ICTR-99-52-T
(25494 – 25490)
21/01/2002

25494

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Decision of: 19 January 2002

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN-BOSCO BARAYAGWIZA

Case No. ICTR-99-52-T

DECISION ON AN ORAL APPLICATION BY DEFENCE COUNSEL CONCERNING WITNESS X

For the Prosecutor:

Mr. Stephen Rapp
Mr. William Egbe
Mr. Alphonse Van
Ms. Simone Monasebian
Ms. Charity Kagwi
Mr. Elvis Bazavule

For the Defence:

Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis QC
Mr. John Floyd III
Mr. René Martel
Mr. Giocomo Barletta-Caldarera
Mr. Alfred Pognon

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse, and Judge Asoka de Zoysa Gunawardana ("the Chamber");

BEING SEIZED OF an oral application by Defence Counsel for Mr. Nahimana, heard in closed session on 6 December 2001;

HEREBY decides the application.

SUBMISSIONS OF THE PARTIES

1. On 6 December 2001, Counsel for Mr. Nahimana requested disclosure of the full record of interview of a person referred to as "Witness ZC" in the material filed by the Prosecution in support of a request to amend the indictment against Mr. Nahimana, on 19 July 1999 ("the supporting material"). Counsel also requested clarification as to whether "Witness ZC" and recently listed Witness X were one and the same person.[1]

2. Counsel for the Prosecution opposed both parts of the application, arguing that the indictment confirmation process is different from proving the case itself, and that not all material relating to, or underlying, the former process had to be disclosed during the latter. It also maintained that there was no reason for it to disclose the identity of Witness X prior to the set date (30 days before the due appearance date of that witness), and that to do so would infringe witness protection measures.[2]

DELIBERATIONS OF THE CHAMBER

Context of supporting material

3. The original indictment against Mr. Nahimana was confirmed on 12 July 1996.[3] The Accused's initial appearance was on 19 February 1997.[4] The indictment was subsequently amended on 22 December 1997, 1 December 1998, 6 September 1999, and 15 November 1999.[5] The last-mentioned amendment was pursuant to a decision by the Chamber dated 5 November 1999,[6] deciding a Prosecution motion for amendment of the indictment filed on 19 July 1999.[7] The supporting material referred to by the Defence was annexed to that motion. It was disclosed to the Defence following the 5 November 1999 decision on the motion.[8] The trial of the Accused commenced on 23 October 2000.

[1] Transcripts of 6 December 2001 pp. 100-111, 114-117.
[2] Ibid. pp. 107-111.
[3] "Decision on the Indictment Review", 12 July 1996.
[4] See transcripts of 19 February 1997.
[5] Dates shown are filing dates.
[6] "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 5 November 1999.
[7] "Prosecutor's Request for Leave to File an Amended Indictment", dated 9 July 1999 (filed 19).
[8] See "Decision" of 5 November 1999 para. 8.

Disclosure of full statement

4. Section 5.8 of the 15 November 1999 amended indictment against Mr. Nahimana concerns the Prosecution's allegation that certain politicians characterised Tutsi as the enemy, and in particular that Léon Mugesera, in a November 1992 speech broadcast on Radio Rwanda, called for the extermination of Tutsi. Among material offered in support of this allegation is a three-page record of interview between "ICTR" and "Witness ZC". It appears to represent an edited excerpt and not the full interview.

5. Counsel for the Defence claimed that the full statement of the person identified as Witness ZC should have been disclosed to the Defence along with other statements received by the Defence in March 2000. Counsel asserted that it was an "extraordinary proposition" that an accused "is at no time in a position to view more than that original extract" appearing in material submitted in support of an indictment.[9] Counsel added that the statement of so-called Witness ZC was no different in kind to that of other persons whose statements were disclosed by the Prosecution but who were not finally called up as witnesses.

6. The Chamber is not convinced by the Defence's argument. Provision of material in confirmation of the indictment (or of an amended indictment) is procedurally separate from disclosure of information to the Defence at the post-confirmation stage preceding trial.[10] The two procedures are governed by distinct sets of provisions:

a) The confirming judge relies on the supporting material to decide whether a prima facie case has been made out. This follows from Article 18 of the Tribunal's Statute and Rule 47 of the Tribunal's Rules of Procedure and Evidence.

b) If the indictment is confirmed, according to Rule 66(A) the supporting material must be disclosed to the accused within 30 days of his or her initial appearance; in addition, no later than 60 days before the date set for trial, copies of statements "of all witnesses whom the Prosecutor intends to call to testify at trial" must be disclosed to the accused. Under Rule 68, the Prosecution must also disclose all exculpatory evidence.

