



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
8-9-2011
(8085-8079)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

8083
AM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 8 September 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON RECLASSIFICATION OF CONFIDENTIAL AND EX PARTE
SUBMISSIONS REGARDING JUDICIAL COOPERATION WITH THE UNITED
STATES OF AMERICA**

Article 28 of the Statute and Rules 54 and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin

Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

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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 Friday, 25 February 2011, having called 38 witnesses. The Defence closed its case on 16 June 2011, having called 38 witnesses.
2. On 25 March 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively) filed its "Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with the United States of America" ("First Defence Motion").
3. On 15 April 2011, the Defence filed a supplementary confidential *ex parte* motion for judicial cooperation with the United States of America.¹ The Defence requested "immediate assistance" from the Chamber due to the lack of response from the United States government and the Executive Agent.²
4. On 19 April 2011, the Chamber granted the Supplementary Motion.³ The Chamber requested cooperation from the United States government and ordered the Registry to report on the implementation thereof.⁴
5. On 15 June 2011, the Defence filed a second motion for judicial cooperation with the United States of America.⁵ The Defence submitted that the United States government had refused to provide it with the material it had requested in its earlier motions.⁶ The Defence argued that the *ex parte* nature of its filing was appropriate since the Prosecution "has no role to play in defence strategy."⁷
6. On 21 June 2011, the Chamber granted the Second Defence Motion in part, noting that, contrary to the submissions of the Defence, the United States government had "not refused to cooperate with the Defence" in providing the requested documents.⁸ The Chamber

¹ Defence Supplementary *Ex Parte* Filing in Support of Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with the United States of America ("Supplementary Motion"), 15 April, 2011.

² Supplementary Motion, paras. 4, 6.

³ Decision on Supplementary *Ex Parte* Filing in Support of the Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with the United States of America ("First Decision"), 19 April 2011.

⁴ First Decision, p. 3.

⁵ Second Extremely Urgent Confidential *Ex Parte* Defence Motion for Judicial Cooperation with the United States of America ("Second Defence Motion"), 15 June, 2011.

⁶ Second Defence Motion, paras. 25-26.

⁷ Second Defence Motion, para. 31.

⁸ Decision on Second Extremely Urgent Confidential *Ex Parte* Defence Motion for Judicial Cooperation with the United States of America ("Second Decision"), 21 June 2011, para. 12.

instead advised the Defence to communicate with the United States government to obtain the documents sought.⁹

7. On 25 July 2011, the Chamber received a letter from the United States Department of State, requesting that the Chamber provide a “copy of the relevant portions of the trial transcript”, in order to determine whether it can provide the material to the Defence.¹⁰

DELIBERATIONS

8. Rule of the Rules of Procedure and Evidence (“Rules”) provides that a Trial Chamber may, *proprio motu*, issue “such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation or conduct of the trial.”

Variance of Protective Measures

9. The Chamber notes that the United States government has indicated that while it is willing to cooperate, it cannot, under the current circumstances, provide the documents to the Defence without obtaining further material in the form of trial transcripts, from the Chamber.¹¹ The Chamber, however, considers that the release of this information to the United States government would require a variance of the protective measures in place for Prosecution Witness ZAV, as it would reveal the identity of the Witness to a third party not bound by the measures.¹²

10. Rule 75(F)(i) provides that “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures [...] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceeding”) unless and until they are rescinded, varied or augmented in accordance with procedure set out in this Rule.”

11. According to Rule 75(G) the Chamber may “rescind, vary or augment protective measures ordered” in the first proceedings when in the interest of justice. The Chamber notes that the practice of the Tribunal requires that the party seeking a variation of the protective

⁹ Second Decision, para. 13.

¹⁰ Letter by Juan Alsace to Trial Chamber III, entitled “Case of Prosecutor v. Ildéphonse Nizeyimana Decision on Extremely Urgent Confidential Ex Parte Defence Motion for Judicial Cooperation with the United States of America, 25 July 2011. See attached hereto as Annex A.

¹¹ Second Confidential Motion, Annex I, pp. 11, 14.

¹² See Decision on Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent Ex Parte Defence Motion for Judicial Cooperation with Canada, 26 May 2011.

