



ICTR-04-81-T
04-02-2009
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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(5837 - 5834)

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 4 February 2009

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-T

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Decision on Prosecution Motion for Special Protection Measures for Witness 006

The Prosecution
Ifeoma Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussiaà-Berdou

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Møse, designated by Trial Chamber I in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

BEING SEIZED OF the Prosecution's motion for special protective measures for Witness 006, filed on 24 September 2008;

CONSIDERING the Defence response, filed on 29 September 2008;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Chamber granted protection measures for the Prosecution's witnesses on 18 September 2007. The decision required the disclosure of witness's identifying information and unredacted statements at least 30 days prior to the commencement of trial.¹ The Prosecution listed Witness 006 as one of its intended witness in its Pre-Trial Brief filed on 25 July 2008.² It did not, however, disclose his identifying information or unredacted witness statements before trial or during the first trial segment, which took place from 25 August to 25 September 2008.

2. Instead, on 24 September 2008, the Prosecution requested special protective measures for Witness 006. In particular, it seeks to be relieved of the obligation to disclose his unredacted statements and identifying information until no later than 30 days before his testimony; non-disclosure of any identifying information to the public; and for the witness to give his testimony entirely in closed session via video-link from The Hague. Other related measures are also sought. The Prosecution submits that, given his position within Rwanda in 1993 and 1994, disclosure of his identity and cooperation with the Prosecution will expose him to serious danger, including the possibility that he or members of his family will be killed. It may also jeopardise future cooperation from other similar sources. In a confidential and *ex parte* affidavit, annexed to the motion, the chief of investigations for the Prosecution details the risks to the witness and its investigations.³

3. The Defence responds that the Prosecution is in violation of the existing witness protection measure, requiring disclosure 30 days before trial. Furthermore, its request for additional measures has not been substantiated. The motion should be denied in its entirety. If it is granted, the main point of contention is with the 30 day period of disclosure proposed by the Prosecution. This period should be at least 60 days before the first day of the trial session in which he is scheduled to give testimony in order to allow for full investigations uninhibited by other trial preparations.⁴

¹ Decision on Prosecution Motion for Protective Measures, 18 September 2007, p. 4, para. 10.

² The Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(ii) of the Rules of Procedure and Evidence, 25 August 2008, p. 40, annex, p. 8.

³ Prosecutor's Motion for Special Protective Measures for Witness 006 Pursuant to Rules 66, 69 and 75 of the Rules of Procedure and Evidence, filed on 24 September 2008, paras. 1-9, 13, 14, p. 5; Affidavit in Support, 24 September 2008.

⁴ Setako Defence Response to the Prosecutor's Motion for Special Protective Measures for Witness 006 Pursuant to Rules 66, 69 and 75 of the Rules of Evidence and Procedure, filed on 29 September 2008. The Defence notes that it is not in a position to comment on the Prosecution's *ex parte* justifications.

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DELIBERATIONS

4. At the outset, the Chamber observes that the Prosecution is in violation of the present disclosure requirements under the Rules of Procedure and Evidence and the Chamber's witness protection decision of 18 September 2007. Its motion for special protection measures was only filed at the end of the first trial segment. This should have been done earlier. Nevertheless, given the importance of witness protection, it remains in the interests of justice to accord these measures, if warranted.

5. Rules 69 and 75 authorise a Chamber to order appropriate measures to safeguard the privacy and security of witnesses, including delaying the disclosure of identifying information. Such measures must not prevent the Defence from having adequate time for preparation.

6. The Chamber accepts the Prosecution submissions, both in its motion and in the confidential affidavit, that Witness 006 is in a precarious position and is likely to be more threatened, in comparison with other witnesses. The witness held a high-profile position in 1993 and 1994 and was uniquely situated to observe certain events, which makes him susceptible to intimidation. Special protection measures are justified. Extra measures, such as a 30 day delay in the disclosure of identifying information prior to testimony and the use of video-link, have been accorded in similar circumstances.⁵ The Chamber considers it equally appropriate to grant these for Witness 006.

7. The main point of contention for the Defence is the timing of the disclosure of Witness 006's identifying information and his unredacted statements. The Chamber is satisfied that a period of 30 days prior to his testimony is sufficient to allow for adequate preparations. The Chamber notes that the Defence received his unredacted statement as well as the summary of his anticipated testimony in the Pre-Trial Brief. The Defence has not substantiated at this stage why additional time is warranted.⁶

8. The upcoming trial session is scheduled to run from 16 February to 6 March 2009. The Prosecution should therefore make the relevant disclosures immediately to enable Witness 006 to be heard by video-link from The Hague on 5 and 6 March. Consistent with practice, the Chamber will assess during the course of his testimony whether all or only part of it should be held in closed session.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motion;

ORDERS that:

- (A) The identity and unredacted witness statements of Witness 006 shall be disclosed no later than 30 days before his testimony;

⁵ See *Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY, 3 October 2003, paras. 6-13, p. 5; *Nahimana et al.*, Decision on Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001.

⁶ In the past, up to 45 days has been allotted where a witness's statements totalled more than a thousand pages. See *Bagosora et al.*, Decision on Modification of Special Protective Measures for Witness BY, 15 March 2004, paras. 2, 5-6. This does not appear to be the case with Witness 006.

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- (B) Information and documents disclosed by the Prosecution under this order relating to Witness 006 shall not be disclosed to any person, including any Accused in any other case or member of their Defence team, who is not officially designated member of a Defence team, or an Accused, in this case;
- (C) The testimony of Witness 006 shall be permitted to be introduced via a secure audio-video transmission link with a location in The Hague;
- (D) The Registry shall make all necessary arrangements in respect of the testimony via video-link with due regard to his security and with a view to holding the hearing on 5 and 6 March 2009;
- (E) Any hearings regarding these protective measures shall be closed to the public;
- (F) The affidavit in support of the present motion, filed by the Prosecution as an annex shall not be disclosed to the Defence and shall remain confidential.

Arusha, 4 February 2009



Erik Møse
Judge

[Seal of the Tribunal]