7. Thus, within 30 days of initial appearance, the accused will be served with the very same information relied upon by the confirming judge; moreover, no later than 60 days before the date set for trial, the accused will be served with statements of all prospective witnesses and any exculpatory material (which may well consist of statements of persons excerpted in the supporting material but not subsequently listed as witnesses by the Prosecution). Should the Defence wish to obtain, in addition to the above, the full statement of a person referred to in the supporting material, but disclosure of whose statement is not obligatory according to the above-cited rules, the Defence is entitled to make a request pursuant to Rule 66(B) (inspection of books, etc.). This would create a reciprocal disclosure obligation, in accordance with Rule 67(C).

[9] Transcripts of 6 December 2001 p. 103.
[10] Ibid. pp. 107-108; and "Decision" of 5 November 1999 para. 8.

8. It follows that neither the Statute nor the Rules oblige the Prosecution to disclose what Counsel for Mr. Nahimana described as "more than that original extract" of a statement by a person contained in the supporting material if that person was not, by the relevant date (60 days prior to trial), a person whom the Prosecution intended to call to testify. There is no evidence before the Chamber that "Witness ZC" was such a person. The pseudonym did not appear in the 4 August 2000 list of 97 prospective Prosecution witnesses, nor in any subsequent list.[11] Moreover, there is no evidence that disclosure of so-called Witness ZC's full statement would prevent any injustice against Mr. Nahimana.

9. Therefore, this part of the application cannot be granted.

Whether Witness X is "Witness ZC"

10. Defence Counsel's second request was to be informed by the Prosecution as to whether "Witness ZC" and listed Witness X are one and the same person. Counsel explained that she had reason to believe that Witness X held an official position in the Interahamwe organisation, and moreover that ZC's excerpted record of interview in the French version of the supporting material (but not in the English) indicated that ZC was an Interahamwe official.[12] Counsel argued that if X and ZC were the same person, the Prosecution's application (of 11 June 2001) to add X as a new witness to its witness list would have been insincere because "we were told very clearly by the Prosecutor ... that it was never within anyone's contemplation that [X] was to be a witness in this trial".[13]

11. Counsel for the Prosecution responded that the Chamber had already decided (in its "Decision on the Prosecutor's Application to add Witness X to its List of Witnesses and for Protective Measures", of 14 September 2001) that Witness X's identity would be revealed thirty days prior to the witness's due date of appearance, and that Counsel for the Defence was engaged in a "sort of guessing game". However, this response is not entirely accurate because Counsel for the Defence, whom the Chamber is prepared to take on her word, does not claim to know the identity either of Witness X or of so-called Witness ZC. Therefore, were the Prosecution to confirm that X and ZC are the same person or different people, that would not definitely reveal the identity of Witness X prior to the date set by the Chamber's decision of 14 September 2001.

12. It is a fact that the Prosecution's ex parte application of 11 June 2001 referred to the person in question as "new Witness X". The most obvious meaning of these words is that X would be "new" to the Prosecution's list of witnesses to be called. That implication was correct irrespective of whether X is ZC, in view of the fact that the latter had never been placed on a list of prospective witnesses.

13. In any case, the Chamber's decision of 14 September 2001 granting leave to the Prosecution to call X as a new witness nowhere relied on an assumption that X had not

[11] See "Amended List of Selected Witnesses Disclosed to the Accused", of 4 August 2000, included in "Registry's Written Representation Pursuant to Trial Chamber I's Oral Order ... Regarding the Status of Disclosures in the Media Case", dated 21 September 2000.
[12] Transcripts of 6 December 2001 pp. 100-101.
[13] Ibid. p. 105.

before been considered by the Prosecution as a potential witness (see paragraphs 11 to 22 of that decision). It is therefore most unlikely that the decision of 14 September 2001 would have been any different had the Defence raised the possibility at the time, or indeed had the Prosecution conceded, that X and ZC were one and the same person.

14. Therefore the Chamber does not feel compelled to order the Prosecution to answer Defence Counsel's question.

15. Finally, the Chamber recalls that the Prosecution is under an obligation to disclose to the Defence all prior statements of Witness X.

FOR THE ABOVE REASONS, THE CHAMBER:

DENIES the application.

Arusha, 19 January 2002

Navanethem Pillay Presiding Judge	Erik Møse Judge	Asoka de Zoysa Gunawardana Judge

(Seal of the Tribunal)