



ICTR-00-55B-T
11-06-2009
(1587 - 1581)

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OR: ENG

TRIAL CHAMBER II

Before Judges: Arlette Ramaroson, presiding
Taghrid Hikmet
Joseph Masanche

Registrar: Adama Dieng

Date: 11 June 2009

THE PROSECUTOR
v.
ILDEPHONSE HATEGEKIMANA

Case No. ICTR-00-55B-T

JUDICIAL RECORDS DIVISION
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**DECISION CONCERNING MOTIONS FOR A POSTPONEMENT OF THE
DEFENCE CASE AS WELL AS FOR AN EXTENSION OF TIME TO DISCLOSE
WITNESS IDENTIFYING INFORMATION AND
JUSTIFICATIONS FOR WITNESS PROTECTIVE MEASURES**

Office of the Prosecutor:
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INTRODUCTION

1. The trial in this case commenced on 16 March 2009 before Trial Chamber II.
2. On 04 May 2009, the Prosecution closed its case. On the same day, a Status Conference was held in preparation for the Defence case, which is scheduled to commence on 22 June 2009. Submissions were heard from the Parties and a representative of the Witness and Victims Support Section (WVSS).¹ After having heard the submissions from the Parties and a representative of the Witness and Victims Support Section (WVSS), the Chamber instructed the Defence to disclose all witness identifying information for twenty-five witnesses at the latest by 01 June 2009.²
3. On 05 May 2009, the Chamber issued a Scheduling Order for the Defence to disclose witness identifying information by 01 June 2009
4. On 01 June 2009, the Defence submitted its Pre-Trial Brief, in which it listed fifty-four Defence witnesses, but did not provide specific witness identifying information to either WVSS or to the Prosecution.³
5. On 02 June 2009, the Defence filed a Motion requesting the Chamber to order protective measures for all Defence witnesses and to establish a date for disclosure of witness identifying information to WVSS.⁴
6. On 03 June 2009, the Chamber ordered the Defence to disclose to WVSS *proforma* information by Friday, 05 June 2009, for all twenty-five witnesses to be called, and to provide supporting material by Monday, 08 June 2008, to justify the requested protective measures for identified witnesses.⁵
7. On 08 June 2009, the Defence filed a Motion requesting additional time to prepare its case. The Defence submitted that its team is still investigating potential witnesses, and despite its best efforts to comply with the Chamber's Orders for disclosure, at present cannot provide a definitive list of witnesses to be called to testify.⁶ On the same day, the Defence filed a further Motion seeking an extension of time to provide supporting material to justify its request for protective measures for its witnesses.⁷

¹ Mr Moussounga Itsouhou-Mbadinga represented WVSS.

² T. 04 May 2009 2009 p. 12 (French transcript).

³ *Mémoire Préalable à la Présentation des Moyens à Décharge de la Défense de l'Accusé Ildephonse Hategekiman en Vertu de l'Article 73 ter du Règlement de Procédure et de Preuve*, 01 June 2009.

⁴ *Requête en Urgence aux Fins de Mesures de Protection des Témoins à Décharge en vertu des Articles 19 et 21 du Statute, 75 du Règlement*, 02 June 2009.

⁵ *Order for Witness Identifying Information and Justification for Witness Protective Measures*, 03 June 2009.

⁶ *Requête en Extrême Urgence aux Fins de Report de la Date du Début de la Présentation des Preuves à Décharge*, 08 June 2009.

⁷ *Requête en Extrême Urgence en Réconsidération Partielle du "Order for Witness Identifying Information and Justification for Witness Protective Measures,"* 08 June 2009.

8. The Prosecution has filed two recent submissions concerning the consequences of the Defence failure to provide timely disclosure of witness identifying information, pursuant to the Chamber's Orders. Both Prosecution submissions, filed on 04 June and 09 June 2009, respectively, seek a postponement of the Defence phase of the proceedings, insofar as the Prosecution has not received any identifying witness information, and, without such information, is hampered in the preparation of its case.⁸

DELIBERATIONS

(i) Commencement of the Defence Phase of the Proceedings

9. The Chamber will address all four of the above Motions in this Decision, since they refer to the same issues relating to the commencement date of the Defence case.

10. The Chamber has been informed that, as of 08 June 2009,⁹ the Defence has communicated identifying *proforma* statements for eleven listed Defence witnesses to WVSS and that eleven of these witnesses have been contacted. According to reports from representatives of WVSS, ten of the identified persons are available to come to the Tribunal to testify as of 22 June 2009. One other witness on the list will be available to testify in Arusha as of 29 June 2009.

