



ICTR-00-55C-T
23-06-2011
(7712-7696)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 22 June 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

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**DECISION ON DEFENCE MOTION FOR VARIANCE OF WITNESS PROTECTIVE
MEASURES AND INTERNATIONAL COOPERATION OF THE GOVERNMENT
OF CANADA**

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INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 7 March 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively) filed a motion asking the Chamber to request the government of Canada to produce immigration materials with respect to three witnesses who testified under the pseudonyms BXF, BZC and ZBJ.¹ The Defence asserted that the three Witnesses had provided information to immigration authorities in Canada regarding events relevant to accusations against the Accused.² The Defence submitted that it attempted to obtain the relevant materials but was unsuccessful, as it was not authorized to provide the supporting information requested by Canadian authorities due to protection measures in place for the three Witnesses.³ Finally, the Defence explained that it filed the First Confidential Motion *ex parte* to avoid making available to the Office of the Prosecutor ("Prosecution") confidential and privileged information regarding the orientation of current investigations relating to the Accused's defence.⁴

3. On 9 March 2011, the Chamber issued an order requesting that the Defence specify which immigration documents it required from the immigration files of the three Witnesses.⁵

4. On 10 March 2011, the Defence filed a descriptive list of the immigration documents it seeks to obtain, noting that "[t]here may be documents which are unknown to the Accused" and that it would thus request "all remaining documents" in the immigration files which are not specified in its list.⁶

¹ Confidential and Extremely Urgent *Ex Parte* Defence Motion Motion [sic] for Judicial Cooperation with Canada (confidential and *ex parte*) ("First Confidential Motion"), 7 March 2011, para. 8.

² See First Confidential Motion, paras. 9-12.

³ First Confidential Motion, paras. 13-19.

⁴ First Confidential Motion, para. 22.

⁵ Order Regarding Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (confidential and *ex parte*), 9 March 2011, p. 2.

⁶ *Ex Parte* List of Immigration Documents Requested (*ex parte*), 10 March 2011, para. 2.

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5. On 14 March 2011, the Chamber granted the Defence Motion in part, and requested assistance from the Canadian government in obtaining the documents sought by the Defence.⁷

6. On 21 April 2011, the Canadian Department of Foreign Affairs and International Trade ("Canadian Government") responded that it could not, pursuant to Canadian law, transmit the requested documents to the Defence without first obtaining the information specified in their letter.⁸ More specifically, the Canadian government requested that the Defence provide (1) clarification as to where the Defence obtained information that the records may contain a summary of incidents that give rise to charges against Mr. Nizeyimana, (2) information as to how the Defence knows that the three individuals identified in the request sought refugee status in Canada, (3) an explanation as to how the requested materials are relevant to the case, (4) an explanation as to how the three individuals are involved in the incidents giving rise to the charges and (5) a summary of the allegations against Mr. Nizeyimana.⁹ The Canadian government further stated that it never received an answer from the Defence to any of the questions posed.¹⁰

7. On 16 May 2011, the Defence filed a Second Confidential Motion requesting judicial cooperation from Canada in light of the communication obtained from the Canadian government.¹¹ The Defence submitted that it could not provide the Canadian government with the information it seeks without violating the existing protective measures.¹² The Defence further argued that the Canadian government cannot refuse to transmit the documents to the Defence, save for "exceptional circumstances" such as "national security interests", since the government is not in a position to "substitute their assessment about the relevance of the information sought to that of the Trial Chamber."¹³

⁷ Decision on Ildelphonse Nizeyimana's *Ex Parte* Motion for Judicial Cooperation with Canada (confidential and *ex parte*) ("14 March Decision"), 14 March 2011.

⁸ Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada ("Second Confidential Motion"), 16 May 2011, Annex I.

⁹ Second Confidential Motion, Annex I, p. 14.

¹⁰ *Ibid.*

¹¹ Second Confidential Motion, para. 19.

¹² Second Confidential Motion, para. 15.

¹³ Second Confidential Motion, para. 16.

8. On 20 May 2011, the Chamber denied the Second Confidential Motion and directed the Defence to provide the information sought by the Canadian government in "general terms".¹⁴

9. On 24 May 2011, the Defence filed a motion for reconsideration of the Impugned Decision.¹⁵ The Defence submitted that the Chamber misunderstood the nature of its Second Confidential Motion and reiterated that it would be in violation of the protective measures in place for the three Prosecution Witnesses if it provided the information sought by the Canadian government.¹⁶ The Defence therefore requested that the Chamber reconsider its Impugned Decision and that it reiterate its request to the Canadian government to provide the documents in question.¹⁷ The Defence finally reiterated that it filed the Motion for Reconsideration *ex parte*, as the issue "deals with Defence investigations which do not involve the Prosecution."¹⁸

10. On 26 May 2011, the Chamber overturned the Impugned Decision.¹⁹ The Chamber further noted that the Defence request would only be possible if the protective measures currently in place for the three Prosecution Witnesses are varied to include the Canadian government.²⁰ The Chamber therefore directed the Defence to re-file its submission, *inter partes*, requesting a variance of the protective measures, including the justifications for the variance.²¹

11. On 6 June 2011, the Defence filed a motion requesting a variance of the protective measures for Prosecution Witnesses BXF, BZC and ZBJ.²² The Defence first submits that it does not consider a variance of protective measures to be appropriate where a State is bound to comply with the Tribunal's orders pursuant to Article 28 of the Statute of the Tribunal.²³ Alternatively, the Defence submits that the conditioning by the Canadian government of the

¹⁴ Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada ("Impugned Decision"), 20 May 2011.

¹⁵ Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada ("Motion for Reconsideration"), 24 May 2011.

¹⁶ Motion for Reconsideration, paras. 13-15.

