brief, submitted by HRW for the purpose of opposing the transfer of a case to Rwanda pursuant to Rule 11 *bis* in an unrelated case, sufficient to objectively justify the fears of the Defence witnesses in this case.<sup>21</sup>

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<sup>16</sup> Rule 75 (F).

<sup>17</sup> Motion, paras. 5-6.

<sup>18</sup> Motion, para. 10.

<sup>19</sup> Motion, para. 7. For this quotation, the Defence refers to *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008; and *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11 *bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008. The Defence also refers to *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008.

<sup>20</sup> Motion, paras. 8-10. The Defence cites *Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11 *bis*, "Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11 *bis* Transfer", 3 January 2008.

<sup>21</sup> See, for example, *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-01-70-T, Decision on the Defence Motion for Protective Measures for Defence Witnesses, 16 May 2007. At paragraph 6 of that decision, the Chamber explains, "[t]he practice of the Tribunal requires the moving party to demonstrate such objective basis [for the fear] through affidavits attesting to the state of insecurity in the witness' place of residence...or other

15. The Chamber is not, therefore, satisfied, that the Defence has demonstrated that the Defence witnesses have a subjective fear which is objectively justified.

16. However, the Chamber notes that the Prosecutor's case is scheduled to commence on 9 February 2009, and that it recently issued a protective measures order for Prosecution witnesses, taking into account the general security situation in Rwanda.<sup>22</sup>

17. The Chamber recalls Article 19 (1) of the Statute, which provides for "fair and expeditious proceedings...with full respect for the rights of the Accused and due regard for the protection of victims and witnesses." The Chamber considered the security situation in Rwanda as it relates to witnesses in this case before issuing protective measures for Prosecution witnesses.<sup>23</sup> In these circumstances, and given the short time remaining before the scheduled commencement of trial, the Chamber considers that it is in the interests of justice to grant similar protective measures in respect of the witnesses who will testify for the Defence in these proceedings.<sup>24</sup>

#### *Which Protective Measures Should be Granted?*

18. The Prosecutor objects to the Defence request for the disclosure of identifying information for Defence witnesses no more than 21 days before the witness is scheduled to testify, but supports disclosure of identifying information by 15 January 2009, and in any case, no later than 21 days before the commencement of the Defence case.

19. The Chamber recalls that Rule 69 (C) requires the identity of protected witnesses to be disclosed to the opposing party within a sufficient time frame to allow adequate time for the preparation of the case.<sup>25</sup> As this is a contempt of the Tribunal case involving a single Accused, there is little likelihood of a substantial delay between the disclosure of a witness's identity and his or her testimony.<sup>26</sup>

20. As the Defence has not sought to substantiate the particular measures it requests, the Chamber considers it appropriate, in these circumstances, to order the same measures for the

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circumstances demonstrating that is the identity of the witness(es) and the fact that they may testify at the Tribunal are known, such witness(es) may face danger to their lives or the lives of their family members."

<sup>22</sup> *Nshogoza*, Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008.

<sup>23</sup> *Ibid.*

<sup>24</sup> The Chamber notes that it can, *proprio motu*, order witness protection measures pursuant to Rule 75 (A). See also *Prosecutor v Aloys Simba*, Case No. ICTR-01-76-PT, Decision on Defence Request for Protection of Witnesses, 25 August 2004. At paragraph 6 of that Decision, the Chamber finds that the Defence did not provide materials to objectively support that the witnesses' fears were well founded. However, the Chamber considered evidence in its previous decisions of the volatile security situation in Rwanda in order to find that exceptional circumstances had been established. See also *Rukundo* Decision, where the Chamber noted at paragraph 8 that for the sake of consistency and trial fairness, similar protective measures should be ordered for Prosecution and Defence witnesses.

<sup>25</sup> Rule 69 (C) reads, "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."

<sup>26</sup> *Nchamihigo*, para. 8 (citations omitted); *Prosecutor v Aloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 7 (citations omitted). Twenty one days before the day the witness will testify is often the period ordered for disclosure of the identity of a protected witness. However, in single accused cases, thirty days has been considered appropriate.

Defence witnesses as were ordered in respect of the Prosecution witnesses.<sup>27</sup> The Chamber finds disclosure of the witness's identity 30 days before the commencement of the Defence case - the same time period ordered for the Prosecutor regarding the disclosure of identifying information - to be reasonable.

21. Pursuant to the Chamber's Order of 31 December 2008, the Defence provided the Chamber, *ex parte*, with a list of 40 witnesses it intends to call.<sup>28</sup> The Chamber notes that at least one of the witnesses contained on the Defence list appears to be a person in respect of whom protective measures were ordered pursuant to the Protective Measure Order. Further, at least one of the persons listed appears to be a family member of a person in respect of whom protective measures were ordered.<sup>29</sup>

22. Measure vii of the Protective Measures Order states:

The Accused and the Defence team shall be prohibited from making contact with a protected witness and/or his or her family members unless the consent of the person concerned has first been obtained. The Accused and/or any member of the Defence team shall contact the Prosecutor, who, with the assistance of the WVSS shall ascertain whether such consent exists. In the event that consent exists, the WVSS shall facilitate the interview, which shall be conducted in the presence of a representative of the Prosecutor

23. Witnesses for whom protective measures are already in place pursuant to the Protective Measures Order cannot be contacted by the Defence without first obtaining the consent of that person in accordance with the procedure specified in Measure vii. This Measure also prevents the Defence from contacting the family members of a protected witness. The protective measures enumerated in the Protective Measures Order remain in effect and must be respected, despite the Defence identifying protected witnesses or family members of protected witnesses as Defence witnesses on the list submitted to the Chamber.

