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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

Original: ENGLISH

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

Registrar: Adama Dieng

Date: 8 March 2002

THE PROSECUTOR
v.
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE
ANDRÉ NTAGERURA

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Case No. ICTR-99-46-T

**DECISION ON BAGAMBIKI'S AND NTAGERURA'S MOTIONS FOR
DISCLOSURE OF CONFESSIONS OF DETAINED WITNESSES**

Office of the Prosecutor:

Richard Karegyesa
Andra Mobberley
Holo Makwaia

Defence Counsel for Ntagerura:

Benoit Henri
Hamuli Rety

Defence Counsel for Bagambiki:

Vincent Lurquin

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 Bagambiki's Motion Seeking Disclosure by the Prosecutor of Confessions by Prosecution Witnesses Held in Detention, Namely LAB, LAG, LAH, LAI, LAJ, LAK, LAM, LAP and LAR, pursuant to Rule 73 of the Rules of Procedure and Evidence (the Rules), filed 12 November 2001 (Bagambiki's Motion);

RECALLING the Prosecutor's oral request of 20 November 2001 to defer consideration of Bagambiki's Motion pending the outcome of the Prosecution request to Rwandan authorities in order to get the confessions sought;

BEING SEISED of Ntagerura's "Requête aux fins d'obtenir les Aveux de Culpabilité des Témoins à Charge Identifiés sous les Pseudonymes LAH, LAJ, LAK, LAB, LAP et LAI selon les articles 73, 66(A), 68, 54 et 98 du Règlement de Procédure et de Preuve et de l'article 28 du Statut du Tribunal International", filed on 28 November 2001 (Ntagerura's Motion);

CONSIDERING the Prosecutor's Further Response to the Defence Motion Seeking Disclosure of Confessions Statements by Prosecution Witnesses, filed on 25 January 2002;

RECALLING the Chamber's Decision of 1 December 2000 on Bagambiki's Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda;

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

Submissions of Bagambiki

1. Counsel for Bagambiki submits that the Prosecution witnesses he mentioned in his motion have stated that they had made confessions in writing before the Rwandan authorities about their participation in the events which occurred in Rwanda in 1994. However, the Prosecutor who has the confessions or who is in a position to obtain them did not introduce them into evidence during the testimonies of the witnesses.

2. Counsel requests the disclosure of the confessions on the basis of Rules 66(A)(ii), 66(B), 68 and 98 of the Rules. He contends that in two ICTY decisions, *Prosecutor v. Delalic* (26 September 1996) and *Prosecutor v. Blaskic* (27 January 2001), Rule 66(A) is given so wide a scope that it was considered that the Prosecutor must disclose to the Defence all prior statements of witnesses regardless of whether those statements had been taken by the Prosecutor or not.

3. Counsel further states that in two decisions of Trial Chamber I *Prosecutor v. Bagilishema* (8 June 2000) and *Prosecutor v. Nahimana et al* (4 September 2001) the Chamber, acting under Rule 98, ordered the Prosecutor to make every effort to disclose to the Defence the written confessions of witnesses held in detention in Rwanda. Counsel adds that the written confessions sought could be material in evaluating the credibility of the

testimonies of witnesses who have said during their testimonies that they had mentioned the accused Bagambiki therein.

Submissions of Ntagerura

4. Counsel submits that the Prosecutor should have spontaneously disclosed the six confessions sought, as they are material for the preparation of the Defence, pursuant to Article 20(4)(e) of the Statute and Rule 90(G) of the Rules. They are also subject to disclosure under Rule 68.

5. Counsel states that the Defence is well aware of the Chamber's decision of 1 December 2000 where it held that Rule 66 (A)(ii) does not apply to the requested confessions, which are not statements taken by the Prosecutor. However the Defence points out that Trial Chamber II held a different view in the *Butare Case (Prosecutor v. Pauline Nyiramasuhuko et al* 18 September 2001).

6. Counsel contends that the Defence cannot undertake to send a direct request to the Rwandan authorities because this would necessarily require the disclosure of the identities of the witnesses whose confessions are sought, in violation of the witness protection order issued by the Chamber. Moreover the Rwandan authorities would never grant the Defence request; and would they grant it, the Defence would face problems with the production of the confessions as evidence and with the certification of the authenticity of said confessions.

7. In the event that the Prosecutor's request to the Rwandan authorities is not successful, Counsel requests the Chamber to apply its general discretionary power provided for in Rule 54, as well as its specific power under Article 28 of the Statute which deals with cooperation of States, and order the Rwandan Government to disclose to the Defence within a prescribed time limit, all the confessions made by the following Prosecution witnesses: LAH, LAJ, LAK, LAB, LAP and LAI. Consequently, the Rwandan Government would instruct the Minister of Justice, the Prosecutor of Cyangugu and his deputy or any other authority to supply the requested documents without unveiling the witnesses' identities.

