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NATIONS UNIES

ICTR-01-76-R75
09-04-2008
(46-41)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

46
S. Munira

OR: ENG

TRIAL CHAMBER I

Before Judge: Dennis C. M. Byron
Designated pursuant to Rule 73(A)

Registrar: Adama Dieng

Date: 9 April 2008

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-R75

**DECISION ON CHARLES MUNYANEZA'S MOTION FOR DISCLOSURE OF
DOCUMENTS RELATED TO PROTECTED WITNESSES BEFORE THE TRIBUNAL**

Rule 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan B. Jallow
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Alex Odora-Obote
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Renifa Madenga
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Defence Counsel for Charles Munyaneza:
Gina Cummings
David Hooper (*for this application*)

Defence Counsel for Aloys Simba:
Alao Sadikou
Wenceslas de Souza

INTRODUCTION

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1. Charles Munyaneza is a Rwandan citizen charged in Rwanda for crimes committed in Gikongoro *préfecture* in 1994. He resides in the United Kingdom. Rwanda has requested his extradition from the United Kingdom, and he is challenging such request before the British Courts.

2. On 2 October 2007, his Counsel in the extradition proceedings through David Hooper who is on the list of counsel before the International Criminal Tribunal for Rwanda ("Tribunal") seized the Registrar seeking variation of protective measures in relation to witnesses who have or may have appeared before the Tribunal. On 29 October 2007, the application was again filed before the President of the Tribunal, Judge Dennis C. M. Byron.

3. In its submissions, the Counsel for Munyaneza specifically requested disclosure of non redacted prior statements and non redacted transcripts in relation to three persons who it thought were protected witnesses in the trial of Aloys Simba ("First Request"). The Counsel further requested disclosure of the same materials related to any witness in the proceedings before the Tribunal who has mentioned Charles Munyaneza ("Second Request"). Finally, the Counsel submitted a list of twelve persons and requested that the Tribunal indicate whether they had given any statement or testimony before the Tribunal and, in the affirmative, that any such material be disclosed to it ("Third Request"). The Chamber will now address the arguments in relation to each of those requests, after having discussed the applicable law and addressed some general matters.

DELIBERATIONS

4. Article 21 of the Statute of the Tribunal provides for the Tribunal to protect victims and witnesses whenever necessary, while still guaranteeing the rights of the Accused notably the fairness of the proceedings as stated in Article 20. Rules 69 and 75 of the Rules of Procedure and Evidence supplement the provision in the Statute. Within that legal framework, the protective measures can be granted upon request, while the moving party has to demonstrate the necessity on a case by case basis. Protective measures are therefore an exception to the general principle of publicity of the criminal proceedings.



5. Rule 75(E)-(H) covers the disclosure of protected information from one case to another, without ending the protective measures but extending its effect in the other case. In practice, whenever an order is made pursuant to Rule 75(G), the group of persons authorized to have access to the protected information is extended, but the witness stays protected, and that group of persons is bound by the protective order as stated in Rule 75(F). Rule 75(G) should therefore be considered as a provision for variation of the protective order. While Rule 75 does not provide for such variation when the second case is not before the Tribunal, the jurisprudence has established that such variation could take place on the basis of Article 28(1) of the Statute.¹ However in the present case, the request did not come from a State Representative, but from a Defence Counsel. The Chamber is of the view that the interest of justice requires a broad interpretation of Rule 75(F)(i) for variation of the protective orders even when the second case is not before the Tribunal but before another jurisdiction, as it is specifically stated in the same provision before the International Criminal Tribunal for the Former Yugoslavia.²

6. A Chamber or a Judge seized of a request for variation pursuant to Rule 75(G) needs consider the security situation at the time of the request, and whether the witness consents to the variation, the same information that would have been considered before the protective measures were initially ordered. The Chamber considers that the party who moved the Chamber for the protection is best suited to inform the Chamber on the current security situation, while the Registry would be in a better and impartial position to secure the views of the witness, taking into account the fact that the Registry is in charge of the implementation of the protective order. In the present case, the Prosecution was the moving party, and, consequently, the Chamber made an order to that effect.³ The Prosecution made its first

¹ See: *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA (TC2), 1 November 2006, para. 15; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA (TC3), 22 March 2007, para. 15; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-5A-T, Decision on the Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness QY (TC2), 23 March 2007, para. 6; and *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness HF (TC3), 26 March 2007, para. 6.

² ICTY Rule 75(F)(i) reads as follows: "[protective measures] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ('second proceeding') or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule".

³ *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-R54, Order to the Prosecution to Make Submissions on Charles Muryaneza's Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal (TC1), 5 March 2008 ("The Chamber [...] [o]rders the Prosecution to make submissions on the request from Charles Muryaneza on the current security context and on whether there is any risk for the witnesses, not later than 13 March 2008").

submissions on 13 March 2008, and requested an extension of time to make additional submissions. On 28 March 2008, the Prosecution made its additional submissions.

