



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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OR: ENG

**TRIAL CHAMBER I**

Before: Judge Erik Møse

Decision of: 16 July 2001

**THE PROSECUTOR  
VERSUS  
ELIZAPHAN NTAKIRUTIMANA  
GERARD NTAKIRUTIMANA**

**Case No. ICTR-96-10-T  
and  
Case No. ICTR-96-17-T**

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**DECISION  
ON PROSECUTION MOTION FOR CONTEMPT OF COURT  
AND  
ON TWO DEFENCE MOTIONS FOR DISCLOSURE ETC.**

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**The Prosecution:**

Charles Adeogun-Phillips  
Wallace Kapaya  
Boi-Tia Stevens

**Counsel for Elizaphan Ntakirutimana:**

Mr Ramsey Clark

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING in the person of Judge Erik Møse, member of Trial Chamber I, in pursuance of Rule 73 (A) of the Rules of Procedure and Evidence (the “Rules”);

BEING SEIZED of a motion filed by the Prosecution on 28 May 2001 for contempt of court;

HAVING CONSIDERED the Defence reply of 8 June 2001, received on 9 July 2001;

BEING SEIZED of a Defence motion of 8 June 2001, received on 9 July 2001, for the disclosure of witness statements and for the identification of expert witnesses, if any, and the disclosure of their qualifications and reports;

BEING SEIZED of an “emergency motion” of 5 July 2001 from the Defence, filed on 6 July 2001, for a decision on pending motions before the judicial recess; for an order directing the Prosecution to file and provide the Accused with her “pre-trial conference statement”; and for scheduling a pre-trial conference not later than the week of 13 August 2001;

HAVING CONSIDERED the submissions of the Prosecution, filed on 12 July 2001, containing its response to the Defence motions of 8 June and 5 July 2001 as well as its rejoinder concerning its motion for contempt of court;

## **DECIDES AS FOLLOWS:**

### **Introduction**

1. On 28 May 2001 the Prosecution filed a motion for contempt of court. The Chamber was not aware of any response before the Defence, on 6 July 2001, filed an emergency motion for a decision on pending motions before the recess. That motion referred to a Defence motion of 8 June 2001, which responded to the motion of contempt of court and also raised questions of disclosure. According to the Court Management Section, this motion of 8 June 2001 had not been received by the Registry.
2. On 6 July 2001 the Presiding Judge addressed a memorandum to the parties. It dealt with the scheduling of the case, the Defence “emergency motion” filed on that day and the fact that no motion of 8 June 2001 had been received. Moreover, on 6 July 2001 the Court Management Section, in a separate fax, requested the Defence to send to the Tribunal the motion of 8 June 2001. It was received on 9 July 2001. The Prosecutor responded on 12 July 2001 to that motion as well as to the Defence motion of 5 July 2001.
3. As the motion submitted by the Prosecution and the two Defence motions raise interrelated issues the Chamber will consider them together.

## **Recapitulation**

4. During the Status Conference on 2 April 2001 several decisions were made:
- It was reiterated that the trial will commence on 17 September 2001;<sup>1</sup>
  - Arrangements were made to facilitate the work of the Defence during its trip to Rwanda (handing over of maps, sketches etc. and assistance by Prosecution investigators);<sup>2</sup>
  - Defence would file admissions by 30 April 2001;<sup>3</sup>
  - The Prosecution would file its pre-trial brief by 15 July 2001;<sup>4</sup>
  - The Prosecution would file its list of the witnesses it intends to call by 15 August 2001.<sup>5</sup>

## **Prosecution Motion for Contempt of Court**

### *Submissions of the Parties*

5. The Prosecution requests the Chamber to hold the Defence, in particular the two accused persons, in contempt of the Chamber's order of 22 August 2000 relating to witness protection. As a consequence of this alleged violation, the Chamber is requested to vary its order concerning the date for disclosure of the list of Prosecution witnesses, from 15 August to 17 September 2001. Moreover, the Prosecution requests the Chamber to grant it leave during trial to disclose the name of a witness scheduled to testify on a particular date one day before that date instead of weekly witnesses disclosures, which is the normal practice. Finally, the Chamber is requested to grant any other relief this motion may warrant. The Prosecution argues that the Chamber has inherent jurisdiction to punish any person for contempt of its Rules and orders. Reference is made to common law jurisprudence and doctrine.