8. Counsel stresses that an alternative would be for the Chamber to use its discretionary power *proprio motu* under Rule 98, and order the Prosecutor to supply the Chamber with additional evidence in conformity with Rule 85 (A) (v), in the interest of justice and in light of the Accused's right to a full and unfettered defence. Trial Chamber I did so in the *Bagilishema Case*, after having denied the Defence motion for disclosure based on Rules 73 and 68.

SUBMISSIONS OF THE PROSECUTOR

9. The Prosecutor informs that on 12 December 2001 she received a letter from the Prosecutor General of Rwanda advising of his inability to supply the confessions sought. However, the Prosecutor General stated in his letter that he was prepared to consider future requests on a case by case basis.

10. The Prosecutor contends that given the above-mentioned communication, she is not in a position to satisfy the Defence. Moreover, the Prosecutor stresses that witness LAG and LAR, whose confessions are also requested, were not called to give evidence.

11. As to Ntagerura's request for orders addressed to the Rwandan Government, the Prosecutor states that she will abide by the Chamber's decision in this matter. However, the Prosecutor stresses that Rules 85(A)(v) and 98, which the Defence requests also to be applied, are not applicable to third parties like a State in the instant case.

12. Lastly, invoking witness protection issues, the Prosecutor requests that the Chamber order that any further submissions in this matter be filed under seal.

DELIBERATIONS

Joinder of motions

13. There is no specific Rule dealing with the joinder of motions filed by different parties even though they are being jointly tried. Rules 48, 48*bis* and 49 deal with different situations. However, in the silence of the Rules, the Chamber may, whenever necessary, use its inherent power to take an appropriate course of action "consonant with the spirit of the Statute and the general principles of law", special care being taken to respect the full rights of the Defence. Counsel for Ntagerura is requesting six confessions out of the nine requested by Counsel for Bagambiki. The Chamber will address the requests in the same decision for the sake of judicial economy.

The merits

14. Turning now to the merits of the motions, the Chamber first agrees that the confessions may be material for the preparation of the defence. The Chamber notes that the Prosecutor volunteered to get the confessions from the Rwandan authorities for the benefit of the Defence. She was not successful in this regard, as proved by the letter of the Prosecutor General of Rwanda attached to the Prosecutor's response.

15. In his letter, the Prosecutor General of Rwanda did not foreclose cooperation with the Tribunal, however. He merely expressed his unwillingness to disclose the confessions in a wholesale fashion, and indicated that he is prepared to cooperate on a case by case basis.

16. Article 28 of the Statute, which governs the cooperation of States, provides in its relevant portions 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 ... the taking of testimony and the *production of evidence*..." [emphasis added]. The Chamber therefore requests the Rwandan authorities to provide to the Registry the confessions made to the Rwandan judicial authorities by the following Prosecution witnesses: LAB, LAH, LAI, LAJ, LAK, LAM, LAP. Given that the Defence has already started presenting their case, the Chamber urges the Rwandan authorities to supply the requested materials as soon as possible and, in any event, by the end of May 2002. As to witnesses LAG and LAR whose confessions are also requested, since the Prosecutor did not call them to testify, there is no need to supply their confessions.


17. In notifying this request to the Rwandan authorities, the Registry is directed to obtain beforehand from the Prosecutor the identities and all the relevant particulars of the concerned witnesses referred to by pseudonyms. Special care will be taken in handling the information supplied by the Prosecutor to avoid any unnecessary disclosure of the identities of the protected witnesses.


18. The Chamber lastly emphasises that this ruling does not in any manner whatsoever predetermine a later ruling as to the admissibility of the confessions or as to the recall of the Prosecution witnesses.

19. For the foregoing reasons, the Chamber:

- a) **GRANTS** Bagambiki's and Ntagerura's Motions in part and **REQUESTS** the Rwandan authorities to provide to the Registry the confessions made before the Rwandan judicial authorities by the following detained witnesses: LAB, LAH, LAI, LAJ, LAK, LAM, LAP.
- b) **URGES** the Rwandan authorities to comply with this Request by the end of May 2002.
- c) **DIRECTS** the Registry, in notifying this request to the Rwandan authorities, to obtain beforehand from the Prosecutor the identities and all the relevant particulars of the concerned witnesses referred to under their pseudonyms.
- d) **DIRECTS** the Registry to immediately inform the Trial Chamber upon the receipt of the confessions so that the Chamber can issue further directives in respect thereof.
- e) **DECIDES** that confessions of witnesses LAG and LAR are not to be sought from the Rwandan authorities and are not to be disclosed to the Defence in this case.
- f) **DENIES** the Motions in all other respects.

Arusha, 8 March 2002.


 Lloyd George Williams, Q.C.
 Judge, Presiding


 Yakov Ostrovsky
 Judge


 Pavel Dolenc
 Judge

Seal of the Tribunal