



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

818/H

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ICTR-04-81-A
06th October 2010
{818/H – 814/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 6 October 2010

ICTR Appeals Chamber
Date: 06th October 2010
Action: A Summary
Copied To: Concerned Judges,
SLO, LO, ALO, CMS,
Parties, LSS.
[Handwritten signature]

Ephrem SETAKO

v.

THE PROSECUTOR

Case No. ICTR-04-81-A

Ex Parte and Confidential

DECISION ON PROSECUTION'S MOTION TO VARY PROTECTIVE MEASURES

Office of the Prosecutor

Hassan Bubacar Jallow
Richard Karegyesa
Frederick Nyiti

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
NAME / NOM: KOFFI KUMELIO A. AFANDE
SIGNATURE: *[Handwritten signature]* DATE: 06 Oct. 2010

The French Republic

Investigating Judges of the French Republic in charge of the proceedings against Pascal Simbikangwa

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of a motion filed confidentially and *ex parte* on 21 July 2010 by the Office of the Prosecutor ("Prosecution") to vary the protective measures granted in the *Setako* case¹ in respect of Prosecution Witnesses SQY and SBI.²

I. INTRODUCTION

2. The Prosecution seeks variation of protective measures for Witness SQY and SBI pursuant to Rule 75(G) of the Rules of Procedure and Evidence of the Tribunal ("Rules") in order to disclose their statements, open and closed session transcripts, exhibits tendered under seal, personal information sheets, and other necessary information to French investigating judges.³ The Prosecution submits that this disclosure will facilitate the testimony of Witnesses SQY and SBI in judicial proceedings in France against Pascal Simbikangwa for crimes allegedly committed in the territory of Rwanda in 1994.⁴ The Prosecution further contends that Witnesses SQY and SBI consent to the disclosure of their statements and the transcripts of their open and closed session testimony before the Tribunal,⁵ and that they have indicated "their willingness to testify in open court, under their names, in the French proceedings."⁶ In support of its Motion, the Prosecution provides a copy of statements signed by Witnesses SBI and SQY, respectively, on 9 April 2010 and 15 April 2010.⁷

3. The Prosecution requests a variation of the protective measures applicable to these witnesses such that they would no longer be required to use pseudonyms and the French authorities could use and refer to the disclosed material in public.⁸

4. In an order dated 23 July 2010, the Appeals Chamber determined that, as the Chamber seised of the proceedings in the *Setako* case, it had jurisdiction to rule on the Prosecution's application to rescind the protective measures previously granted to Witnesses SQY and SBI in this

¹ See *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures, 18 September 2007 ("*Setako* Protective Measures Order").

² Prosecutor's Urgent *Ex Parte* Motion to Vary Protective Measures for Witnesses SQY & SBI, Art. 28 & Rule 75, 21 July 2010 (*ex parte* and confidential) ("Motion"), paras. 1-3, 15.

³ Motion, paras. 1, 5.

⁴ Motion, paras. 1, 15.

⁵ Motion, para. 5.

⁶ Motion, para. 13. See also Motion, para. 6.

⁷ Motion, Annex A.

case.⁹ The Appeals Chamber recalls its determination in the Order that, since the Prosecution, in the Motion, appeared to seek the variation of the protective measures granted to Witness SBI both in the *Setako* case and in other cases before the Tribunal,¹⁰ it can only dispose of the Motion to the extent it concerns the *Setako* case.¹¹

5. Recalling the importance of a witness's consent to the variation of his protective measures, and noting that the statements attached to the Motion were over three months old and did not appear to support the Prosecution's assertion that Witnesses SQY and SBI consented to the complete rescission of their protective measures,¹² the Appeals Chamber instructed the Witness and Victims Support Section of the Tribunal ("WVSS") to:

- (1) consult with Witnesses SQY and SBI for the purpose of confirming their consent to (i) the disclosure of their confidential statements, transcripts, and other relevant documents from the *Setako* case to the French investigating judges in charge of the proceedings against Pascal Simbikangwa, and/or (ii) the complete lifting of their protected status granted in the *Setako* case; and
- (2) report to the Appeals Chamber on the outcome of its consultation and provide the new affidavits of Witnesses SQY and SBI, if any.¹³

6. Pursuant to the Order, WVSS filed affidavits of Witnesses SQY and SBI declaring their consent only to the disclosure of their confidential documents from the *Setako* case to the French judicial authorities without the complete lifting of their protected status.¹⁴

II. DISCUSSION

7. Within the framework set out in Rules 69 and 75 of the Rules, protective measures may be granted upon request, on a case-by-case basis, and as an exception to the general principle that all

⁸ Motion, para. 13.

⁹ Order in Relation to Prosecutor's Urgent Motion to Vary Protective Measures for Witnesses SQY and SBI, 23 July 2010 (*ex parte* and confidential) ("Order"), para. 4.

¹⁰ See Motion, paras. 2, 5, 6.

¹¹ Order, paras. 4, 5.

¹² Order, para. 7.