11. After careful review of the Parties' submissions, the Chamber finds that neither the Defence nor the Prosecution will suffer any prejudice if the trial recommences, as scheduled, on 22 June 2009. The Chamber is satisfied that the Defence has been afforded ample time to prepare its case, although it accepts that the Defence may still have some witnesses to locate. Therefore, the Chamber has decided that the Defence phase of the trial will commence with the testimonies of eleven identified witnesses, who, according to WVSS, are available to come to Arusha to testify as of the third week of June 2009. In addition to the witnesses whose identifying information has been provided to WVSS, the Defence should continue to locate witnesses and to disclose their identifying information to the Chamber, the Prosecution and WVSS on a continuous basis and as soon as the information is available. In light of the immediate availability of identifying information concerning eleven Defence witnesses, the Chamber finds that Prosecution will have the tools necessary to prepare its case between now and the scheduled appearances of the Defence witnesses commencing on 22 June 2009.

⁸ *Réponse du Procureur au Mémoire Préalable à la Présentation des Moyens à Décharge de la Défense de l'Accusé Ildephonse Hategekimana en Vertu de l'Article 73 ter du Règlement de Procédure et de Preuve*, 04 June 2009; *Réponse du Procureur la à Requête en Extrême Urgence aux Fins de Report de la Date du Début de la Présentation des Preuves à Décharge Introduite par la Défense de Ildephonse Hategekimana*.

⁹ The Chamber notes that the Defence has partially complied with its Decision of 03 June 2009 in submitting the *proforma* information to WVSS concerning the above-mentioned eleven witnesses.

(ii) *Disclosure of Witness Identifying Information, Including Will-Say Statements*

12. The Chamber observes that the Defence has received continuous instruction since 16 April 2009 to provide timely disclosure of identifying information in relation to all Defence witnesses.¹⁰ The Chambers finds that there is no good cause to justify the postponement of the commencement date for the Defence phase of the proceedings.

13. In the Chamber's view, the disclosure to WVSS of eleven identifying witness *proforma* statements is indicative that the information needed by the Prosecution to prepare for the cross-examination of these witnesses is available and can be disclosed immediately by the Defence.

14. Accordingly, the Chamber instructs the Defence to disclose to the Prosecution immediately, and not later than one day following the date of issuance of this Decision, the following identifying information, including will-say statements, relating to the above-mentioned eleven Defence witnesses:

- a. The full names (including the family name, first name, nicknames (where applicable) and the assigned pseudonym);
- b. The date and place of birth including *cellule, secteur, commune, and préfecture*;
- c. Full names of both parents;
- d. Residence in 1994 including *cellule, secteur, commune and préfecture*;
- e. Current city and country of Residence;
- f. Religion;
- g. Occupation in 1994;
- h. Current occupation.

15. In light of the Defence submissions concerning its difficulties in locating witnesses,¹¹ the Chamber accepts that the Defence will provide a rolling disclosure of identifying information, including will-say statements, to the Prosecution. This continuous disclosure should be undertaken as soon as possible.

16. The above disclosure is not related to the Defence obligation to continue to provide necessary information to the Chamber, the Prosecution and to WVSS in relation to the remainder of the twenty-five witnesses that it intends to call to testify. It is requisite for the Prosecution to receive this information, including will-say statements, in order to continue to prepare its case. Similarly, it is essential for WVSS to receive

¹⁰ Prior to the Chamber's respective Orders on 04 and 05 May 2009 and on 03 June 2009 mentioned above, in its Oral Decision of 16 April 2009 the Chamber instructed the Defence "to disclose all witness identifying information as soon as possible, but at the latest by 25th of May 2009, three weeks before the commencement of its case." T. 16 April 2009 p. 2.

¹¹ *Requête en Extrême Urgence aux Fins de Report de la Date du Début de la Présentation des Preuves à Décharge*, 05 June 200, paras. 16, 17, 20.

witness identifying information as soon as possible in order to make adequate arrangements for the witnesses to come to Arusha.

