

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Dr. Agwu U. Okali

Date: 1 December 2000

THE PROSECUTOR

v.

**EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE**

THE PROSECUTOR

v.

ANDRÉ NTAGERURA

Case No. ICTR-99-46-T

**DECISION ON BAGAMBIKI'S MOTION FOR DISCLOSURE OF THE
GUILTY PLEAS OF DETAINED WITNESSES AND OF STATEMENTS
BY JEAN KAMBANDA**

Office of the Prosecutor:

Léonard Assira
Liliane Rasendra
Andra Mobberley
Richard Karegyesa
Holo Makwaia

Defence Counsel for Bagambiki:

Vincent Lurquin
Luc Boutin

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),

SITTING as Trial Chamber III (Chamber) composed of Judges Lloyd George Williams, presiding, Yakov Ostrovsky, and Pavel Dolenc;

BEING SEISED of Emmanuel Bagambiki's Motion for Disclosure of the Guilty Pleas of Witnesses LC, LQ, LAI, LAP, LAJ, LAG, LAR, LAM, LAH, LAK, LAB and of Statements by Jean Kambanda, filed on 11 September 2000 (Motion);

CONSIDERING the Prosecutor's response to the Motion, filed on 16 October 2000;

RECALLING the Chamber's Decision of 23 August 2000 on the Prosecutor's Motion for the Transfer of Detained Witnesses Pursuant to Rule 90 bis of the Rules of Procedure and Evidence (Rules)

NOW CONSIDERS the matter solely on the basis of the briefs of the parties, pursuant to Rule 73 of the Rules.

SUBMISSIONS OF THE DEFENCE

1. The Defence submits that the Prosecutor intends to call eleven witnesses imprisoned in Rwanda to testify in the trial of André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe. These witnesses who were detained at Cyangugu Prison by Rwandan authorities were transferred to the United Nations Detention Facility (UNDF) in Arusha following the Chamber's decision granting leave to the Prosecutor to transfer the detained witnesses.

2. The Defence states that the Prosecutor disclosed these witnesses' statements under their pseudonyms referred to above. In these statements the witnesses state that they had admitted their crimes before Rwandan authorities and that they had acknowledged their guilt. The Defence, however, did not receive from the Prosecutor the eleven imprisoned witnesses' admissions of guilt.

3. Referring to the precedent set by Trial Chamber I in the case *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T (Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witness)(8 June 2000), which the Defence says, granted a similar request, the Defence prays the Chamber to order the Prosecutor to disclose the imprisoned witnesses' admissions of guilt to prepare the Defence case, and to assess the credibility of these witnesses.

4. The Defence also asks the Chamber to order the Prosecutor to disclose the audio recordings and transcripts from the questioning of Jean Kambanda, especially those concerning Bagambiki and the Prefecture of Cyangugu of which Bagambiki was *Préfet*, and also concerning civil defence. The Defence submits this information is necessary for its preparation of the trial.

SUBMISSIONS OF THE PROSECUTOR

5. The Prosecutor submits that she would not spontaneously disclose to the Defence the witnesses' confessions, which were referred to in their statements just for preliminary and

illustrative purposes, and which statements are of no interest to the Prosecutor in the instant case. Further, those documents if they exist, are not in the Prosecutor's possession or under her control. Instead, they would be matters of a sovereign country, out of the Prosecutor's authority.

6. The Prosecutor posits that the arguments she makes here are not similar to the arguments she raised in the *Bagilishema* case to which the Defence refers. This explains why Trial Chamber I applied Rule 98 in reaching its decision. Indeed, states the Prosecutor, Rule 98 concerns copies of the statements of additional Prosecution witnesses to be made available to the Defence within a prescribed time; whereas, in the instant case, the witnesses in question are not additional witnesses nor did the Prosecutor take the statements asked for by the Defence. Thus, contends the Prosecutor, it is up to the Defence to obtain those statements on its own, if it deems them useful for its case.

7. The Prosecutor, however, concedes that should the Chamber deem it appropriate to satisfy the Defence request, it could do so by way of sending a letter of request to the Rwandan authorities.

8. As to the audio recordings and transcripts from the questioning of Jean Kambanda, the Prosecutor asserts that this request is totally unjustified and there is not even an attempt to justify it. She adds that there is no link between the documents for which the Defence is asking and the documents already disclosed by the Prosecutor. The Defence does not even allege that Jean Kambanda referred to Bagambiki's name or the Prefecture of Cyangugu in his statements. The Prosecutor, in the indictment and the supporting materials, did not refer to Jean Kambanda's statements.

