

ICTR-07-91-PT  
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UNITED NATIONS  
NATIONS UNIES

**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:** 23 January 2009

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**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-PT**

**DECISION ON DEFENCE MOTION FOR VARIATION OF 24 NOVEMBER 2008  
WITNESS PROTECTION ORDER**

*Rules 54, 73 and 75 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Richard Karegyesa  
Abdoulaye Seye  
Dennis Mabura  
Florida Kabisanga

**For the Accused:**

Allison Turner

## INTRODUCTION

1. On 18 December 2008, the Defence filed a motion seeking to vary the Chamber's Order of 24 November 2008,<sup>1</sup> which granted protective measures in respect of Prosecution witnesses ("Protective Measures Order").<sup>2</sup> The Defence seeks to have the Protective Measures Order varied in respect of a family member of Witness BUC. The individual in question was given the pseudonym SP-0017 by the Prosecutor in 2005.

2. The Defence requests that the Chamber vary the Protective Measures Order so that Measure vii<sup>3</sup> of the Order will not apply to SP-0017, and so that the Prosecutor, and any person from the Office of the Prosecutor assigned to these proceedings, will be prevented from making contact with this individual. The Defence also requests the variation of the Protective Measures Order to take effect retroactively, from the date of the filing of the Motion.

3. On 9 and 16 January 2009, the Defence filed a list of witnesses pursuant to the Chamber's Decision of 31 December 2008.<sup>4</sup>

4. The Prosecutor objects to the Motion. The Prosecutor submits that SP-0017 remains a potential Prosecution witness; that the Defence has not advanced any legitimate reason for the Order to be varied; and that the Protective Measures Order sets out a simple procedure for contacting a protected Prosecution witness.<sup>5</sup>

## DISCUSSION

### *Applicable Law*

5. Article 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>6</sup> 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

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008.

<sup>2</sup> *Nshogoza*, "Urgent and Confidential Application for Variance of 24 November 2008 Witness Protection Order (Rules 54, 73, 75 (I) ICTR R.P.E.," filed 18 December 2008 ("Motion").

<sup>3</sup> Measure vii of the Protective Measures Order is set out at paragraph 10 of this Decision.

<sup>4</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"). Though for the particulars of the witnesses are not provided, it appears that SP-0017 is on the list filed on 9 January 2009.

<sup>5</sup> *Nshogoza*, 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 ("Response").

<sup>6</sup> Article 21 of the Statute reads "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

6. Pursuant to Article 19 (1) of the Statute, the Chamber must ensure that “the trial is fair and expeditious and that the 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 the protection of victims and witnesses.”

7. Rule 75 (F) provides that an application to vary protective measures in respect of a witness may be dealt with by either the Chamber or a Judge of that Chamber.

*Should the Chamber Vary the Protective Measures Order?*

8. The Defence asserts that “BUC has always been a defence witness.”<sup>7</sup> According to the Defence, the application of Measure vii to Witness BUC’s sister is unnecessary because she has agreed to testify for the Defence, and the application of the measure requires “advanced disclosure” of the witness’s identifying information. Finally, the Defence submits that the use of the measure “unduly hinders the [D]efence in the conduct of its investigations.”<sup>8</sup>

9. The Prosecutor objects to the request to vary the Protective Measures Order. The Prosecutor asserts that SP-0017 is a potential Prosecution witness who was interviewed in 2005 and assigned a pseudonym. As a potential Prosecution witness, the Prosecutor submits that the Protective Measures Order already applies to SP-0017.<sup>9</sup> The Prosecutor also asserts that the Defence can follow the procedure established in Measure vii in order to contact the witness and that the Defence has not provided a legitimate reason for the Chamber to vary the Order.<sup>10</sup>

10. 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.

11. The Chamber does not accept the Prosecutor’s assertion that the Protective Measures Order already applies to SP-0017 as a potential Prosecution witness. Rather, the Protective Measures Order applies to existing Prosecution witnesses, and may apply to additional witnesses if the Prosecutor decides to call them to testify.

12. However, Measure vii prevents the Defence from contacting a family member of a protected witness without first obtaining the consent of that person in accordance with the procedure specified in the measure. Since Witness BUC is a protected Prosecution witness, the Defence must contact the Prosecutor in order to meet with SP-0017, who is a family member

<sup>7</sup> The Defence then refers to attempts by the Defence to hear Witness BUC during the Rule 115 hearing in *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54. See Motion para. 2 and corresponding footnote 2.

