



ICTR-99-54A-T  
30-8-2002  
(1017-1012)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1017  
Muhana

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramarosan

**Registrar:** Adama Dieng

**Date:** 29 August 2002

JUDICIAL RECORDS SECTION  
2002 AUG 30 PM 12:03  
ICTR

**The PROSECUTOR**  
v.  
**Jean de Dieu KAMUHANDA**

**Case No. ICTR-99-54A-T**

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**DECISION ON KAMUHANDA'S MOTION FOR  
DISCLOSURE OF WITNESS STATEMENTS AND SANCTION OF THE  
PROSECUTOR**

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**Office of the Prosecutor**  
Douglas M. Moore  
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**Counsel for the Defence**  
Aïcha Condé  
Patricia Mongo

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

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the “Chamber”);

**BEING SEIZED** of a Defence Oral Motion argued in closed session on 26 August 2002;

**RECALLING** the “Decision on Jean de Dieu Kamuhanda’s Motion for Protective Measures for Defense Witnesses”, Case No. *ICTR-99-54-T* of 21 March 2001 (the “Decision for Protective Measures for Defence Witnesses of 21 March 2001”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 66 and 68 of the Rules;

**NOW DECIDES** the Motion after having heard the Parties on 26 August 2002.

### **SUBMISSIONS OF THE PARTIES**

#### *Defence Submissions*

1. The Defence requests disclosure of statements obtained by the Office of the Prosecutor (the “OTP”) from Defence witnesses or relatives of Defence witnesses in violation of the orders of the Decision for Protective Measures for Defence Witnesses of 21 March 2001 and in violation of Rules 34 and 75 of the Rules.

2. The Defence submits that during a trip to Rwanda made from July until early August 2002, it discovered that Defence Witness ALA had been contacted by the OTP in mid-July in violation of the witness protection order of the Decision for Protective Measures for Defence Witnesses of 21 March 2001 whereas the identity of the witness had been revealed to the Prosecution on 14 May 2002. The Defence submits that the OTP investigator took advantage of the fact that he had already interviewed the witness prior to the latter becoming a Defence witness, with a view to obtaining a statement containing information on Defence Witness ALR. The Defence further submits that, a week later, the spouse of Witness ALA was also contacted to give information concerning her husband, and the statement hereby taken was due to be signed on 31 July 2002 but was never signed. The Defence reiterates that, as already indicated to the Court in a written Motion, Witness ALA has decided not to come to testify as a result of the manner in which his wife was contacted by the OTP.

3. According to the Defence, Witness AG was also contacted by an OTP investigator on 31 July 2002 and she would then have signed a statement.

4. The Defence further alleges that another Defence witness, Witness ALB has indicated that members of his family had been interrogated by the OTP.

5. According to the Defence, by the above mentioned acts, the Prosecution has deliberately violated the orders for protective measures for witnesses dated 21 March 2001 and should be sanctioned. The Defence adds that, contrary to the Prosecution’s assertions that the family of a witness is not protected, Rule 34 of the Rules allows for the protection of the witness’ relatives.

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6. The Defence argues that, pursuant to Rule 95 of the Rules, the information obtained by the Prosecutor in the instant case seriously damages the integrity of the proceedings and should therefore be excluded.

7. Nonetheless, the Defence seeks to verify that the information obtained by the Prosecutor will not be used at trial and thereby requests disclosure of the following documents: the statements of Witness AG, Witness ALA's statement in relation to Witness ALR, the unsigned statement of Witness ALA's spouse and the statements of Witness ALB's parents.

### ***The Prosecution's Response***

8. The Prosecution acknowledges that investigations were conducted with regard to a person whose identity had been mentioned in open court three months before the latter was listed as Witness ALA, a Defence alibi witness. The Prosecution concludes that the contact with Witness ALA and the obtention of a statement were legal at that time.

9. With regard to the statement obtained from Witness ALA after the filing of the notice of alibi, the Prosecutor acknowledges that this statement was taken by an OTP investigator in July 2002 after having been informed in May 2002 that Witness ALA was an alibi witness. Counsel for the Prosecution explains that the investigator had been of the opinion that, if the Defence did not call Witness ALA, that witness could become a witness in rebuttal. In any event, the Prosecution submits that such statement is not exculpatory pursuant to Rule 68 of the Rules, but rather it is incriminatory, so it is under no disclosure obligation.