¹³ Order, para. 10.

¹⁴ Affidavit of Prosecution Witness "SQY" for the Purpose of Confirming his Consent to (i) the Disclosure of his Confidential Statements, Transcripts, and Other Relevant Documents from the *Setako* Case to the French Investigating [*sic*] Judges in Charge of the Proceedings Against Pascal Simbikangwa (ii) and/or the Complete Lifting of his Protected Status Granted in the *Setako* Case, dated 22 September 2010 and filed on 23 September 2010 (*ex parte* and confidential) ("Affidavit of SQY"), Part Three, pp. 3, 4; Affidavit of Prosecution Witness "SBI" for the Purpose of Confirming his Consent to (i) the Disclosure of his Confidential Statements, Transcripts, and Other Relevant Documents from the *Setako* Case to the French Investigating [*sic*] Judges in Charge of the Proceedings Against Pascal Simbikangwa (ii) and/or the Complete Lifting of his Protected Status Granted in the *Setako* Case, dated

proceedings before the Tribunal shall be public.¹⁵ Protective measures must also be balanced with the rights of the accused provided for in Article 20 of the Statute of the Tribunal ("Statute").

8. The Appeals Chamber appreciates the Prosecution's plea that "it is vital for [it] to be able to transfer evidence to national authorities to enable them to prosecute cases arising from international crimes committed in Rwanda."¹⁶ However, the Appeals Chamber must consider whether and to what extent the witnesses in question consent to the variation of their protective measures.¹⁷ In this case, the consent of Witnesses SQY and SBI is limited to the disclosure of their confidential documents in the *Setako* case to the French judicial authorities and does not extend to a complete lifting of their protected status, to making their confidential documents available to the public beyond the French judicial authorities, or to testifying in open court in the French proceedings under their own names.¹⁸

9. As such, the Appeals Chamber is not convinced that the requested variation of protective measures in respect of Witnesses SQY and SBI, which in fact amounts to their complete rescission, would be appropriate in the present circumstances. However, the Appeals Chamber is of the view that a partial variation of their protective measures is appropriate. Consequently, the Prosecution may disclose closed session transcripts or other confidential materials related to Witnesses SQY and SBI from the *Setako* case to the French investigating judges for the purpose of criminal proceedings against Pascal Simbikangwa. Any other protective measures granted to Witnesses SQY and SBI before the Tribunal shall continue to have effect *mutatis mutandis* in any proceedings before the French judicial authorities.

10. In this respect, the Appeals Chamber recalls the obligations of Member States of the United Nations pursuant to Article 28 of the Statute, and therefore of the investigating judges of the French Republic, as well as French judicial authorities in general, to respect and comply with all relevant orders and decisions concerning protective measures issued by this Tribunal. The Appeals Chamber acknowledges that if the French investigating judges introduce evidence or testimony from Witnesses SQY and SBI in proceedings against Pascal Simbikangwa, it will likely be necessary to disclose certain confidential materials in that case. In such a situation, it will be for the French

28 September 2010 and filed on 29 September 2010 (*ex parte* and confidential) ("Affidavit of SBI"), Part Three, pp. 3, 4.

¹⁵ See Rules 78 and 107 of the Rules.

¹⁶ Motion, para. 7.

¹⁷ See *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B, *The Prosecutor v. Obed Ruzindana and Clément Kayishema*, Case No. ICTR-95-1, *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14, *The Prosecutor v. Elizaphan Ntakirutimana et al.*, Case No. ICTR-96-10/17, *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses, 13 August 2008, para. 6; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgment, 7 July 2009, para. 170.

judicial authorities to order appropriate protective measures, giving due consideration to the protective measures ordered in respect of Witnesses SQY and SBI by the Tribunal in the *Setako* case.

III. DISPOSITION

11. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion **IN PART**, insofar as it relates to the *Setako* Protective Measures Order and subject to the conditions below;

VARIES the protective measures granted to Witnesses SQY and SBI in the *Setako* case for the purpose of disclosing their confidential statements, transcripts, and other relevant documents to the French investigating judges;

AUTHORIZES the Prosecution to disclose Witnesses SQY's and SBI's confidential statements, transcripts, and other relevant documents to the French investigating judges;

AUTHORIZES the French investigating judges to disclose, if necessary, Witnesses SQY's and SBI's confidential statements, transcripts, and other relevant documents to the French judicial authorities seised of the criminal proceedings against Pascal Simbikangwa and to the parties in that case, provided that all necessary measures are taken by the French judicial authorities to safeguard the confidentiality of the materials disclosed; and

DECLARES this decision to be without prejudice to any future application to rescind, vary, or augment Witnesses SQY's and SBI's protective measures in accordance with the procedure set out in Rule 75 of the Rules.

Done in English and French, the English version being authoritative.

Done this sixth day of October 2010,
at The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Patrick Robinson
Presiding

¹⁸ Affidavit of SQY, Part Three, pp. 3, 4; Affidavit of SBI, Part Three, pp. 3, 4.