

1572-97-21-0909

ICTR-97-21-T
01-11-2006
(2283 - 2279)

2283
mump



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 1 November 2006

OR: ENG

2006 NOV - 1 P 4:40

JUDICIAL RECORDS ARCHIVES
UNICTR

The PROSECUTOR v. Élie NDAYAMBAJE
(Case No. ICTR-96-8-T)

The PROSECUTOR v. Joseph KANYABASHI
(Case No. ICTR-96-15-T)

The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)

The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)

Joint Case No. ICTR-98-42-T

DECISION ON PROSECUTION'S MOTION TO UNSEAL THE TRANSCRIPTS OF
WITNESS WDUSA

Office of the Prosecutor

Ms Silvana Arbia
Ms Adelaide Whest
Mr Gregory Townsend
Ms Holo Makwaia
Ms Althea Alexis Windsor
Mr Cheikh T. Mara
Ms Astou Mbow, Case Manager

Defence Counsel for Ndayambaje

Mr Pierre Boulé

Defence Counsel for Kanyabashi

Mr Michel Marchand

Ms Simone Santerre

Defence Counsel for Nyiramasuhuko

Ms Nicole Bergevin

Mr Guy Poupart

Defence Counsel for Ntahobali

Mr Normand Marquis

Mr Louis Huot

Defence Counsel for Nsabimana

Ms Josette Kadji

Defence Counsel for Nteziryayo

Mr Titinga Frédéric Pacere
Mr Richard Perras

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA (the "Motion"); filed on 9 October 2006.

HAVING RECEIVED the "*Réponse de Arsène Shalom Ntahobali à la requête du Procureur intitulée 'Prosecutor's motion to unseal the transcripts of Witness WDUSA (Ntahobali's Response')*" filed on 12 October 2006;

CONSIDERING the "Prosecutor's Reply to Ntahobali's Response to the Prosecutor's Motion to Unseal Transcripts of Witness WDUSA" ("Prosecution's Reply") filed on 16 October 2006;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules"), on the basis of the written submissions of the Parties.

INTRODUCTION

1. Witness WDUSA is a Defence protected witness. The protection he enjoys was ordered pursuant to the Chamber's decision of 15 February 2000 regarding Ntahobali's witnesses. It entails among others, that his identity be concealed from the press and the public. Witness WDUSA testified on 3 and 4 April 2006. Part of his evidence was given in closed session to avoid the disclosure of his identity.

2. On 26 September 2006, the Prosecution filed an *ex-parte* Motion seeking leave from the Chamber to disclose to the Danish authorities the transcripts and other relevant documents pertaining to the testimony of Witness WDUSA in open and closed session.¹ On 9 October 2006, the Chamber instructed the Prosecution to refile the Motion *inter partes*, should it wish to pursue this matter.² The same day, the Prosecution refiled the Motion *inter partes*.³

SUBMISSIONS OF THE PARTIES

The Prosecution

3. The Prosecution seeks a variance order of the witness protection Decision of 21 April 2001 regarding Ntahobali's witnesses, to be authorised to disclose the open and closed session transcripts of Witness WDUSA's testimony of 3 and 4 April 2006⁴ and exhibit D-392, containing the witness's identifying information, to the Danish Special International Crimes Office (*Statsadvokaten Forsverlige Internationale Straffesager*).⁵

¹ Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA, filed on 26 September 2006.

² Facsimile transmission dated 9 October 2006

³ Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA, filed on 9 October 2006.

⁴ Motion, para 6.

⁵ Motion, para 10.

4. The Prosecution submits that under Rules 54, 73, 75 and 66 (C), the Chamber has the authority to vary its own witness protection order and issue the order sought for disclosure. The Prosecution further argues that the sharing of information between the Tribunal and national authorities is consistent with Articles 15 and 28 of the Statute and Security Council Resolution 1503.⁶

5. The Prosecution also submits that Witness WDUSA's written consent annexed to the Motion demonstrates that the disclosure of the witness's own testimony can have no negative repercussions for his protection.⁷

6. Further, the Prosecution submits that the disclosure of the transcripts to the Danish Special International Crimes Office will not prejudice Witness WDUSA or any other witnesses, given the guarantees that exist under Danish law and the assurances of the Danish Prosecutor regarding a previous request that: "[I]f the witness statement (transcript) needs to be produced in court the prosecution will request (under Section 729a) a closed session and the court may... order non-disclosure to the public of any records identifying a witness."⁸

Ntahobali's Response

7. The Defence opposes the Motion, arguing that the consent form allegedly signed by Witness WDUSA is the only element supporting the disclosure, and it is not sufficient, and that, in the present case, it is hazardous to disclose the transcripts of WDUSA's testimony to the Danish authorities, as neither the Statute nor the Rules prescribe the possibility of disclosing testimonies heard in closed session before the Tribunal to parties outside the Tribunal.⁹

8. The Defence requests that the witness' consent *a posteriori* and while in detention, be subjected to further verification. Moreover, the Defence argues that there is no reference in the Motion to the fundamental rights of a suspect or an accused in Denmark.

