



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-61-1
41-02-2004
(1452-1448)

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S.Musea

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 11 February 2004

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. : ICTR-2000-61-I

2004 FEB 11 P 3:10
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DECISION ON PROSECUTION REQUEST FOR PROTECTION OF WITNESSES

The Office of the Prosecutor

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Counsel for the Defence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Judge Erik Møse, designated by Trial Chamber I in accordance with Rule 73(A);

BEING SEIZED OF the Prosecution "Motion for Protective Measures for Victims and Witnesses", filed on 14 March 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. The present motion is brought under Rule 69 of the Rules of Procedure and Evidence ("the Rules"), in conjunction with other Rules, seeking permission to relieve the Prosecution of disclosure obligations imposed on it by virtue of Rule 66. A prior decision has already relieved the Prosecution of some of its obligations under Rule 66(a)(i), by permitting it to redact the names and other identifying information from witness statements used to substantiate confirmation of the Indictment.¹ That decision noted that "the Trial Chamber will at a later stage decide within what time frame the Prosecutor shall be required to disclose the identity of the witnesses and victims in order to allow adequate time to the Accused for the preparation of his defence as required by Rule 69(C)".² The Chamber is now seized of such a motion. There is no response from the Defence.

SUBMISSIONS

2. The Prosecution claims that its witnesses face a real and substantial danger of being threatened, assaulted, or killed if their identities are revealed. The motion includes annexes containing statements of investigators of the Tribunal; a memorandum from the Witness and Victims Support Section; and reports of journalists, human rights organizations, and organs of the United Nations, which support that claim. The Prosecution requests permission to disclose the names of its witnesses, and portions of statements that may identify witnesses, be delayed until a fixed period before the testimony of each witness, also known as "rolling disclosure", in derogation of its obligations under Rule 66(a)(ii) and other Rules. Rolling disclosure twenty-one days prior to the date of each witness's testimony is said to have "crystallized as the Tribunal's practice".³ In addition to rolling disclosure to the Defence, the Prosecution requests a variety of measures to prevent disclosure of any identifying information to the public.

DELIBERATIONS

3. Rule 66(A) provides that:

The Prosecutor shall disclose to the Defence:

- ...
- ii) No later than 60 days before the date set for trial, copies of the statements of all witness whom the Prosecutor intends to call to testify at trial.

Extensive jurisprudence has emerged from the Tribunal concerning the exception to this general rule provided in Rule 69, "Protection of Victims and Witnesses":

¹ *Gatete*, Decision on Non-Disclosure Pursuant to Rule 53, 66, 69, and 75 (TC), 27 September 2002.

² *Ibid.* p. 3.

³ Motion for Protective Measures for Victims and Witnesses, para. 29.

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(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

...

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

4. The established jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. The Prosecution has submitted persuasive evidence of the volatile security situation in Rwanda and of potential threats against Rwandans living in other countries. This situation could give rise to a justified and real fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security. Accordingly, exceptional circumstances have been established warranting delayed disclosure of the identity of witnesses to the Defence, and non-disclosure to the public.

5. Rule 75 describes the measures that may be taken to "safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused". These measures include the non-disclosure to the public of the name of the witness or any other identifying information, and to hold closed trial sessions to prevent such information from being publicly disseminated. Rule 75 does not diminish the Prosecution obligation under Rule 69 to, at some point, disclose the identity and prior statements of the witness to the Defence. Rule 69 simply modifies the timing of disclosure, displacing the fixed rule of sixty days before trial with a more flexible standard of an "adequate time for preparation...of the Defence". What is "adequate" must be assessed in light of the rights of the accused set out in Article 19 and 20 of the Statute. Article 19 expressly requires that both the rights of the accused and the interests of witnesses and victims be accommodated.

