

ICTR-2001-69-1
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

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-I

ORDER FOR NON-DISCLOSURE

The Office of the Prosecutor:

Silvana Arbia

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 (the Rules);

BEING SEIZED of the "Prosecutor's Ex Parte Motion for Non-Disclosure of the Names of Witnesses and Other Identifying Information in the Indictment, Supporting Materials and Witness" dated and filed on 5 July 2001 (the Motion);

CONSIDERING the Indictment against Hormisdas NSENGIMANA (the Accused) dated 8 June 2001, filed on June 21 2001 with the Registry, and confirmed by Judge Dolenc on July 5, 2001;

HAVING HEARD the Prosecutor during *ex parte* hearings on 4 and 5 July 2001;

HAVING REVIEWED the Prosecutor's proposed redactions;

CONSIDERING Articles 18(2) and 21 of the Statute of the Tribunal (the Statute) and Rules 39(ii) and (iv), 47(H)(i), 53, 54, 66, 69 and 75;

SUBMISSIONS OF THE PROSECUTOR

1. In paragraph 7 of the Motion, the Prosecutor requests that this Tribunal:
 - (a) ORDER that there be no public disclosure of the indictment or any part thereof, or information pertaining to it until it is served on the suspect;
 - (b) ORDER non-disclosure of the names of witnesses and other identifying information in the Supporting Materials and Witness Statements to the accused and/or the Counsel for the accused;
 - (c) ORDER that the indictment not be disclosed to the media or included in any public record of the Tribunal until such time when it is served on the accused;
 - (d) ORDER that the material in support of the indictment, witness statements and any other document to be disclosed to the accused be so disclosed upon redaction of any information that tends to or is likely to disclose the identity or address of witnesses;
 - (e) ORDER that the disclosure of Supporting Materials and Witness Statements be so disclosed only upon redaction of any information that tends to or is likely to disclose the identity or address of such co-suspect;
 - (f) Any other Order or Orders as the Confirming Judge or Trial Chamber may find just in the interests of justice.
2. The Prosecutor seeks these orders for the purposes of facilitating the arrest of the accused and to protect the identity of witnesses.

3. During the *ex parte* hearing the Prosecutor advised the Tribunal that she was also requesting that the names of other suspects and other information relating to ongoing investigations be expunged from the witness statements and that such information be redacted from the materials to be disclosed to the defence.

FINDINGS

4. In her request, the Prosecutor refers to Rule 53 in its entirety and does not specify which particular provision is applicable for each of the requested measures. The English version of Rule 53 provides:

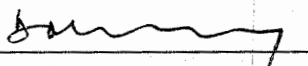
Rule 53: Non-disclosure

- (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.*
5. 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, as requested in paragraph 7(a) of the Motion. 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 in the present case.
 6. The provisions of paragraphs (A) and (C) of the same rule 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. Rule 53(C) does not require exceptional circumstances as a prerequisite for an order of non-disclosure. Further, Rule 53(C) facilitates non-disclosure of information and materials which may prejudice other or ongoing investigations. For the purpose of this decision therefore, the Tribunal applies Rule 53(C).
 7. 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 Rules 66(C), 69(A), 75 and 39(ii) and (iv) and thereby serves the interests of justice.

8. 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 to 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 of a likelihood of danger or risk for particular witnesses, which the present motion does not allege. However, an order for non-disclosure of the identifying information 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.
9. 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. It is therefore justified to grant the Prosecutor's request in this respect.
10. Some witness statements include information which could reveal to the public, to the media and to the defence the identity of possible accomplices in the crimes alleged in the indictment or of potential suspects in other crimes under investigation by the Prosecutor. The investigation of potential suspects whose alleged crimes fall within jurisdiction of the Tribunal is confidential. Disclosure of such information could obstruct the efficiency of the prosecutor's activities under Rule 39(i) and (ii). Successful investigation and prosecution of the crimes within jurisdiction of the Tribunal is clearly in the interest of justice and therefore it is appropriate to protect the identities of these suspects, pursuant to Rule 53 at this time. This requested Order may also serve to give effect to the provisions of Rule 66(C).
11. The indictment against the accused does not include any co-suspects. Thus, the order requested in 7(e) cannot be granted.
12. For the reasons above the Tribunal:
 - (a) **ORDERS** non-disclosure of the indictment, including the act of Confirmation and related orders including the present order, or any part thereof or any information pertaining to it until it is served on the accused;
 - (b) **ORDERS** non-disclosure to the public and to the media of the identity, whereabouts and any other information that is likely to disclose the identity or addresses of 20 witnesses identified by pseudonyms proposed by the Prosecutor;
 - (c) **ORDERS** non-disclosure to the accused and his counsel the names and other identifying information of the same witnesses;
 - (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** that the names of other suspects and other confidential information necessary for on-going investigations be expunged from the 20 witnesses statements as approved by the Tribunal, until further order of the Tribunal;
- (f) **ORDERS** the assignment to the witnesses of the pseudonyms as proposed by the Prosecutor;
- (g) **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), (e) and (f) 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;
- (h) **DENIES** the motion in all other respects.

Arusha, 10 July 2001.



Judge Pavel Dolenc

Seal of the Tribunal

