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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-01-76-I
04-02-2004
(1305 — 1301)

1305
S. Mussa

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 4 March 2004

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THE PROSECUTOR

v.

Aloys SIMBA

Case No. : ICTR-2001-76-I

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 to Crimes Alleged in the Indictment", filed on 16 February 2004;

CONSIDERING that there has been no response from the Defence;

HEREBY DECIDES the motion.

INTRODUCTION

1. The present motion is brought under Rule 69 of the Rules of Procedure and Evidence ("the Rules") seeking modification of the Prosecution obligation to disclose complete statements of its witnesses no later than 60 days before the start of trial, as required by Rule 66(A)(ii).[1]

SUBMISSIONS

2. The Prosecution claims that its potential witnesses face a real and substantial danger of being threatened, assaulted, or killed if their identities are revealed. That claim is supported by statements of investigators of the Tribunal; a memorandum from the Witness and Victims Support Section; a statement from the Chief of Security in Kigali, Rwanda; newspaper articles; and reports of journalists, human rights organizations, and organs of the United Nations, all of which are appended to the Motion.The Prosecution requests permission to disclose the name of each of its witnesses, and portions of statements that may serve to identify the witness, until a fixed period before the testimony of each witness, also known as "rolling disclosure." Rolling disclosure twenty-one days prior to the date of each witness's testimony is said to have "crystallized as the Tribunal's practice".[2] The Prosecution also requests a variety of measures to ensure that this information is not disclosed 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 witnesses whom the Prosecutor intends to call to testify at trial.

Under Rule 69, "Protection of Victims and Witnesses", however:

> (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.
> ...

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[1] A previous decision relieved the Prosecution of some of its disclosure obligations under Rule 66(A)(i). *Simba*, Decision on the Prosecutor's *Ex Parte* Application for Review and Confirmation of the Indictment and Other Related Orders (TC), 8 January 2002, pp. 3-4.

[2] Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, para. 36.

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

4. Established jurisprudence 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, which must be objectively justified. The evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security. These submissions have not been contradicted by the Defence. Accordingly, exceptional circumstances have been established.

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. 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 permits deferred 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 Articles 19 and 20 of the Statute while also considering the needs and vulnerability of witnesses expressed in Article 21 of the Statute. Article 19 expressly requires accommodation of the rights of the Accused and the interests of witnesses and victims.

6. Contrary to the assertion of the Prosecution, rolling disclosure twenty-one days prior to the testimony of the witness has not crystallized as the Tribunal's practice. Full disclosure before trial is still often required.[3] Not only does rolling disclosure shorten the period of preparation for the Defence provided for in Rule 66(A)(ii), its effect is that the trial will begin, and Prosecution witnesses will be heard, before the Defence knows the names of all Prosecution witnesses or is informed of the entirety of their statements.

7. The Prosecution case is to be short in comparison with some of the longer trials before the Tribunal in which rolling disclosure has been ordered.[4] Indeed, the Prosecution has stated that it intends to call no more than twenty witnesses.[5] As a practical matter, rolling disclosure would not, under these circumstances, significantly enhance the protection afforded to witnesses. Based on a concrete evaluation of the present case, the Chamber shall order complete disclosure of the witness statements to the Defence, without redactions to protect the identity of the witness, thirty days prior to the commencement of trial.

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[3] *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003 ("Seromba Decision"); *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, p. 7. 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 (requiring immediate disclosure of identifying information of all Prosecution witnesses)("Reconsideration Decision"). Similarly, disclosure of the complete statements of Defence witnesses has also been required before the start of the Defence case. *Ndindabahizi*, Decision on the Defence Motion for Protection of Witnesses (TC), 15 September 2003, p. 4; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 4. These decisions were all rendered after 6 July 2002 when Rule 69(C), which had formerly required disclosure before trial, was amended to permit rolling disclosure at the Chamber's discretion. The numerous decisions prior to that date requiring disclosure before trial are omitted.

[4] Reconsideration Decision, para. 2; Seromba Decision, para. 7.

[5] *Simba*, Transcript, 15 January 2004, p. 22.

8. Most 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.[6] A novel 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 in 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.[7]

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.

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 to do so, 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

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[6] *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004.

[7] See *Mpambara*, Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses) (TC), 29 May 2002, paras. 21-24.

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 thirty days before the commencement of trial.

Arusha, 4 March 2004

Erik Møse
Judge

[Seal of the Tribunal]