6. The reason for the Prosecution's requests is that in the appeals proceedings in the case of *The Prosecutor v. Alfred Musema*<sup>6</sup> Defence Counsel on 19 April 2001 filed a motion under Rule 68 requesting the Prosecution to disclose exculpatory material, namely the statement of Witness II in the Ntakirutimana case. That statement was enclosed to the appellant's motion. According to the motion the appellant had received the statement from another detainee at the UN Detention Facility, who had received it as part of his case papers. According to the Prosecution it is clear that this referred to one or both Accused in the present case. The Prosecution argues that the disclosure of the identity of Witness II to Alfred Musema was wilful, deliberate and an intentional and flagrant violation of the Chamber's witness protection order.

7. In its motion of 8 June 2001 (paras. 1-6) the Defence responds that a witness statement could find its way into the hands of any detainee in a large number of ways. Any person possessing a witness statement which the Prosecution wrongfully withheld has a duty to make the statement available to the convicted person. The Chamber's witness protection order was not intended to protect the Prosecutor from the failure to do her duty. There is no claim by the Prosecution that any witness has been placed in danger as a result of the alleged

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<sup>1</sup> Transcripts of 2 April 2001 pp. 21-22.

<sup>2</sup> Ibid. pp. 10, 24 and 36 as well as pp. 16 and 19, respectively.

<sup>3</sup> Ibid. p. 28.

<sup>4</sup> Ibid. pp. 28 and 31.

<sup>5</sup> Ibid. pp. 33-34.

<sup>6</sup> Case No. ICTR-96-13-A.

acts of the Defence. The Defence also points out that the Prosecution does not allege that any disclosure has occurred beyond Alfred Musema and his counsel.

8. The Defence opposes the Prosecution's motion for contempt as an attempt to deny the defendants their rights to prepare and present a defence by withholding Prosecution witness statements and reports until the eve of their testimony when it is too late for the Defence to investigate and prepare to cross-examine the witness. The motion should be denied without further imposition on the time and resources of the Tribunal and the parties.

### *Deliberations*

9. The Chamber notes that Witness II's statement of 28 January 2000 falls under the decision for witness protection of 22 August 2000. The available information indicates that the statement, which was appended to the motion in the appeals proceedings in the *Musema* case, was provided by one of the accused in the present case. Reference is made in particular to the information given by Counsel for Musema in his motion to the Appeals Chamber. The handing over of the statement in its non-redacted form amounts to a breach of para. 4 of the witness protection order. The Chamber stresses the necessity to observe applicable provisions concerning witness protection.

10. The next question is whether the breach is serious enough to be tantamount to contempt. The statement of Witness II is claimed by the Defence for Musema to be exculpatory under Rule 68 of the Rules. Under that provision, the Prosecution must disclose exculpatory evidence to the Defence concerned. In a motion of 5 April 2001 the Prosecution requested variation of witness protection measures for Witness II and expressed the view that the said statement might fall within the scope of Rule 68. The Chamber granted the motion on 6 April 2001 and stated that "the Prosecution is permitted to disclose the non-redacted statement of prosecution Witness II to Mr Steven Kay QC, for the purposes of the appeal in *Alfred Musema v. The Prosecutor*." Therefore, following the breach of the witness protection order the statement has later been communicated to the Defence of Alfred Musema as a consequence of the Prosecution's own interpretation of Rule 68. There is no evidence that the statement has been made available to any other than Alfred Musema and his Counsel.

11. The Chamber recalls that already during the Status Conference of 2 April 2001 the Prosecution alleged that the witness statement had been disclosed by the Ntakirutimana team to Counsel in the *Musema* case and voiced strong objections to providing the Defence with the final list of witnesses at an early stage. The Chamber then ordered that the list should be disclosed on 15 August 2001.<sup>7</sup> There is no new information available at the present stage which should lead to a variation of the Chamber's order of 2 April 2001.

12. The handing over of the witness statement to Alfred Musema occurred in a specific context, which was closely connected with Rule 68. This episode does not give a sufficient basis to fear that the two accused persons or members of the Defence team will disregard the protection order in the future. Therefore, the Chamber does not grant the Prosecution's request to postpone the date for disclosure until 17 September 2001, or vary the normal disclosure procedure during the trial. Such measures, if granted, would be disproportionate and seriously curtail the right of the Defence to have adequate time and facilities for preparation.

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<sup>7</sup> Transcripts of 2 April 2001 pp. 29-34.

### **Defence Motion concerning Disclosure of Information relating to Witnesses**

13. The Defence motion of 8 June 2001 (paras. 7-9) raised two issues, the question of expert witnesses and the final list of factual witnesses.