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measures demonstrate that the protected witness has consented to this variation¹³ or that there exist new circumstances warranting a change in the situation that initially justified the protective measures.¹⁴

Ex Parte Nature of Submissions

12. The Chamber notes that the Defence motions seeking judicial cooperation from the United States government were filed on an *ex parte* basis. However, given the possibility that disclosure of the materials requested by the Defence from the United States government may require the variation of the protective measures accorded to Prosecution Witness ZAV, the Chamber finds it untenable to determine this issue without providing the Prosecution with an opportunity to make submissions on this matter.

13. The Chamber recalls that as a general rule, applications must be filed *inter partes*.¹⁵ An *ex parte* filing should be entertained only when it is in the interest of justice, and where it does not cause prejudice to any of the parties to the proceedings.¹⁶ When a Trial Chamber renders a decision on an *ex parte* application, it should consider whether the *ex parte* nature of the filing is appropriate.¹⁷

14. Following the above determination, the Chamber finds the basis for maintaining the *ex parte* nature of the Defence motion untenable and prejudicial to the Prosecution. The Chamber therefore directs the registry to re-classify all filings referenced in the procedural history of this Decision from *ex parte* to *inter partes*. The Chamber further directs the Defence to file submissions on the justification for varying the existing protective measures in place for Prosecution witness ZAV.

FOR THESE REASONS, THE CHAMBER

¹³ See *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecutor's 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 Witnesses (TC), 13 August 2008, para. 6; *Prosecutor v. Nindiliyimana 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.

¹⁴ See Nzabonimana Decision, para. 11; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-1, *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; *Procureur v. Nshogoza*, Case No. ICTR-07-91-PT, *Décision Relative à la Requête en Extrême Urgence du Procureur en Prescription de Mesures de Protection en Faveur de Victimes et de Témoins* (PT), 24 November 2008, paras. 10-12.

¹⁵ Decision on Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent Ex Parte Defence Motion for Judicial Cooperation with Canada, 26 May 2011, para. 15.

¹⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 11.

¹⁷ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5.

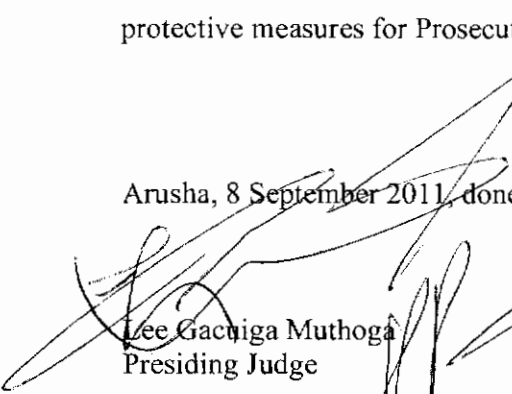
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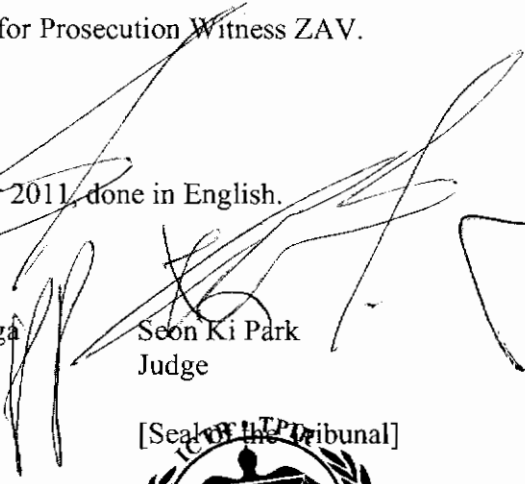


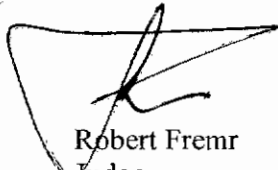
DIRECTS the registry to re-classify the documents referenced in the Introduction from *ex parte* to *inter partes*; and

DIRECTS the Defence to file a submission on the justification for a variance of the existing protective measures for Prosecution Witness ZAV.

Arusha, 8 September 2011, done in English.


Lee Gacniga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