10. Concerning Witness AG, the Prosecution alleges that it was informed that this witness would be an alibi witness during the third week of July 2002 whereas OTP had contacted the said person five weeks prior to this notification and notes were taken during that contact (around 22 June). The Prosecution acknowledges that the witness was contacted again on or around 22 July 2002.

11. In relation to the Defence's arguments on the violation of protective measures concerning witnesses' relatives, the Prosecution submits that since the Defence did not request protective measures for witnesses' relatives, those in this category are considered to be members of the public and thus contactable by anyone. The Prosecution adds that Rule 34 of the Rules only concerns the administrative implementation of the protective measures by the Witness and Victims Support Section of the Tribunal.

### ***The Defence's Reply***

12. The Defence does not contest the right of the Prosecution to have contacted Witness ALA prior to the notification of the alibi. However, after the identity and the location of the witness were disclosed to the Prosecution on 14 May 2002, such contact was then in violation of the protective Orders of the Decision for Protective Measures for Defence Witnesses of 21 March 2001. The Defence also maintains that the contacting of the wife of the said witness did not respect the privacy of the witness pursuant to Rule 75 of the Rules. The Defence maintains that the same reasoning applies to the contacting of the parents of Witness ALB. The Defence abandons her request for the disclosure of Witness ALA's statement dated 24 January 2002.

13. With regard to Witness AG, Counsel for the Defence submits that on 18 July 2002, she had informed the Prosecutor by email that Witness AG was a Defence Witness whereas the interview by the OTP of the said witness subsequently took place on 22 July 2002 in violation of the protective measure orders of 21 March 2001.

14. Finally, the Defence argues that the Chamber could rely on Rule 98 of the Rules to order the production of additional evidence.

#### **HAVING DELIBERATED**

15. The Chamber notes that the issues raised by the Defence relate to the disclosure by the Prosecution of several categories of documents, some of which relate to Defence witnesses to be called to testify at trial within the next couple of days.

16. The Chamber observes that the Defence alleges that the Prosecution, in taking statements from those Defence witnesses or their relatives, violated Rules 34 and 75 of the Rules and the Orders for protective measures for Defence witnesses. Accordingly, the Defence submits that the Prosecution should be prohibited, pursuant to Rule 95 of the Rules, from using this evidence and be sanctioned. However, the Chamber is of the opinion that no case has been made by the Defence to support the exclusion of evidence pursuant to Rule 95 of the Rules.

17. The Chamber notes the Prosecution's argument that no Order for protective measures has been violated by the Prosecution and that, after the close of its case, the only outstanding disclosure obligation pertains to exculpatory material pursuant to Rule 68 of the Rules for which none of those statements qualify.

#### ***On the Orders for Protective Measures***

18. In order to determine the category of persons that cannot be contacted without prior notification to the Defence, the Chamber recalls its Decision for Protective Measures for Defence Witnesses of 21 March 2001:

[6] Requiring that the Prosecutor and her representatives, acting on her instructions, shall notify the Defense of any request to contact Defense witnesses and for the Defense to make the necessary arrangements to that end;

19. Consequently, the Chamber finds that (1), only Defence witnesses are concerned by the said measure, and not their relatives, and that (2), Defence witnesses can be contacted following a specific procedure but that any contacting of a Defence witness without prior notification to the Defence so that it can make the necessary arrangements is in violation of the Decision for Protective Measures for Defence Witnesses of 21 March 2001.

20. The Chamber is of the opinion that, following the representations of the Parties, it appears that two persons, Witness ALA and Witness AG, were contacted by an OTP investigator after the Prosecution had received notice that those persons were Defence witnesses, without respecting the procedure laid out in Order 6 of the Decision for Protective Measures for Defence Witnesses of 21 March 2001. The Chamber finds that, given the fact that the Prosecution was on notice that those individuals were Defence witnesses, the Prosecution acted in violation of the Court's Order pertaining to the contacting of Defence

witnesses. Moreover, the Chamber is not convinced by the reasons advanced by the Prosecution to justify the contacts made. The Chamber affirms that the letter and the spirit of Decision for Protective Measures for Defence Witnesses of 21 March 2001 must be respected and decides, in terms of Rule 46(A) of the Rules, to warn the Prosecution to desist from a conduct that violated a Court's Order, which conduct is contrary to the interests of justice.

