

ICTR-2001-71-I
10-7-2001
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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Pavel Dolenc

Registrar: Adama Dieng

Date: July 10 2001

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Adama Dieng

THE PROSECUTOR

v.

Emmanuel NDINDABAHIZI

Case No. ICTR-2001- 71 -I

ORDER FOR NON-DISCLOSURE

The Office of the Prosecutor:

Melinda Pollard

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: *William R. Homeier*
SIGNATURE: *W. Homeier* DATE: *11-02-2001*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),

SITTING as Judge Pavel Dolenc, designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence of the Tribunal (Rules);

BEING SEIZED of the "Prosecutor's Memorandum Concerning an Application for Review and Confirmation of an Indictment and Related Documents" filed on 26 June 2001 (Memorandum);

CONSIDERING the Indictment against Emmanuel Ndindabahizi (Accused) dated 7 June 2001, filed with the Registry on 26 June 2001, and confirmed by Judge Dolenc on July 5, 2001;

HAVING HEARD the Prosecutor in *ex parte* hearings on 4, 6 and 10 July 2001;

HAVING REVIEWED the Prosecutor's proposed redactions;

CONSIDERING Articles 18(2) and 21 of the Statute of the Tribunal (Statute) and Rule 47(H)(i), 53, 54, 66, 69 and 75;

SUBMISSIONS OF THE PROSECUTOR

1. On page 6 of the Prosecutor's Memorandum, the Prosecutor requests that this Tribunal:
 - (b) **ORDER**, pursuant to Rule 70 of the Rules of Procedure and Evidence, that the Explanatory Notes filed herewith are not subject to disclosure as they constitute internal documents of the Prosecutor prepared in connection with the preparation of the case and that said document (including any copies thereof) be returned to the Prosecutor after the indictment review process is complete.
 - (c) **ORDER**, pursuant to Rule 66(C) of the Rules of Procedure and Evidence, that any unredacted materials provided to the Court during the confirmation process be kept confidential and not be the subject of disclosure under Rule 66(A)(i) of the Rules of Procedure and Evidence; and
 - (d) **ORDER**, pursuant to Rules 53(C) and 66(C) of the Rules of Procedure and Evidence, for non-disclosure to the accused and/or his counsel of the names of witnesses and of any information that may tend or is likely to disclose the identity or address of witnesses contained in the supporting materials or any related document and that such documents only be so disclosed in redacted form until further order of the Court.
 - (e) **ORDER**, pursuant to Rule 53 of the Rules of Procedure and Evidence, for the non-disclosure to the public, including the media or any public record, of the indictment or any part thereof or information pertaining to the indictment until further order of the Court.
 - (f) Any other order or orders as the Confirming Judge or Trial Chamber may find just in the interest of justice.

FINDINGS

2. The Explanatory Notes in Support of the Indictment, contained in pages 294 to 283 of the Registry File are the internal work product of the Office of the Prosecutor as contemplated by Rule 70, and as such are exempted from the disclosure requirements under the rules. Therefore, these notes should not be disclosed to the public or to the media or to the suspect or any of his representatives and should be removed from the Registry files and returned to the Office of the Prosecutor.

3. The English version of Rule 53 provides:

Rule 53: Non-disclosure

(A) *In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.*

(B) *When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.*

(C) *A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.*

4. Rule 53(B) provides for non-disclosure to the public of the indictment or any information pertaining to it *until it has been served upon the accused*. In paragraph (e) of the Prosecutor's request, she seeks to have this measure extended until "further Order of the Court". For the reasons advanced by the prosecutor, notably that non-disclosure will facilitate the arrest of the accused, the Tribunal finds that such measures are justified until the Indictment has been served on the accused. However, the Tribunal finds no support for the extension of these measures pertaining to the indictment after that time.


5. The provisions of paragraphs (A) and (C) of Rule 53 are not so clear. Nevertheless, the Tribunal finds that English version of Rule 53(C) does not preclude a reviewing judge from granting the requested orders and does not limit non-disclosure only to the public. Rather, this Rule also encompasses non-disclosure to the defence. Further, Rule 53(C) does not require exceptional circumstances as a prerequisite for an order of non-disclosure. For the purpose of this decision therefore the Tribunal applies Rule 53(C).

6. Non-disclosure under Rule 53(C) may be ordered to give effect to a provision of the Rules or to protect confidential information obtained by the Prosecutor or to facilitate the interest of justice. In the present circumstances, the Tribunal finds that non-disclosure to the defence of certain information is necessary to give effect to the provisions of Rules 69(A) and 75 and thereby serves the interests of justice.

7. Rule 69(A) provides for non-disclosure, *in exceptional circumstances*, to the accused and his counsel of the identity of witnesses who may be in danger or at risk. Non-disclosure of this information to the defence is an exception to the general obligation of the Prosecutor under Rule 66(A) to disclose all supporting materials, including witness statements, to the defence within a specified period of time after the initial appearance. Therefore, an order for non-disclosure pursuant Rule 53(C) cannot be used as a substitute for an order under Rule 69(A) because the latter requires the existence of exceptional circumstances and proof of danger or risk for particular witnesses, which the present Memorandum does not allege. However, an order for non-disclosure of the identifying information of witnesses under Rule 53(C) is a provisional measure which may be used during an interim period to permit the Prosecutor to request a specific order for non-disclosure pursuant to Rule 69(A). The provisional use of Rule 53(C) is in the interest of justice since it protects the anonymity of witnesses that might be at risk or danger.
8. The Prosecutor has not specifically requested that these measures also be extended to the public and the media. However, this Tribunal finds that such a measure is required in the interests of justice. Rule 75(A) and (B) provides for non-disclosure to the public and to the media of identifying information of witnesses during pretrial proceedings, preparations for trial and during the trial. It is in the interest of justice to extend this protection to the early stages of these proceedings, pursuant to Rule 53, in order to preserve the Trial Chamber's ability to make meaningful orders under Rule 75 where necessary and to give effect to the Order of non-disclosure to the accused.
9. For the reasons above the Tribunal:
 - (a) **ORDERS** that the Explanatory Notes filed with the supporting materials accompanying the Indictment, and any copies thereof, be returned to the Prosecutor;
 - (b) **ORDERS** the non-disclosure of the Indictment, including the Confirmation of the Indictment dated 5 July 2001 and all related Orders including the present Order, or any part thereof or any information pertaining to it until it is served on the accused;
 - (c) **ORDERS** non-disclosure to the public and to the media of the identity, whereabouts and any other information that is likely to reveal the identity or addresses of the 20 witnesses identified by pseudonyms;
 - (d) **ORDERS** that the names and other identifying information be expunged from the 20 witnesses statements as approved by the Tribunal, until further order of the Tribunal;

- (e) **ORDERS** the assignment to the 20 witnesses of the pseudonyms as proposed by the Prosecutor;
- (f) **ORDERS** that the disclosure to the defence of any and all of the 20 witness statements be made in redacted form pursuant to Orders (d) and (e) above, until such time as the Prosecutor is obliged to disclose the unredacted statements pursuant to Rule 66(A) or until further Order of the Tribunal;

Arusha, 10 July 2001.



Judge Pavel Dolenc

Seal of the Tribunal