#### *Factual Witnesses*

14. The Defence argues that the Prosecution should be ordered now to provide the Defence with its final list of witnesses on, or before, 17 July 2001 “as required by Rule 66 (A) (ii)”. According to the Prosecution this is an attempt to review the Chamber’s decision during the Status Conference, for which there is no legal basis. Moreover, the motion flagrantly disregards the Prosecution’s motion for contempt of court.

15. The Chamber recalls that during the Status Conference, Counsel for Gerard Ntakirutimana stressed the wish of the Defence to know immediately the identity of the 15-20 witnesses the Prosecution intends to call out of the total number of about 50 potential witnesses. The Prosecution objected, but agreed to submit the list “on or before” 15 August 2001. The Chamber fixed the date to 15 August 2001.<sup>8</sup> The Defence is now seeking to obtain an earlier disclosure date. The Chamber sees no reason to reconsider its decision of 2 April 2001. In view of the Defence submissions it is recalled that Rule 66 (A) (ii) relates to disclosure of witness statements, which in the present case have been disclosed in non-redacted form a long time ago.

#### *Expert Witnesses*

16. The Defence invokes Rule 94 *bis* and emphasises its need to know as soon as possible whether the Prosecution will call experts, their qualifications and copies of their reports. The Prosecution argues that this issue was also settled at the Status Conference.

17. The Chamber is not aware whether the Prosecution will call any expert witness. The issue was not raised explicitly during the Status Conference. The discussion focussed on the factual witnesses.

18. According to Rule 94 *bis* (A) the Prosecutor is under an obligation to disclose statements of any expert witness “as early as possible” and “not less than twenty-one days prior to the date on which the expert is expected to testify”. The Chamber may, in its discretion, extend the time-limit for the submission of such statements. The trial is scheduled for 17 September 2001. The presentation of the Prosecution’s case will take about five weeks. Expert statements, if any, must be made timely available in both English and French in order to avoid complications during the limited period for the presentation of the Prosecution’s case. Moreover, following the Chamber’s order at the Status Conference the Defence transmitted its admissions on 25 April 2001 (retransmitted on 9 June 2001). Consequently, the Prosecution is now in a position to assess the need for expert evidence and make its position known.

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<sup>8</sup> Ibid.

19. The Chamber therefore requests the Prosecution to clarify whether it intends to call any expert witness and, if so, to communicate forthwith the identity and qualifications to the Defence. If any expert is called the Prosecution is requested to file expert reports in both official languages not later than 3 September 2001.

#### **Defence Motion for a “Pre-Trial Conference Statement”**

20. In its motion of 5 July 2001 the Defence requested entry of an order directing the Prosecution to file and provide the Accused with its “pre-trial conference statement” which is fully prepared by 9 July 2001. The Chamber recalls that during the Status Conference it ordered the Prosecution to submit its pre-trial brief by 15 July 2001. There is no basis for re-opening this issue. It should be added that as the time limit expires on a Sunday it is automatically extended to the subsequent working day, namely Monday 16 July 2001, see Rule 7 *ter* of the Rules.

#### **Defence Motion for Scheduling a Pre-Trial Conference**

21. The Defence has also requested that a pre-trial conference be scheduled not later than the week of 13 August 2001. This would enable the Defence to arrange through the Registry a second trip to Rwanda. Such a trip would be most useful at least one month before the trial. The Prosecution had no objections to this.

22. The Chamber is at the disposal of the parties for a pre-trial conference from Monday 20 August 2001 onwards. The exact date and time will be decided following consultations with the parties through the Court Management Section.

#### **Other Matters**

23. The Defence motion of 5 July also referred to a motion filed by the Defence on 19 June 2001 for the assignment of co-Counsel for Elizaphan Ntakirutimana. That motion was decided by the Chamber on 13 July 2001. Consequently, there are no pending motions in the present case.

**FOR ALL THE ABOVE REASONS**

**THE CHAMBER**

**DISMISSES** the Prosecution's motion for contempt of court and recalls that the list of witnesses the Prosecution intends to call at trial shall be disclosed by Wednesday 15 August 2001;

**DISMISSES** the Defence motion for early disclosure of the Prosecution's pre-trial brief and recalls that the Prosecution shall file its pre-trial brief by Monday 16 July 2001;

**REQUESTS** the Prosecution to clarify whether it intends to call any expert witness and, if so, to communicate forthwith the identity and qualifications to the Defence. Should an expert witness be called the Prosecution shall file expert reports in both English and French not later than Monday 3 September 2001.

**DIRECTS** the Court Management Section to consult with the parties with a view to scheduling a pre-trial conference.

Arusha, 16 July 2001.

Erik Møse  
Judge

(Seal of the Tribunal)