

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-96-10-T 817
17-02-2004
(2837-2830)

2837 S. M. M. 885

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 16 February 2004

2004 FEB 17 A 9 53
S. M. M. 885

THE PROSECUTOR

v.

Elizaphan and Gérard NTAKIRUTIMANA

Case Nos. : ICTR-96-10-T and ICTR-96-17-T

DECISION ON RELEASE OF CLOSED SESSION TRANSCRIPT OF WITNESS OO
FOR USE IN THE TRIAL OF *BAGOSORA ET AL.*

The Prosecution

Hassan Bubacar Jallow
Charles Adeogun-Phillips
Wallace Kapaya

Defence for Ntabakuze

Peter Erlinder
André Tremblay

S. M. M. 885

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal (“the Rules”);

BEING SEIZED OF the Defence of Ntabakuze “Requête urgente ... aux fins de communication des procès-verbaux des audiences à huis clos des pièces déposés sous scellés lors de la déposition du témoin OO”, filed on 12 February 2004;

HEREBY DECIDES the motion.

1. Aloys Ntabakuze, one of the defendants in the case of *Bagosora et al.*, requests disclosure of transcripts of closed session testimony, and any exhibits under seal, of a protected witness who appeared at the trial of *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Witness OO. That witness is scheduled to testify as Prosecution witness KJ in the trial of *Bagosora et al.* The Defence submits that it needs the transcripts to prepare for the testimony and states that it is willing to be bound by the protective measures applicable to this material, namely, the witness protection decision in the *Ntakirutimana* case.

2. The order requested requires modification of the *Ntakirutimana* witness protection decision to permit the Registry to disclose the information to the moving party. Trial Chamber I, though now differently constituted than at the time of the witness protection decision, has ongoing authority to review its own decisions, including the conditions under which the records of the Chamber are kept. A valid reason for modifying an order governing the testimony of a protected witness is the need of the Defence in another case to know the content of the witness’s prior testimony, which may be relevant to the assessment of the witness’s credibility. The Chamber follows past decisions in finding that its protective order should be modified to permit the moving party access to the protected material on condition that its terms shall apply *mutatis mutandis* to that party.¹

3. As to the timing of disclosure, the witness protection order in effect in the case of *Bagosora et al.* has already required that identifying information of protected witnesses be disclosed.² Accordingly, the protected materials can be disclosed by the Registry to the Defence forthwith.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness OO in the *Ntakirutimana* case, and exhibits filed under seal therewith, shall be made available to any Defence team in the case of *Bagosora et al.* which undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the witness protection decision of 22 August 2000, attached hereto as Annex A;

¹ *Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Nahimana et al.*, Decision on Joseph Nzirorera’s Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera’s Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003.


² *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001 (TC).

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ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the witness protection decision of 22 August 2000;

ORDERS the Registry to carry out the terms of this Decision, and to otherwise continue to enforce the terms of the witness protection decision of 22 August 2000.

Arusha, 16 February 2004


Erik Møse
Judge

[Seal of the Tribunal]



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ANNEX A

ICTR-96-10-1
(896-893)

UNITED NATIONS  NATIONS UNIES

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Erik Møse
Registry: Ms Aminatta N'Gum
Decision of: 22 August 2000

ICTR
JUDICIAL RECORDS/PROCES
RECEIVED

2000 AUG 22 P 12:17

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA AND GERARD NTAKIRUTIMANA
(ICTR-96-17-T)

DECISION ON WITNESS PROTECTION

The Office of the Prosecutor:
Wallace Kapaya
Charles Adeogun-Phillips

Counsel for Elizaphan Ntakirutimana:
Mr Ramsey Clark

Counsel for Gerard Ntakirutimana:
Mr Edward Medvene

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the 'TRIBUNAL'),

SITTING as Trial Chamber I, composed of Judge Erik Møse, pursuant to Rule 75 (A) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the motion, filed on 6 April 2000, by the Prosecution, for orders for protective measures for victims and witnesses to crimes alleged in the Indictment, and the brief in support;

CONSIDERING the Defence brief in response to the Prosecution's request for orders for protective measures, filed on 14 July 2000, and the Defence request in response that protection of witnesses sought therein be co-extensive with Defence witnesses;

CONSIDERING the letter dated 21 August 2000, from the Prosecution to the Trial Chamber;

CONSIDERING Articles 20 and 21 of the Statute (the "Statute") and Rules 66, 69 and 75 of the Rules;

HEREBY DECIDES the Prosecution motion and Defence request on the basis of the written briefs of the Parties.