<sup>8</sup> Motion, paras. 5-6.

<sup>9</sup> Response, paras. 6-7.

<sup>10</sup> Response, paras. 10-13.

of Protected Witness BUC. In addition, Measure vii requires that the Prosecutor's representative be present at any such meeting.

13. The Chamber considers that the requirement to have a representative of the Prosecutor present for all meetings between SP-0017 and the Defence may not be appropriate if this person has agreed to testify for the Defence. The Defence should be able to interview a witness who has agreed to testify on behalf of the Accused without the Prosecutor being present at the meeting. The Chamber notes, however, that the Defence has not provided any documentation to support its assertion that SP-0017 has: (i) consented to meet with the Defence, and (ii) agreed to testify on behalf of the Accused.

14. The Accused in this case is alleged to have disregarded protective measures orders in other proceedings before this Tribunal.<sup>11</sup> The Chamber considers that, taking into account a careful balancing of the rights of the Accused and the need to adequately ensure the safety of victims and witnesses, supporting documentation that SP-0017 has consented to meet with the Defence and agreed to testify on behalf of the Accused should be provided to the Chamber in order for the Protective Measures Order to be varied.

#### *Dispute over Witnesses*

15. The Prosecutor asserts that SP-0017 is a potential Prosecution witness. The Defence attempts to claim Witness BUC as a Defence witness based on this witness's involvement in the *Kamuhanda* proceedings and disputes the ability of the Prosecutor to call this witness to testify for the Prosecution.<sup>12</sup>

16. The Chamber considers that both Parties are mistaken in attempting to claim property in these witnesses. The Appeals Chamber has held that "[w]itnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them."<sup>13</sup>

17. The Chamber notes that SP-0017 is not on the Prosecutor's list of witnesses. The Chamber considers that the fact that the Prosecutor interviewed SP-00-17 and assigned the individual a pseudonym does not prevent the Defence from deciding to call SP-0017 as a witness.

18. With regard to Witness BUC, the Chamber considers that the participation of this witness in the *Kamuhanda* proceedings has no bearing on the Prosecutor's ability to call the witness to testify for the Prosecution in these proceedings.

**FOR THESE REASONS, the Chamber**

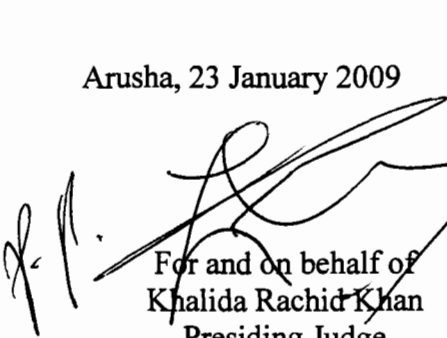
<sup>11</sup> *Nshogoza*, Indictment, 7 January 2008.


<sup>12</sup> Motion, para. 2.

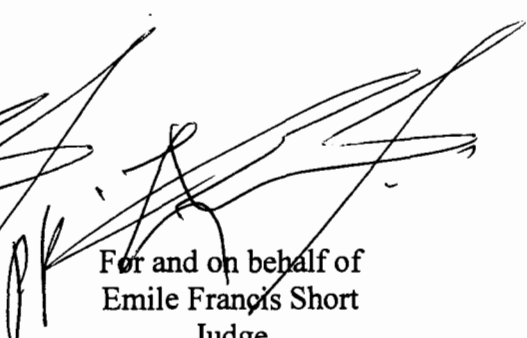
<sup>13</sup> *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003, para 15; *Prosecutor v. Ndindiliyimana et. al*, Case No. ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, para. 3.

**ORDERS** that in respect of the family member of Protected Prosecution Witness BUC, who is on the Defence list of witnesses and who is known by the pseudonym SP-0017, the Defence shall provide the Chamber with a signed consent, obtained in accordance with the procedure set out in Measure vii of the Protective Measures Order, stating that the witness has agreed to testify on behalf of the Defence.

Arusha, 23 January 2009

  
For and on behalf of  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuiga Muthoga  
Judge

  
For and on behalf of  
Emile François Short  
Judge

[Seal of the Tribunal]