6. The amount of time that will afford the Defence an adequate opportunity to prepare depends largely on the factual circumstances of each case, as is reflected in the variety of the periods of disclosure ordered from case to case. The measures fashioned by a Chamber must take into account both the rights of the accused set forth in Articles 19 and 20 of the Statute, and the needs of witness protection in Article 21 of the Statute and Rules 69(C) and 75. The vulnerability of the witness or witnesses and the nature of the threat in the particular case must be weighed against the impact of the particular period of non-disclosure on the ability of the Defence to prepare. Rule 69(C), which formerly required disclosure before the commencement of trial, was amended on 6 July 2002 to expressly permit rolling disclosure.⁴ Nevertheless, full disclosure before trial is still often required.⁵ Not only does rolling disclosure shorten the period of preparation for the Defence provided for in Rule 66(a)(ii), its effect is also that the trial will begin, and Prosecution witnesses will be heard, before the

⁴ Rule 69(C) had formerly read: "Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence."

⁵ *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003, ("Seromba Decision"), p. 4; *Nyaramasuhuko et al.*, Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses (TC), 8 June 2001, p. 7, 10. The Prosecutor also made full disclosure before trial on a voluntary basis in the *Media* case. See also *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 ("Reconsideration Decision").

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Defence knows the names of all Prosecution witnesses or is informed of the entirety of their statements.

7. As this case involves a single Accused, the Chamber expects the Prosecution case to be short in comparison with some of the larger cases before the Tribunal in which rolling disclosure has been ordered.⁶ Accordingly, the Chamber is of the view that full disclosure should be made to the Defence twenty-one days prior to the commencement of trial.

8. Many of the other measures sought by the Prosecution are substantially identical to those ordered in previous cases, and are granted below in language customarily adopted in such orders.⁷ An innovative request, however, is a prohibition on "the Accused both individually or through any person working for the Defence from personally possessing any material that contains any Identifying Information, including but not limited to, any copy of a witness statement even if the statement is in redacted form, unless the Accused is, at the time of its possession, in the presence of Counsel". The Prosecution argues that this measure is needed to prevent sharing of witness identities amongst co-detainees, as has occurred in the past, in violation of witness protection orders. The Chamber is concerned by the examples cited by the Prosecution, but is not persuaded that the measure will achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that he is personally subject to the terms of the present order, and that any violation hereof is a serious matter.⁸

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that:

1. The names, addresses, whereabouts, and other identifying information ("identifying information") of any witness for whom the Prosecution claims the application of this order ("protected witness") shall be kept confidential by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public. If any such information does appear in the Tribunal's non-confidential records, it shall be expunged.
2. The Prosecution shall assign a pseudonym to each protected witnesses for whom it claims the application of this order. The identifying information of each protected witness, with a corresponding pseudonym, shall be forwarded by the Prosecution to the Registry in confidence, and shall not be disclosed by the Registry to the Defence unless otherwise ordered. Where necessary to ensure non-disclosure of identifying information, the pseudonym shall be used in trial proceedings, discussions between the Parties in proceedings, and in statements disclosed in redacted form to the Defence.
3. Making or publicizing photographs, sketches, or audio or video recordings of protected witnesses while at, or travelling to or from, the Tribunal, without leave of the Chamber or the protected witness, is prohibited.

⁶ Reconsideration Decision, para. 2; Seromba Decision, para. 7.

⁷ *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

⁸ See *Mpambara*, Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses) (TC), 15 January 2003, paras. 21-24.

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4. Neither the Defence nor the Accused shall contact, or attempt to contact or influence, whether directly or indirectly, any protected witness in any manner, or encourage any person so to do, without first notifying the Prosecution which shall, if appropriate, make arrangements for such contacts.
5. The Defence shall provide the Registry with a designation of all persons working on the Defence team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any persons leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.
6. Neither the Defence nor the Accused shall attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.
7. The Defence and the Accused shall keep confidential to themselves all identifying information of any protected witness, and shall not distribute or disseminate to any person not designated as part of the Defence team in accordance with paragraph 5 above, or make public, identifying information in any form.
8. The Prosecution is authorised to withhold disclosure of identifying information to the Defence, and to temporarily redact their names, addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Defence.
9. The identifying information withheld by the Prosecution in accordance with this order shall be disclosed by the Prosecution to the Defence no later than twenty-one days before the commencement of trial.

Arusha, 11 February 2004



Erik Møse
Judge

[Seal of the Tribunal]