21. In relation to the contacts made by the Prosecution with relatives of Witness ALA and Witness ALB, the Chamber finds that those persons do not form part of the category of persons protected by Order 6 of the Decision for Protective Measures for Defence Witnesses of 21 March 2001, as they are not listed as Defence witnesses. Accordingly, the Chamber does not accept that this contact was made in violation of the said order, or of any of the Rules relied upon by the Defence. The Chamber notes the Prosecution's submissions that those contacts have formed part of the investigation of the Defence of alibi. The Chamber therefore rejects the Defence's submissions in respect of statements obtained from the wife of Witness ALA and from the parents of Witness ALB.

***On the Disclosure Obligation***

22. The Chamber notes that the Defence requests the disclosure of all statements and other documents pertaining to the enumerated witnesses or relatives of witnesses on the basis that such disclosure is necessary for the Defence to verify that the Prosecution will not make use of that information in the case against the accused.

23. The Chamber recalls that Rules 66 to 71 of the Rules pertain to the production of evidence. In the instant case, the Chamber has heard the submissions of the Parties on the issue of communication of the disputed documents and notes that the Prosecution does not accept that any of the said documents have any exculpatory value pursuant to Rule 68 of the Rules warranting immediate disclosure to the Defence. The Chamber also observes that the Defence has abandoned its request concerning the disclosure of the 24 January 2002 statement from Witness ALA pursuant to Rule 68 of the Rules.

24. In view of the nature of the documents in dispute, the Chamber is of the opinion that the issue raised by the Defence is not one of disclosure but rather one of inspection pursuant to Rule 66 (B) of the Rules which reads as follows:

(B) At the request of the defence, 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 belonged to the accused.

25. The Chamber observes that the Prosecution admits possessing the said documents but indicates that those documents are not intended for use by the Prosecution as evidence at trial insofar as the Prosecution's case is closed. Nonetheless, the Chamber is of the opinion that the Defence has demonstrated that such documents could be material to the preparation of its case as they relate to Defence witnesses whereas the Prosecution did not apply to the Chamber in accordance with Rule 66 (C) of the Rules or Rule 70 (A) of the Rules to be relieved of its obligation pursuant to Rule 66(B) when the Chamber invited Counsel for the Prosecution to comment upon the applicability of the said Rule to the instant case.

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26. The Chamber takes note of the Parties' submissions in relation to the nature of the documentation resulting from the interview of Witness AG in June and July 2002. Whereas the Defence indicates that Witness AG signed a statement, the Prosecution confusingly indicates that in June 2002, the document is consecutively a "statement" and then "an investigator's notes" and with respect to July's document, Counsel for the Prosecution submits that the "statement" was taken prior to any notice of alibi. As the Chamber is not in possession of such documents, the Chamber rules that if those documents are statements taken from Witness AG, then they are subject to inspection by the Defence pursuant to Rule 66(B).

27. Consequently, the Chamber acting *proprio motu*, orders the Prosecution, pursuant to Rule 66(B), to permit the Defence to inspect the statement of Witness ALA taken around mid-July after the filing of the notification of alibi by the Defence, and the statements of Witness AG taken in June and on or about 22 July 2002 which are in custody of the Prosecution and are material to the preparation of the Defence as they relate to a witness for the Defence.

28. The Chamber finally observes that, pursuant to Rule 67 (B) of the Rules on the Reciprocal Disclosure of Evidence, the Prosecutor "shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at trial".

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** in part the Defence request and **DIRECTS** the Prosecution to immediately permit the Defence to inspect the statement of Witness ALA taken around mid-July and the statements of Witness AG taken in June 2002 and on or about 22 July 2002

**WARNS** the Prosecution to desist from a conduct that violated a Court's Order, which conduct is contrary to the interests of justice pursuant to Rule 46(A) of the Rules.

**DENIES** the Defence Motion in all other aspects.

Arusha, 29 August 2002



William H. Sekule  
Presiding Judge



Winston C. Matarizima Maqutu  
Judge



Arlette Ramarason  
Judge

[Seal of the Tribunal]