9. The Prosecutor, however, states that if the Chamber would deem the Defence request well founded, within eight days following the Chamber's order, she would call upon the Defence to inspect the portions of Jean Kambanda's statements which might relate to Bagambiki and the Prefecture of Cyangugu.

DELIBERATIONS

Request for the Witnesses' Confessions

10. The Defence request is based on Rule 66(A)(ii) and Rule 98.

11. Rule 66(A)(ii) obliges the Prosecutor: (1) to disclose to the Defence within a time frame, the statements of witnesses whom he or she intends to call to testify at trial; (2) to disclose to the Defence, if the Chamber so orders upon good cause shown, the statements of additional prosecution witnesses.

12. The statements sought by the Defence are not those taken by the Prosecutor, nor are the detained witnesses additional prosecution witnesses. Therefore Rule 66(A)(ii) does not apply to the Defence request.

13. Rule 98 reads in part: "A Trial Chamber may *proprio motu* order either party to produce additional evidence." This Rule covers a situation whereby the Chamber itself deems it appropriate to order a party to produce additional evidence. Rule 98 does not

provide for the Chamber to order a party to go and obtain evidence on behalf of another party.

14. In principle the Chambers apply rules which are characteristic of adversarial criminal proceedings and it would be very strange indeed, if not incompatible, to order a party to obtain evidence for the opposing party beyond the requirements of Rule 68 to disclose to the Defence the existence of exculpatory evidence known to the Prosecutor. In addition, the Motion does not provide any grounds indicating the evidential necessity of confessions, which the witnesses gave to Rwandan authorities. Rather, the Motion merely cites and relies on the Decision in *Bagilishema* case, where Trial Chamber I ordered the Prosecutor to provide to the Defence the confessions of the witnesses and held that such written confessions of Prosecutor's witnesses could be material in evaluating their credibility, considering the facts and circumstances of that specific case. However, the factual circumstances Trial Chamber I considered in rendering its decision are not known to this Chamber.

Request for Disclosure of Jean Kambanda's Statements

15. The request for disclosure of Jean Kambanda's statements is based on Rule 66(B) which provides that upon a Defence request, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the Defence, or are intended for use by the Prosecutor as evidence at trial, or were obtained from or belong to the accused.

16. The Defence argues that Jean Kambanda's statements are necessary for the preparation of the trial. The appropriate legal procedure for the Defence to gain access to such statements is, pursuant to Rule 66(B), to request the Prosecutor to permit the inspection. Resorting to the Chamber is permissible only if the request to the Prosecutor is unsuccessful. However, exceptionally and without setting any precedent, the Chamber wishing to avoid delay, and in light of the particular circumstances, due to the fact that trial has already commenced, and in the interests of justice and judicial economy, permits the Defence request.

17. The Chamber recalls that in a previous decision, *Prosecutor v. Ntagerura*, ICTR-96-10A-I; (Decision on Defence Motion for Disclosure of Evidence Pursuant to Rules 66 *et al* and 73 of the Rules of Procedure and Evidence and Articles 19(1), 20(2), and 20(4)(6) of the Statute of the Tribunal)(26 June 2000), it already found that certain portions of the audio recordings and transcripts from the questioning of Jean Kambanda may well be material for the preparation of the Defence. In that decision, the Chamber had been satisfied by the Prosecutor's suggestion "that if the Chamber would deem it necessary to allow the Defence access to Kambanda's statements listed as item 1 on the List, the Prosecutor would allow the Defence to access the portions of such statements as concern the Accused..." On that occasion, the Chamber ordered the Prosecutor to act as she proposed.

18. Because the Defence request and the Prosecutor's attitude towards that request, as far as Kambanda's statements are concerned, are similar to Ntagerura's request and the Prosecutor's response referred to above, the Chamber will deal with them similarly. Therefore, the Chamber, acting under Rules 54 and 66(B), orders the Prosecutor to make available for purposes of inspection by the Defence, from and after 8 December 2000, the portions of Jean Kambanda's statements which relate to Bagambiki, the Prefecture of Cyangugu, and civil defence in Cyangugu.

19. For these reasons, the Chamber:

- (a) **GRANTS** the Motion, in part;
- (b) **ORDERS** the Prosecutor to make available, for purposes of inspection by the Defence, from and after 8 December 2000, the portions of Jean Kambanda's audio and written statements to the Prosecutor which relate to Emmanuel Bagambiki, the Prefecture of Cyangugu and civil defence in Cyangugu;
- (c) **DENIES** the Motion in all other respects.

Arusha, 1 December 2000.

Lloyd George Williams
Judge, Presiding

Yakov Ostrovsky
Judge

Pavel Dolenc
Judge

Seal of the Tribunal