



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

847
Jury

ICTR-01-63-I
26-7-2006
(847 - 843)

Or: ENG

Before: Judge Dennis C. M. Byron, Presiding
sitting pursuant to Rules 54 and 73(A) of the Rules

Registrar: Adama Dieng

Date: 26 July 2006

THE PROSECUTOR
v.
Siméon NCHAMIHIGO
Case No. ICTR-2001-63-PT

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DECISION ON MOTIONS FOR PROTECTIVE MEASURES FOR PROSECUTION WITNESSES

Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Alphonse Van
Madeleine Schwarz

Defence Counsel:
Denis Turcotte
Benoît Henry

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INTRODUCTION

1. The trial in the instant case is scheduled to begin on 25 September 2006. On 5 May 2006, the Prosecution requested the Chamber to grant leave to amend the Indictment against Siméon Nchamihigo, which had been filed on 29 June 2001. In its 14 July 2006 Decision on Request for Leave to Amend the Indictment, Trial Chamber I granted the Prosecution's request for witness protection measures as to Witnesses BRG, BRD, BRE, BNB, BRF, BRK, BRH, BRR, BRQ, BRN, BRO, BPA, BRX, BOV, BPX, BRY, BRZ, BOU, and API by authorizing the Prosecution to file any witness statements in support of the Amended Indictment pursuant to Rule 66 (A)(i) of the Rules of Procedure and Evidence in redacted form to conceal the identities of the makers thereof. The Chamber noted that the Prosecution would need to file an additional motion if it wished to be relieved of any further disclosure obligation.¹

2. The Prosecution now moves the Chamber to order protective measures, described in paragraphs 33, 47 and 50 of a Motion filed on 24 July 2006, for the following 18 additional witnesses: Witnesses LDD, LM, BRP, LDC, LAG/BRL, BRI, BRJ, LDB, LAA, LBB/BNO, LCR, LDA, NM, LCJ/BRM, LF, NI, NL and LY.² It claims that there is a real fear for the safety of victims and potential witnesses based on an objective assessment of the security situation confronting such persons in and outside Rwanda, whether in Africa or elsewhere in the world, and has attached nineteen annexes to support its application. In a second Motion filed on the same day, the Prosecution urgently requests that the Chamber allow it to disclose, in redacted form, the statements of the above-listed additional 18 witnesses that it intends to call to testify at trial so that the Prosecution can comply with its disclosure obligations within the time limits set out by Rule 66 (A)(ii), namely sixty days before the trial start date, pending the outcome of the Chamber's Decision on the Prosecution's application for protective measures.³

3. The statutory time limit for the Defence to reply under Rule 73 (E) of the Rules has not yet expired, and the Defence has not yet submitted responses to these motions. Given, however, that the deadline for disclosure of the statements of all witnesses whom the Prosecution intends to call to testify at trial is sixty days before the trial start date and will therefore expire on 27 July 2006, and that the Defence may not be able to respond before that deadline expires, the Chamber considers it a measure necessary under Rule 54 for the conduct of the trial and in the interests of justice to provide a provisional decision based on the Prosecution submissions only. If necessary, the Chamber may render a subsequent decision based on any additional submissions from the parties.

DISCUSSION

4. In accordance with Article 21 of the Statute and Rules 69 and 75, the Chamber will consider protective measures for witnesses that are appropriate to the safeguard the privacy and security of the victims and witnesses, without overriding the rights of the Accused. Measures for the protection of witnesses are granted on a case-by-case basis.

¹ 14 July Decision, para. 31.

² Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 24 July 2006.

³ *Requête en Extrême Urgence du Procureur aux fins d'être Autorisé à Communiquer à la Défense la Version Caviardée des Déclarations des Témoins de l'Accusation Avant une Décision de la Chambre de Première Instance sur la Requête du Procureur en Protection des Témoins*, filed on 24 July 2006.

5. The jurisprudence of this Tribunal requires that the Prosecution demonstrate that the witnesses for whom protective measures are sought have a real fear for their safety or that of their family, and that an objective justification exists for this fear.⁴ Such fears may be expressed by persons other than the witnesses themselves.

6. After reviewing the information provided by the Prosecution, and taking into account the fairness of the trial and the rights of the Accused, the Chamber finds that there is subjective and objective fear on the part of the Prosecution witnesses such that witnesses, wherever they may reside, do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.⁵

7. The measures requested by the Prosecution are well-established and uncontroversial, with two exceptions. The measure proposed in sub-paragraph 47 xi of its Motion for protective measures would prohibit

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; also instructing the United Nations Detention Centre authorities to ensure compliance with the prohibition set out in this paragraph.