The Motions

1. The Prosecution, on 6 April 2000, filed its motion for orders for protective measures for victims and witnesses to crimes alleged in the Indictment. In their joint response to the Prosecution motion, the Defence did not object to the protective measures requested by the Prosecution provided that the Defence witnesses be afforded the same protective measures as the Prosecution witnesses. Having been asked by the Chamber to comment on the Defence request, the Prosecution, in its letter of 21 August 2000, stated that it had no objection in principle. Therefore, the Trial Chamber will consider herein a request for protective measures for witnesses from both the Prosecution and the Defence teams.

The Legal Basis

2. The Parties' requests are based on Article 21 of the Statute and Rules 69 and 75 of the Rules. Article 21 of the Statute obliges the Tribunal to provide in its Rules 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. To this end, Rule 75 of the Rules provides, *inter alia*, that a Judge or a Chamber may *proprio motu*, or at the request of either party, or of the victims or witnesses concerned, or of the Tribunal's Victims and Witnesses Support Unit, order appropriate measures for the privacy and protection of victims or witnesses, provided that these

measures are consistent with the rights of the accused.

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3. The Tribunal shall order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of victims and witnesses so as to ensure a fair determination of the matter before it. Measures for the protection of witnesses are granted on a case by case basis, and take effect once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Unit. In order to determine the appropriateness of such protective measures, the Tribunal shall evaluate the general security situation affecting the witnesses concerned.

4. In this case, the attachments presented by the Prosecution in support of its motion, demonstrate the particularly volatile security situation in Rwanda and in neighbouring countries, at the present time. This volatile security situation endangers the lives of those persons who may be called as witnesses at trial.

The Non-disclosure of the Identity of Witnesses

5. The Parties request the non-disclosure of the identity of their witnesses. Pursuant to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise. However, this is subject to Rule 69 (C) whereby the identity of the witness shall be disclosed in sufficient time prior to trial in order to allow adequate time for preparation of the Prosecution and Defence cases.

6. In relation to the non-disclosure of witness identity, it follows from established case law of the Tribunal, that for a witness to qualify for the protection of his or her identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to underscore this fear. Moreover, that the judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.

7. The Prosecution motion, and the Defence request for co-extensive protective measures, are well founded and the Trial Chamber holds that there are good grounds for protective measures for Prosecution and Defence witnesses. Furthermore, the Trial Chamber finds that there exist exceptional circumstances warranting the non-disclosure of the identity of witnesses.

8. The measures requested have been examined in light of the current practice of the Tribunal.

**THE TRIBUNAL
HEREBY DECIDES that:**

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1. The names, addresses and other identifying information concerning the Parties' witnesses shall be forwarded by the Parties, to the Victims and Witnesses Support Section of the Tribunal, in confidence, and shall be kept under seal by the Registry and not be included in any public records of the Tribunal.
2. Where the names, addresses, locations or other identifying information concerning the Parties' witnesses appear in the Tribunal's public records, this information shall be expunged from the records.
3. The names, addresses, locations and other identifying information of the Parties' witnesses contained in the Parties' trial materials, shall not be disclosed to the public or to the media.
4. The Parties shall not disclose, or reveal any document or information identifying the witnesses protected by this order, to anyone except members of the Parties' immediate team or the accused.
5. No photographs, audio or video recordings or broadcastings, or sketches of witnesses protected by this order may be taken, without leave of the Trial Chamber and the Party concerned.
6. The Parties shall be permitted to designate pseudonyms for each of their witnesses for use in the proceedings of the Tribunal and during discussions between the Parties.
7. Counsel for the Parties, and any representative acting on their behalf, shall notify the other Party prior to any contact with the witnesses of that other Party, and the other Party shall make arrangements for such contacts.
8. The Parties are authorised to withhold disclosure of the identity of the witness and to temporarily redact their names, addresses, locations and other identifying information from the supporting material and other disclosure on file with the Registry, until such time as the witnesses are under the protection of the Tribunal.

RECALLS that, pursuant to Rule 69 (C) of the Rules, the identity of the witnesses shall be disclosed to the other Party, in sufficient time prior to the trial in order to allow adequate time for the preparation of the case.

Arusha, 22 August 2000

Erik Møse
Erik Møse
Judge

