International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ICTR-98-41-I
21-07-2005
(25218-25213)

25218
S. Mussa

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 21 July 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON REQUEST FOR CERTIFICATION CONCERNING SUFFICIENCY OF DEFENCE WITNESS SUMMARIES

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Joint Defence "Request for Certification to Appeal" the Chamber's decision of 5 July 2005 requiring the Defence to disclose to the Prosecution the country of current residence of its witnesses, filed on 11 July 2005;

CONSIDERING the Prosecution Response, filed on 14 July 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 5 July 2005, the Chamber granted a Prosecution request that the Defence be ordered to supply certain information concerning its witnesses. In relevant part, the Chamber held:

> The Chamber has ruled pursuant to Rule 73 *ter* (B)(iii)(a) that personal information of each Defence witness must be provided in the same format as had been provided by the Prosecution in respect of its witnesses. The information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence. Exigent witness protection measures are in place to satisfy those concerns. The Defence cannot rely upon expressions of insecurity by witnesses as a basis for refusing to provide witness identifying information.[1]

The Defence requests certification to appeal this order only to the extent that it requires disclosure to the Prosecution of the country of current residence of its witnesses.

2. The significance of a witness's country of current residence was previously addressed by the Chamber in its *Decision on Motion to Harmonize and Amend Witness Protection Orders*, of 1 June 2005 ("Harmonization Decision").[2] The decision held that the Defence witness protection orders do not bar the Prosecution from making inquiries to national immigration authorities about prior statements given by Defence witnesses, provided that their role as Defence witnesses is not disclosed. The Defence's request for certification of that decision is today granted by the Chamber in a separate decision.[3]

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[1] *Bagosora et al.*, Decision on Sufficiency of Defence Witness Summaries (TC), 5 July 2005, para. 8 (citations omitted). The Prosecution's other request – that the Defence provide more detailed summaries of the content of the witness's testimony – was denied by the Chamber.

[2] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 2 June 2005. The motion was originally filed on 2 June 2005, and then with a corrected cover page on 3 June 2005.

[3] *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

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(i) Grounds of Certification

3. The Defence argues that the Chamber is not legally empowered by the Statute or the Rules to make such an order. Rule 73 *ter* (B)(iii)(a) of the Rules of Procedure and Evidence ("the Rules") only authorizes the Chamber to order the Defence to disclose the names or pseudonyms of its witnesses. Although the Defence accepts that this may include "identifying particulars" of the witnesses, the current place of residence "has nothing whatsoever to do with identifying the witnesses", and is instead designed to facilitate inquiries to national immigration authorities. The Defence also argues that the Chamber erred in characterizing the effectiveness of witness protection measures. Many witnesses justifiably fear being returned to Rwanda in retaliation for testifying as Defence witnesses. In these circumstances, the Defence is under an ethical obligation to warn its witnesses of the limitations of the witness protection measures, including the possible consequences of disclosure that the witness had given incorrect information on statements to national immigration authorities. This warning will deter witnesses from coming to give their testimony. Finally, the Defence argues that the Prosecution can independently discover the country of residence of its witnesses, and that the Defence should not be obliged to cooperate in such investigations.

4. None of these grounds of objection to the decision were raised by the Defence in its responses to the original Prosecution motion. An email appended to the Ntabakuze response did indicate that "in light of the stated intention of the OTP to carry out immigration investigations of witnesses, the current location of these and other witnesses in the same situation will not be provided".[4] No arguments to support this refusal were presented, however. The Nsengiyumva response stated that "the information being sought has been supplied regarding most witnesses", but also claimed that it does not "possess that information" in respect of other witnesses who "fear for their safety and security".[5] The Nsengiyumva response then argued that the Prosecution's request was:

> an attempt to circumvent the Rules of Procedure and Evidence and to illegally encroach onto the field of information that is only supposed to be disclosed to the WVSS [Witness and Victims Support Section]. The previous attempts by the Prosecutor to infringe on confidentiality of witness information are so far causing difficulties for the Nsengiyumva team which is faced with a situation where witnesses will refuse to testify.[6]

5. Leave to appeal may be certified under Rule 73 (B) of the Rules where a decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". Interlocutory appeals under Rule 73 (B) have been described as exceptional, and the Appeals Chamber has underscored the primacy of Trial Chamber rulings involving an exercise of discretion.[7] Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior decision on the

[4] Ntabakuze Response, Annex, para. 5.b.
[5] Nsengiyumva Response, para. 2.
[6] Nsengiyumva Response, para. 22.
[7] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("Consequently, as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified").

merits by the Trial Chamber. Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B). A certification motion is not an appropriate venue to advance new grounds of argument. A decision to grant certification on the basis of grounds which had not been previously argued could take the responding party by surprise, and circumvent the usual procedure for assessing motions on the merits.

6. The grounds presented by the Defence were not suitably raised in the original motion. The Defence made no arguments concerning the scope of Rule 73 *ter* (B)(iii)(a) or the irrelevance of present country of residence to witness identification. Neither the alleged inadequacy of witness protection measures nor the ethical obligations of counsel were mentioned.[8] The Nsengiyumva response did make reference to the potential effect of disclosure on its witnesses, but did not present any legal arguments to justify non-disclosure. Under these circumstances, the Defence request for certification cannot be granted. It follows that there is no basis for granting the Defence request for a stay of application of the 5 July decision, pending resolution of the interlocutory appeal.