¹⁷ Motion for Reconsideration, p. 5.

¹⁸ Motion for Reconsideration, para. 21.

¹⁹ Decision on Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada ("Decision on Motion for Reconsideration"), 26 May 2011.

²⁰ Decision on Motion for Reconsideration, para. 12.

²¹ Decision on Motion for Reconsideration, para. 16.

²² Nizeyimana Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada ("Motion"), 6 June 2011.

²³ Motion, paras. 19-22.



disclosure of the immigration documents on obtaining information covered by protective measures constitutes a "new circumstance" justifying a variance of the protective measures.²⁴

12. On 13 June 2011, the Prosecution filed its response, submitting that the attempt by the Defence to gain access to the Prosecution Witnesses' files at this stage of the proceedings is "ill placed".²⁵ The Prosecution notes that all three Witnesses refused to consent to a variance of their protective measures.²⁶ Moreover, the Prosecution does not concede that the majority of documents requested by the Defence are prior statements by the Witnesses, and therefore considers the majority of the documents requested to be irrelevant and overbroad given the narrow scope to which the material pertains.²⁷ Lastly, the Prosecution submits that if the Chamber were to vary the protective measures in place, the Defence should "specify the factual relevance of each document sought".²⁸

13. The Defence did not file a reply.

DELIBERATIONS

Variance of Protective Measures

14. The Chamber recalls that Rule 75(G) provides it with the discretion to "rescind, vary or augment protective measures ordered" when in the interest of justice. The Chamber notes that the practice of the Tribunal requires the party seeking a variation of the protective measures to demonstrate that the protected witness has consented to this variation²⁹ or that there exist new circumstances which constitute a change in the situation that initially justified the protective measures.³⁰

²⁴ Motion, para. 24.

²⁵ Prosecutor's Response to Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada ("Response"), 13 June 2011, para. 24.

²⁶ Response, para. 27.

²⁷ Response, paras. 28-34.

²⁸ Response, para. 35.

²⁹ See *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecutor's Urgent *Ex Parte* Motion to Vary Protective Measures for Prosecution Witness CNAT (TC) ("Nzabonimana Decision"), 16 September 2010, para. 11; *Prosecutor v. 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 (TC), 13 August 2008, para. 6; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Joseph Nzirorera's Motion for Variation of Protective Measures for Witness DC2-5 and CBP99 (TC), 16 July 2009, paras. 7-9.

³⁰ See *Nzabonimana Decision*, para. 11; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-I, *Décision sur la Requête du Procureur aux fins de Modification et d'Extension des Mesures de Protection des Victimes et des Témoins* (TC), 19 March 2004, para. 39.

15. When an application to vary the protective measures is made pursuant to Rule 75(G), the order of confidentiality which lies at the heart of the protective measures applies *mutatis mutandis* to the extended group of persons authorized to access the protected information, without relinquishing the protection over the witness.³¹

16. The Chamber notes at the outset that Witnesses BXF, BZC and ZBJ did not consent to a variance of the protective measures in place for them.³² The Chamber will thus assess whether new circumstances have arisen which justify a change in the protective measures. In doing so, the Chamber will have to “balance the circumstances of the witnesses with the rights of the accused who will benefit from the variation.”³³

17. The Chamber reminds the parties that it has already determined that the specific category of immigration documents pertaining to Prosecution Witnesses BXF, BZC and ZBJ could be of importance to the Defence in the preparation of its case.³⁴ The Chamber notes the diligent and continued efforts made by the Defence to obtain the immigration documents while remaining in compliance with the protective measures in place. The Chamber further notes the Canadian government’s request for information pertaining to the three Witnesses as a pre-condition to the transmission of documents corresponding to the Defence’s request.

18. The Chamber is of the view that the Canadian government’s inability to assist the Defence without receiving the information required pursuant to its domestic laws constitutes a new circumstance which justifies a variance of the protective measures in place. Accordingly, the Chamber finds it in the interest of justice to vary the protective measures in place for Prosecution Witnesses BXF, BZC and ZBJ to apply *mutatis mutandis* to the Department of Foreign Affairs and International Trade, and the Canadian government in general.

Article 28 of the Statute of the Tribunal

19. The Chamber recalls that Article 28(1) of the Statute provides that, “States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.” The Chamber further reminds the parties of Security Council Resolutions 955 (1994) and 1165 (1998), which strongly urge the member States to cooperate fully with the Tribunal.

³¹ *Prosecutor v. Simba*, Case No. ICTR-01-76-R75, Decision on Charles Munyaneza’s Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal (“Simba Decision”), 9 April 2008, para. 5.

³² Response, para. 27.

³³ Simba Decision, para. 8.

³⁴ 14 March 2011 Decision, para. 5.

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20. Article 28(2) mandates that:

States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

21. Having determined that the protective measures in place for the three Witnesses apply *mutatis mutandis* to Canadian government, the Chamber recalls the obligation of the government and its agents to respect and comply with all relevant orders and decisions concerning the protective measures ordered by this Tribunal in respect of Witnesses BXF, BZC and ZBJ.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence Motion;

VARIES the protective measures in place for Prosecution Witnesses BXF, BZC and ZBJ for purposes of disclosing the information requested to the Canadian government and its agents;

AUTHORIZES the Defence to disclose the information requested to the Canadian Department of Foreign Affairs and International Trade;

REQUESTS that the Department of Foreign Affairs and International Trade, and the Canadian government in general, respect and comply with the protective measures attached hereto as Annex I;


REQUESTS the Canadian government to assist the Defence team for Ildéphonse Nizeyimana in accessing the immigration documents requested; and

DIRECTS the Registry to transmit the present decision to the Canadian government, and to report back to the Chamber on its implementation.




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Arusha, 22 June 2011, done in English.


Lee Gacumba Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