The aim of this prohibition is said to be to ensure that protected information is not improperly shared between accused persons at the United Nations Detention Facility or otherwise.⁶ While the Chamber is concerned by the example cited in the motion, it is not persuaded that the measure would achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that witness identities may not be shared with other accused persons, and that any violation of this requirement is a serious matter. Furthermore, depriving the Accused of the statements of Prosecution witnesses could interfere with the preparation of the defence. Previous decisions have rejected this measure in the absence of a specific showing of misconduct by the Accused.⁷

8. The proposed measure in paragraph 33 of the Motion for protective measures is that the witness's identity be disclosed to the Defence twenty-one days before the date that the witness is expected to testify. The Prosecution asserts that this "rolling disclosure" has crystallised as the ordinary practice of the Tribunal.⁸ The Chamber disagrees. Numerous decisions have required that the identity of all witnesses disclosed before the start of trial, particularly in the trials of a single Accused, where there is little likelihood of a long delay

⁴ *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 2; *Bagosora, et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 2.

⁵ *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 6; *Prosecutor v. Nsengimana*, Case No. ICTR-2000-69-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, para. 14.

⁶ First Motion, para. 48.

⁷ See, e.g., *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 8; *Prosecutor v. Gatete*, Case No. ICTR-2000-61-I, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, para. 8; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 19; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003, paras. 15-16.

⁸ First Motion, para. 37.

between disclosure of the witness's identity and their testimony.⁹ According to Rule 69 (C) of the Rules, in order to allow adequate time for the preparation of both parties, the Chamber considers, in light of that an appropriate deadline is that witness identities, and unredacted witness statements, be disclosed to the Defence thirty days before the start of trial.

FOR THOSE REASONS, THE CHAMBER

GRANTS in part the Motion, and

I. ORDERS the following protective measures for all Prosecution witnesses or potential Prosecution witnesses wherever they reside and who have not affirmatively waived their right to protective measures ("Protected Witness"):

1. The Prosecution is required to designate a pseudonym for each of the Protected Witnesses; the pseudonym shall be used whenever referring to such Protected Witness in Tribunal proceedings, communications, and discussions, both between the Parties and with the public. The use of such pseudonyms shall last until such time as the Trial Chamber orders otherwise.
2. The names, addresses, whereabouts, and other information that might identify or assist in identifying any Protected Witness ("Identifying Information") must be sealed by the Registry and not included in public or non-confidential Tribunal records.
3. To the extent that any names, addresses, relations, whereabouts or other Identifying Information is contained in existing records of the Tribunal, such Identifying Information must be expunged from the public record of the Tribunal and placed under seal.
4. Any Identifying Information concerning Protected Witness shall not be disclosed to the public or the media; this order shall remain in effect after the termination of the trial.
5. The Accused or any member of the Defence team shall not attempt to make any independent determination of the identity of any Protected Witness or encouraging or otherwise aiding any person to attempt to identify any such Protected Witness.
6. The names and identities of the Protected Witnesses shall be forwarded from the Prosecution to the Registry in confidence, and shall not be disclosed to the Defence unless otherwise ordered.
7. Nowhere and at no time shall the public or the media make audio or video recordings or broadcasts, or take photographs or make sketches of any Protected Witness, in relation to their testimony, without leave of the Trial Chamber.

⁹ *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 6; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, paras. 6-7; *Prosecutor v. Seromba*, Case No. ICTR-2000-66-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7. Similarly, disclosure of the identity of all Defence witnesses is frequently required before the start of the Defence case. See, e.g., *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 10. Several such decisions were 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.

8. The Defence and any representative acting on its behalf and/or the Accused shall provide reasonable notice to the Prosecution, prior to contacting any Protected Witness. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, the Prosecution shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.
9. The Defence and/or the Accused shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any Identifying Information to any person or entity other than the Accused, assigned Defence Counsel, or other persons the Registry designates as working on the Defence team.
10. The Defence and/or the Accused are required to provide the Witnesses and Victims Support Section a designation of all persons working on the immediate Defence team who will have access to any Identifying Information; the Defence are also required to notify WVSS in writing of any person leaving the Defence team and to confirm in writing to the WVSS that such person has remitted all material containing Identifying Information.
11. The Prosecution may withhold disclosure to the Defence of the identity of the Protected Witnesses and temporarily redact their Identifying Information from material disclosed to the Defence. The Identifying Information shall be disclosed by the Prosecution to the Defence thirty days prior to commencement of the Prosecution case.

II. DENIES the remainder of the Motion.

Arusha, 26 July 2006, done in English.



Presiding Judge

[Seal of the Tribunal]