(iii) Witness Protective Measures

17. According to the well-established jurisprudence of the Tribunal, a witness' subjective expressions of fear must be underscored by objective considerations to justify protective measures.¹² The practice of the Tribunal requires the moving party to demonstrate such an objective justification through affidavits attesting to the state of insecurity in the witness' place of residence, the presence at such a place of individuals either related to, friends with, or otherwise supportive of the accused, or other circumstances demonstrating that if the identity of the witness and the fact that she or he may testify before the Tribunal are known, the witness' life may be endangered or the lives of family members may be threatened.

18. In view of time constraints in relation to the commencement of the Defence case, the Chamber will grant protective measures to all twenty-five Defence witnesses at this time, with the understanding that the Defence will provide justifying information for these measures before each witness is called to testify. For the sake of consistency and fairness, the protective measures are identical to those which have been granted to the Prosecution witnesses in the present case, as enumerated below.¹³ The Chamber notes that it may reverse its decision on the protective measures, on a case-by-case basis, in relation to the supporting material presented by the Defence.

I. Pseudonyms designated by the Defence shall be used in the proceedings and in communications and discussions, both between the Parties and with the public. The Defence shall designate pseudonyms for any additional witnesses whom it is subsequently permitted to call.

II. Names, addresses, whereabouts, and other identifying information concerning the protected witnesses shall be sealed by the Registry and not included in any public or non-confidential Tribunal records, or otherwise disclosed to the public.

III. Names, addresses, locations and other identifying information of the protected witnesses which may appear in the Tribunal's public records shall be expunged and placed under seal.

IV. No person shall disclose identifying information about protected witnesses to the public or the media.

¹² *Prosecutor v. Hategekimana*, "Decision on Prosecution Extremely Urgent Motion for Protective Measures" (TC), 16 January 2009; *Prosecutor v. Kalimanzira*, "Decision on Prosecution Motion for Protective Measures" (TC), 8 November 2007; *Prosecutor v. Setako*, "Decision on Prosecution Motion for Protective Measures" (TC), 18 September 2007.

¹³ *Prosecutor v. Hategekimana*, "Decision on Prosecution Extremely Urgent Motion for Protective Measures" (TC), 16 January 2009.

- V. The Prosecution, or any person working for the Prosecution, shall not attempt to make an independent determination of the identity of any protected witness or encourage or otherwise aid any person in so doing.
- VI. No person shall make audio or video recordings or broadcastings, or take photographs or make sketches of protected witnesses, without leave of the Chamber and the Parties.
- VII. The Prosecution team in this case and any representative acting on its behalf shall notify the Defence in writing if it wishes to contact any protected witness and, if the witness consents, the Defence shall facilitate such contact.
- VIII. The Prosecution shall keep confidential to itself all information identifying any protected witness and shall not, directly or indirectly, share, discuss or reveal any such information.
- IX. The Prosecution shall provide the Registry with a designation of all persons working on the Prosecution team in this case who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any such person leaving the Prosecution team and confirm in writing that this person has remitted all material containing identifying information.
- X. The Defence shall immediately disclose the identifying information of the protected witnesses to the Prosecution as soon as possible and, in any event, no later than two days from the notification provided by this Decision, in order to allow the Prosecution adequate time to prepare for the Defence case, pursuant to Rule 69 (C) of the Rules.
- XI. The Defence shall forward the names and identities of the protected witnesses to the Registry in confidence, to be communicated to the WVSS for the purpose of implementing the above protective measures for such witnesses.

**FOR THE ABOVE REASONS, THE CHAMBER
DENIES THE MOTIONS AND**

ORDERS that the Defence phase of the present trial commence on 22 June 2009, as scheduled;

ORDERS that the Defence disclose to the Prosecution by Friday, 12 June 2009, all identifying information and witness will-say statements in relation to eleven witnesses whose identities, as of this date, have been provided to WVSS;

ORDERS that the Defence disclose to the Prosecution the identifying information, including witness statements, in relation to the remaining witnesses on a continuous basis, as soon as such information is available;

ORDERS that witness protective measures be granted to all twenty-five Defence witnesses, in accordance with the measures afforded to Prosecution witnesses in the present case, subject to the subsequent presentation by the Defence of supportive materials;

ORDERS that the Defence provide the Chamber, the Prosecution and WVSS with the order of appearance of the first eleven witnesses that it intends to call by Friday, 12 June 2009.

Arusha, 11 June 2009

Arlette Ramaroson
Presiding Judge

Taghrid Hikmet
Judge

[read and approved by]
Joseph Masanche
Judge

[absent at the time
of signature]