24. The Chamber recognizes that in respect of those individuals who may be relatives of protected Prosecution witnesses, and who have agreed to testify on behalf of the Accused, the requirement to have a representative of the Prosecutor present for all meetings between such persons and the Defence may not be appropriate. However, such instances will have to be considered on a case-by-case basis.

**FOR THESE REASONS**, the Chamber

**GRANTS** the Motion, in the interests of justice; and,

**ORDERS** that the following protective measures shall apply to Defence witnesses listed on the Defence witness lists submitted to the Chamber on 9 and 16 January 2009, living in Rwanda, as well as other witnesses that the Defence may call to testify; and that, in accordance with Rule 75 of the Rules, these measures shall remain in force unless the Chamber orders otherwise:

<sup>27</sup> See *Prosecutor v. Karera*, Case No. ICTR-01-74-T, at para 4, where the Chamber states, "[t]he interests of trial fairness and administrative simplicity strongly favour the adoption of identical measures ...."

<sup>28</sup> *Nshogoza*, Order for the Defence to File a List of Witnesses, 31 December 2008; *Nshogoza*, "Defence Strictly Confidential, *Ex Parte* and Under Seal Filing," filed 9 January 2009 ("Defence Witness List"); *Nshogoza*, Defence Further Strictly Confidential, *Ex Parte* and Sealed Filing," filed 16 January 2009 ("Defence Further Witness List").

<sup>29</sup> *Nshogoza*, Defence Witness List.

- i. The Defence shall designate pseudonyms for each protected Defence witness, to be used whenever referring to such witnesses in ICTR proceedings, communications, and discussions, both between the parties and the public;
- ii. The names, addresses, whereabouts and other information that might identify or assist in identifying the witnesses and their families (“identifying information”) shall be sealed by the Registry and shall not be included in public or non-confidential records;
- iii. Identifying information contained in existing records of the Tribunal shall be removed from the public record of the Tribunal and placed under seal;
- iv. Identifying information shall not be disclosed to the public or the media for an indefinite period of time to exceed the conclusion of the trial;
- v. Until 30-days prior to the Defence case, when the Defence discloses identifying information to the Prosecution,<sup>30</sup> no member of the Prosecution shall attempt or encourage or aid another person in an attempt to make an independent determination of the identity of any protected witness or his or her family members;
- vi. The public and the media shall be prohibited from making audio or video recordings, broadcasts, sketches or taking photographs of any protected witness and/or his or her family members in relation to their testimony at the Tribunal, without leave of the Chamber;
- vii. The Prosecution shall not make contact with a protected witness and/or his or her family members unless the consent of the person concerned has first been obtained. The Prosecution shall contact the Defence, who, with the assistance of the Victims and Witnesses Support Unit (“WVSS”) shall ascertain whether such consent exists. In the event that consent exists, the WVSS shall facilitate the interview, which shall be conducted in the presence of a representative of the Defence;
- viii. The Prosecution shall keep confidential any identifying information, and shall not share, discuss, or reveal, directly or indirectly, such information to any person or entity;
- ix. The Prosecution shall provide a written list to the WVSS and to the Defence designating all officially authorised persons working with the Prosecution who will have access to any identifying information. In the event any such persons leave the Prosecution, the Prosecution must provide written notification to the WVSS and confirm that such person has remitted all materials containing identifying information; and
- x. The Defence shall disclose identifying information to the Prosecution no later than thirty days before the commencement of the Defence case; and,


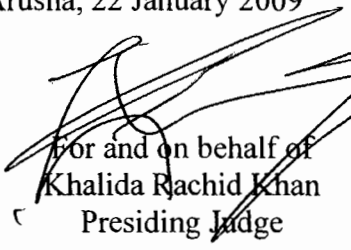
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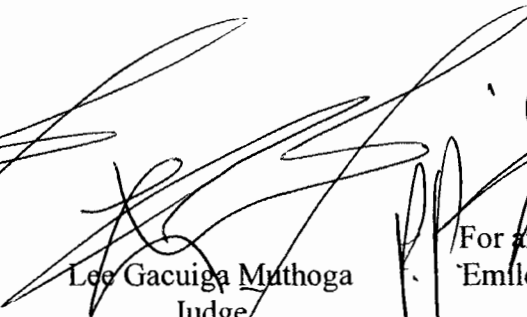
<sup>30</sup> The reference to “Prosecution” means the Prosecutor, and the Prosecution team. That includes individuals from the Office of the Prosecutor who are assigned to represent the Prosecutor in these proceedings, and/or to assist in the preparation of the case.

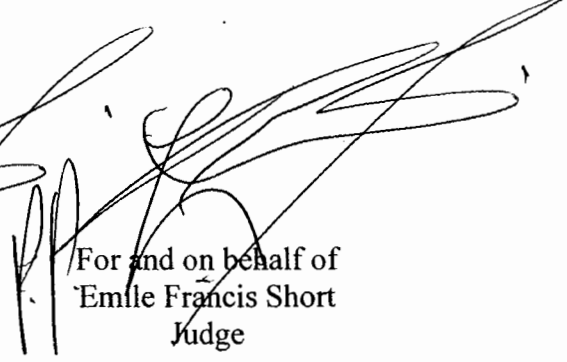


**FURTHER ORDERS** that these protective measures shall not apply to witnesses who are already subject to protective measures in these proceedings pursuant to the Protective Measures Order, nor to family members of such witnesses.

Arusha, 22 January 2009

  
  
For and on behalf of  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuiga Muthoga  
Judge  
[Seal of the Tribunal]

  
For and on behalf of  
Emile Francis Short  
Judge