(ii) Reconsideration on the Merits

7. In light of the urgency of the questions raised by the Defence to ongoing trial proceedings, the interests of justice nevertheless favour immediate consideration of the arguments raised. Accordingly, the Chamber shall *proprio motu* evaluate the Defence submissions.

(a) Legal Competence to Issue the Order

8. The Defence argues that the Prosecution seeks to obtain the country of current residence of its witnesses not for the purpose of witness identification, but rather to assist it in obtaining statements given to immigration authorities of the states in which they reside. Accordingly, the order is said to fall outside the scope of Rule 73 *ter* (B)(iii)(a).

9. The dichotomy presented by the Defence is not persuasive. State of current residence is a factor which could significantly assist the Prosecution in properly identifying a witness. Information about current country of residence is generally considered as protected information and placed under seal, illustrating that this element may contribute to identifying witnesses. The fact that the information may also be used to determine whether the witnesses have given prior statements to immigration authorities does not negate its ability to assist with identification.

10. Even if it may be argued that the scope of Rule 73 *ter* (B)(iii)(a) is not quite clear, the Chamber has the authority under the general provision in Rule 54 to define, and require disclosure of, information probative of the witness's identity, as well as information that may be relevant to cross-examination of witnesses. That Rule permits the Chamber to "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". The 5 July decision falls within the scope of this Rule. Finally, state of current residence was routinely provided by the Prosecution in identifying its own witnesses. Such disclosure in relation to Defence witnesses has also taken place in other trials.

[8] Some of the arguments were raised and considered in the Harmonization Decision, against which certification for appeal has been granted (*see* paras. 2 and 12 of the present decision).

(b) Defence Ethical Obligations and the Effectiveness of Witness Protection 25214

11. The Defence indicates that it is bound by ethical obligations to give a warning to its witnesses about the limitations of the Tribunal's witness protection measures, and the possible consequences of leaks of information. That warning will inevitably dissuade witnesses from testifying, thus impairing the presentation of the Defence.

12. The Chamber has, to a large extent, already addressed the merits of this argument in its Harmonization Decision. In that decision, the Chamber carefully weighed the relative claims of witness protection and the needs of legitimate investigations. The scope of permissible investigations was strictly defined so as to insulate witnesses from discovery and interference:

> The essence of the prohibition [in the witness protection orders] is against disclosure of information that would, directly or indirectly, reveal that the person is a witness. The ultimate purpose of witness protection orders is to prevent partisans from one side or the other from harassing or intimidating witnesses for the other side. That purpose is satisfied if the role of the person in the trial proceedings remains secret. Though an inquiry [by the Prosecution] about a person certainly signals interest, it does not necessarily reveal that the person is a witness. The object of the inquiry may, for instance, be a Prosecution source or prospective witness, whose prior statements the Prosecution is under an obligation to obtain and disclose to the Defence. The inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which would require revealing that information, then the investigation must cease. Inquiries conducted within these parameters do not give rise to a breach of the witness protection order.[9]

The Chamber also noted that the Defence had made such inquiries during the cross-examination of Prosecution witnesses, without believing that it had thereby violated the Prosecution witness protection orders.

13. The Chamber recognized in the Harmonization Decision that there might be exceptions for particularly vulnerable witnesses and invited the Defence to make individual applications for special protective measures.[10] At least one witness has been relieved of the obligation in response to a Prosecution application.[11] The Defence has yet to make such an application despite the Chamber's specific invitation to do so. Such individual applications would assist the Chamber in calibrating the balance between witness protection and adequate disclosure. The Ntabakuze Defence suggested procedure that the country of residence be disclosed to the Bench but not to the Prosecution is not in conformity with the Chamber's decision of 5 July.

14. The Defence also argues that "nothing prevents the prosecution from making the necessary inquiries to discover that which is discoverable without the Defence and the Defence witnesses themselves being obliged to assist in their investigations".[12] This statement acknowledges that, with additional effort, the Prosecution may be able to obtain the very information the disclosure of which the Defence protests, and that the only concrete

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[9] Harmonization Decision, para. 11.

[10] Para. 17 ("If the Defence believes that a witness is in a particularly precarious situation, such that any indication of cooperation with the Tribunal could be a danger to the witness's security, then special protective measures may be sought").

[11] The request was granted on at least on occasion: *Bagosora et al.*, Decision on the Prosecution Motion for Special Protective Measures for Witness "A" Pursuant to Rule 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002.

[12] Joint Defence Motion, para. 22.

issue is upon whom rests the burden of discovery or disclosure. If so, disclosure of identity could, in reality, lead to discovery of their country of residence by the Prosecution. In the end, therefore, the effect of requiring disclosure of present country of residence should be only marginally more dissuasive than disclosure of identity. Admittedly, the subjective fears of some witnesses may place undue emphasis on the distinction. Where such witnesses are in a particularly precarious or vulnerable position, then applications for special protective measures can be made. In this manner, the balance of convenience assessment can adapt to the individual circumstances of particular witnesses. The needs of those individuals, and the possibility that they might be dissuaded from testifying, do not, however, justify a blanket policy of non-disclosure of country of current residence for Defence witnesses.[13]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request for certification.

Arusha, 21 July 2005

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[13] The kind of warning to witnesses, which according to the Defence is required (Joint Defence Motion para. 20) is a clear exaggeration of the risks involved.