7. The Prosecution attached to its first submissions the forms submitted by WVSS to two witnesses where the witnesses opposed the request from Munyaneza. On 28 March 2008, the Prosecution produced forms which it presented to two other witnesses and where they also opposed the request. Those forms stated that if the witness consents to the disclosure, (s)he will consequently be waiving his/her right to the protection granted, and will be excluded from the protection program run by the Tribunal while facing any consequence of the change of situation.⁴ Such statement in the forms is misleading, and might have influenced the decision of the witnesses, affecting therefore the fairness of the procedure.

8. The Chamber recalls that protective measures are granted on a case by case basis upon a request by a party which takes into account a need expressed by the witness. When varying the protective measures, the Chamber will again consider the need. If the witness consents to the variation, the Chamber can hardly maintain the protective measure as it stands. But if the witness opposes the variation, the Chamber will still need to balance the circumstances of the witness with the rights of the accused in the criminal proceedings who will benefit from the variation. In other words, the opposition expressed by the witness against the request for variation is not binding.

9. In the present case, the request from Munyaneza demonstrates knowledge of the identity of some of the persons to which this request relates. The statements of five witnesses taken by the Rwandan Prosecutor and filed in support of the request for extradition were attached to his request. The Chamber considers that is sufficient ground for his request to be granted, for those he has identified (KSM, ANX and KDD) (First Request), if the current security situation of the witness so permits.

⁴ These are relevant extracts from WVSS form which are similar in the Prosecution form:
"Such a request [of disclosure and meeting], if accepted, entails disclosure of the individual's identity and hence the need for the witness to renounce and waive the protective measures instituted by the ICTR thereby absolving the ICTR from any consequences that might arise thereof.
Acceptance by a protected witness of this request requires the individual to do the following altogether -
(1) To Express his/her Agreement to the disclosure of his/her statements and transcripts of testimonies provided to the ICTR;
(2) To Willingly waive his/her anonymity, by filling in and signing a waiver for the 'voluntary renunciation of ICTR protection', and
(3) To express his/her Willingness/Acceptance to be contacted and interviewed by the said counsel for Mr. Munyaneza."

10. On 13 March 2008, the Prosecution made a general statement that "the current security situation and the risk to the witnesses remains (*sic*) high such that their anonymity and protective measures should not be lifted". On 28 March 2008, the Prosecution further "submit[ted] that the exceptional circumstances surrounding the security of the witnesses and the risk to their lives that necessitated the initial protective measures issued by Trial Chamber I still exist." The Chamber considers that the statements represent an opinion without presenting the basis on which it was reached. The Chamber notes that those witnesses made public statements implicating Charles Munyaneza which were disclosed in the extradition proceedings. It would facilitate the preparation of his defence to have access to other statements they have already made on the same events.

11. Charles Munyaneza requested the Tribunal to search for any witness who mentioned him in his/her statement or testimony before the Tribunal (Second Request). The Chamber considers such request is not specific enough to be reasonably acted upon. Finally, Charles Munyaneza listed 12 persons for whom he requested the statement or testimony before the Tribunal if they have given any (Third Request). Among those twelve, he included the three witnesses he has already specifically referred to as having testified in *Aloys Simba* case. Among the nine remaining, only one (KEC) has been a witness in *Simba* case and Munyaneza has attached his statement in the extradition proceedings. The Chamber is of the view that the reasons on the First Request should also apply to this single case.

12. For the remaining eight, the Third Request is as vague as the Second, and therefore, for the same reasons, falls to be dismissed.

13. Having seized the Tribunal, Charles Munyaneza and his Counsel have accepted to be bound by the orders of the Tribunal. However, the Counsel are not on the list of counsel before the Tribunal, except for Mr David Hooper who Mrs Cummings has requested to assist in this proceedings. The Chamber is of the view that the consequence of those protective measures is that no public reference should be made to the material disclosed as from the Tribunal.

14. The Chamber recalls that the protective measures provided for witnesses render it compulsory to make confidential any submission which contains identifying information related to the witnesses. Accordingly the Chamber will invite the Registry to make all those submissions confidential while filing them within the appropriate case.

FOR THOSE REASONS, THE CHAMBER

- I. **GRANTS** the Motion in part;
- II. **INVITES** the Registrar to disclose to the Defence for Charles Munyaneza all transcripts of the testimony of Witnesses ANX, KDD, KEC and KSM in the trial of Aloys Simba and accompanied with the Decision of 4 March 2004 providing for their protection;
- III. **REMINDS** the Counsel for Charles Munyaneza that those witnesses are protected, and that they shall comply with the Decision of 4 March 2004 by not mentioning the origin of the testimony disclosed;
- IV. **DENIES** the Motion in all other respects.

Arusha, 9 April 2008, done in English.



Dennis C. M. Byron

Designated Judge Pursuant to Rule 73(A)

[Seal of the Tribunal]