9. The Defence also questions the manner in which the Danish authorities would be bound by the protective orders issued by the Chamber.

Prosecution's Reply

10. The Prosecution submits that its Motion also relied on Rules 54 and 73, which the Defence failed to acknowledge, and which both provide a sufficient basis for granting the Motion.¹⁰ The Prosecution further submits that the sharing of information between the Tribunal and national authorities is consistent with the completion strategy envisaged in Security Council Resolutions 1503 and 1534 and, most recently, in the President's report to the General Assembly on 9 October 2006.¹¹

⁶ Motion, para 9

⁷ Motion, para 8.

⁸ Motion, para 9.

⁹ Reference is made to R. 75 (F) which allows disclosure to other Chambers of the Tribunal.

¹⁰ Prosecution reply, p.1.

¹¹ Prosecution reply, p.1.

11. The Prosecution also submits that the signature on the signed consent form of Witness WDUSA is identical to that of exhibit D-392 signed by the witness. In the absence of any evidence, the Defence assertion that the witness may have been subjected to threats, promises or violations of his rights, is mere speculation.¹²

DELIBERATIONS

12. The Chamber recalls that pursuant to Rule 78, "all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided" and that as such, the transcripts of the testimony of Witness WDUSA heard in open session are accessible to the public without further order by the Chamber.

13. The Chamber also recalls that the Defence had asked for protective measures for Witness WDUSA to safeguard his privacy and safety, and which included the protection of identifying materials from the public's knowledge. Further, parts of the testimony of Witness WDUSA were heard in closed session under Rule 79.A (ii) for reasons of safety, security or non-disclosure of identity of a protected witness, pursuant to Rule 75.¹³

14. However, the Chamber notes that the Danish authorities are aware of the identity of Witness WDUSA and of the fact that he has testified before the Tribunal. Moreover, the Chamber notes and accepts that Witness WDUSA has given his written consent for his prior statements to be disclosed to the Danish Special International Crimes Office. In the absence of any cogent element indicating the contrary, the Chamber finds the Defence request for the Chamber to inquire further into the consent of the witness to be speculative.

15. The Chamber recognises the uniqueness of the Motion, as disclosure of the transcripts of the testimony of a witness is requested for by Danish authorities; who are not party to any proceedings before the Tribunal. The Chamber considers that the guiding principles of state cooperation under Article 28 (1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law. Moreover, the Chamber notes that the Danish authorities' investigation of Witness WDUSA for crimes committed in Rwanda in 1994 is in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534.

16. Accordingly, having considered that there is no prejudice to the witness, the Chamber is of the view that it is in the overall interest of justice to vary its order for protective measures for Witness WDUSA, pursuant to Rule 75(A). The Chamber directs the Registry to provide copies of the closed session transcripts of the witness and of exhibit D-392 for the purpose of the proceedings before the Danish Special International Crimes Office. The Chamber further orders that the protective measures granted to Witness WDUSA shall continue to have effect *mutatis mutandis* in any proceedings before the Danish authorities unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in Rule 75.

¹² Prosecution reply, p.2.

¹³ 'Décision relative à la requête de la Défense aux fins d'obtenir des mesures de protection pour les témoins de la Défense' (Chamber's witness protection decision of 15 February 2000.)



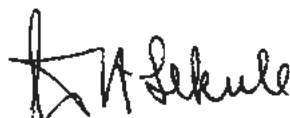
FOR THE ABOVE REASONS, THE TRIBUNAL

DIRECTS the Registry to provide the Prosecution with the closed session transcripts of Witness WDUSA's testimony of 3 and 4 April 2006, together with exhibit D-392, for the purpose of disclosure of the same to the Danish Special International Crimes Office. (*Statsadvokaten forsverlige Internationale straffesager*).

With regard to the testimony of Witness WDUSA heard in open session, the Chamber observes that this is accessible to the public without further order of the Chamber.

ORDERS that the protective measures granted to Witness WDUSA shall continue to have effect *mutatis mutandis* in any proceedings before the Danish authorities.

Arusha, 1 November 2006



William H. Sekule
Presiding judge



Arlene Ramarson
Judge



Solomy Balungi Bossa

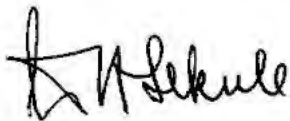
FOR THE ABOVE REASONS, THE TRIBUNAL

DIRECTS the Registry to provide the Prosecution with the closed session transcripts of Witness WDUSA's testimony of 3 and 4 April 2006, together with exhibit D-392, for the purpose of disclosure of the same to the Danish Special International Crimes Office. (*Statsadvokaten forsverlige Internationale straffesager*).

With regard to the testimony of Witness WDUSA heard in open session, the Chamber observes that this is accessible to the public without further order of the Chamber.

ORDERS that the protective measures granted to Witness WDUSA shall continue to have effect *mutatis mutandis* in any proceedings before the Danish authorities.

Arusha, 1 November 2006



William H. Sekule
Presiding judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa