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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

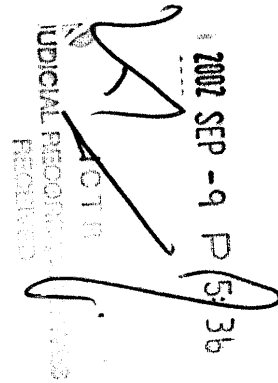
OR: ENG

TRIAL CHAMBER II

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

Registry: Adama Dieng

Date: 9 September 2002



The Prosecutor

v.

Samuel MUSABYIMANA

ICTR 2001-62-T

**DECISION ON SAMUEL MUSABYIMANA'S MOTION TO EXCLUDE
ANONYMOUS PROSECUTORIAL WITNESS STATEMENTS
AND TO REVIEW THE DECISION ON
CONFIRMATION OF THE INDICTMENT**

The Office of the Prosecutor:
Silvana Arbia
Jonathan Moses
Faria Rekkas

Counsel for Musabyimana:
Gerardus Knoops

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

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

BEING SEIZED of:

- (1) the “Motion to Exclude Anonymous Prosecutorial Witness Statements and for Review of the Decision of 13 March 2001 on the Confirmation of the Indictment for Lack of a *prima facie* Case”, filed on 15 October 2001 (the “Motion”); and
- (2) the “Response by the Prosecutor to the Motion to Exclude Anonymous Prosecutorial Witness Statements and to Review the Decision to Confirm the Indictment for Lack of a *prima facie* Case”, filed on 9 November 2001 (the “Prosecutor’s Response”);
- (3) the “Reply to Prosecutor’s Response to (Preliminary) Motion to Exclude Anonymous Prosecutorial Witness Statements and to Review the Decision to Confirm the Indictment for Lack of a *prima facie* Case”, filed on 31 January 2002 (the “Defence Reply”);

RECALLING the Chamber’s Decision on the “Confirmation of the Indictment and Order for Non-Disclosure” against Samuel Musabyimana of 13 March 2001, (the “Decision on the Confirmation of the Indictment”);

CONSIDERING the Statute of the Tribunal (the “Statute”), specifically Articles 18 (1) and 20 and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 53(A), 69(C) and 75 of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 of the Rules on the basis of the written briefs only, as filed by the Parties.

SUBMISSIONS OF THE PARTIES

Defence Submissions:

1. The Defence brings the Motion pursuant to Rule 73 of the Rules requesting the exclusion of anonymous prosecutorial witness statements in the defendant’s case.
2. Whereas the Defence acknowledges that pursuant to Article 18(1) of the Statute, the Confirming Judge must find that a *prima facie* case has been established by the Prosecutor in order to confirm an indictment, the Defence submits that in the instant case, when the Prosecutor requested the confirmation of the Indictment against the Accused, she relied upon anonymous witness statements or witnesses whose identities were not disclosed at the pre-trial stage. The Defence argues that reliance on such evidence is unfair, particularly as the Prosecutor has not provided any concrete justification as to why she has relied upon such evidence.

3. On the above grounds, the Defence requests that the Chamber review the Decision on the Confirmation of the Indictment with regard to the conclusion as to the existence of a *prima facie* case against the Accused

4. Furthermore, the Defence alleges that the Prosecutor has not complied with the provisions of Rules 69 and 75 of the Rules resulting in the violation of Article 20(2) of the Statute. The Defence alleges this because, after the initial appearance of the Accused, the Prosecutor disclosed to the Defence the statements of 21 anonymous witnesses. The Defence maintains that the Non-Disclosure Order made in the Decision on the Confirmation of the Indictment was conditional upon service of the Indictment against the Accused.

5. In support of her arguments, the Defence refers to the jurisprudence of the Tribunal and the case law of the European Court of Human Rights in *Van Mechelen v. The Netherlands*, Decision of 23 April 1997, and the Decision of 26 April 2001 in *Meftah v. France*.

6. Accordingly, the Defence requests that the Chamber order (1) the review of the Decision on the Confirmation of the Indictment with regard to the conclusion as to the existence of a *prima facie* case against the Accused; (2) the exclusion of the 21 anonymous witness statements or other affiliated documents; and (3) the immediate release of the Accused from the Tribunal's Detention Facilities, (the "UNDF"), either unconditionally or by virtue of Rule 65 of the Rules.

Prosecutor's Submissions

7. The Prosecution, in objection to the Motion, submits that the Chamber has no jurisdiction to hear the Motion because there are no provisions under the Statute and the Rules to review a Decision on the confirmation of an Indictment.

8. The Prosecutor objects to the Motion on a factual basis submitting that the Defence does not understand the confirmation procedure adopted by the Tribunal. The Prosecutor submits that it is incorrect to allege that the Decision on the Confirmation of the Indictment was based on "21 anonymous prosecution witnesses." The Prosecutor submits that during the confirmation procedure, she submitted to the Confirming Judge the Indictment, together with the supporting material containing witness statements that were not "anonymous" in spite of the fact that the witnesses had been assigned pseudonyms. Pursuant to a request by the Prosecutor, the Confirming Judge ordered "Non-Disclosure of the Names of Witnesses and Other Identifying Information in the Indictment, Supporting Materials and Witness Statements." The Prosecutor thus argues that the Confirming Judge did not decide the Indictment on the basis of "anonymous testimony," as alleged by the Defence.

9. The Prosecutor further argues that she has fully complied with her obligations to disclose to the Defence the supporting material, pursuant to Rule 66 of the Rules.

Moreover, the Prosecutor submits that she has filed before the Chamber a Motion requesting protective measures for her witnesses, which has not yet been ruled upon.

10. Accordingly, the Prosecution prays that the Motion be dismissed.

HAVING DELIBERATED

Legal Basis of the Motion

11. The Chamber notes that the Defence properly filed the Motion, pursuant to Rule 73 of the Rules, which grants either party the right to request appropriate ruling or relief after the initial appearance of the accused.

Regarding the Confirmation of the Indictment

12. The Chamber notes that the Defence, in essence, alleges that the Judge, when confirming the Indictment against the Accused, relied on “21 anonymous prosecution witnesses” and found that a *prima facie* case existed against the Accused. The Defence argues that reliance on anonymous witnesses to find a *prima facie* case, is contrary to the rights of the Accused as provided for under Article 20(2) of the Statute. The Defence thus requests the Chamber to review the Decision on the Confirmation of the Indictment, particularly with regard to the conclusion as to the existence of a *prima facie* case against the Accused. The Prosecutor objects to the Defence arguments and submits that, during the confirmation of the Indictment, the Judge was provided with an Indictment and supporting material, which consisted of witness statements by witnesses with pseudonyms. The Prosecutor argues that these witnesses were not “anonymous” as claimed by the Defence.

13. The Chamber recalls the Decision on the Confirmation of the Indictment wherein the Tribunal stated that, pursuant to Article 18(1) of the Statute and Rule 47(E) of the Rules, “the scope of the review of an indictment [...] is to examine in respect of each count whether the alleged crime [...] falls within the jurisdiction of the Tribunal and whether a *prima facie* case exists [against the Accused], on the basis of the evidence submitted by the Prosecution.” In the aforementioned Decision, the Tribunal found that “the Prosecutor has established a *prima facie* case against the suspect in respect of all four counts set out in the indictment.”

14. On this matter, and as has been indicated by the Prosecutor, the Appeals Chamber in the case of *the Prosecutor v. Bagosora and 28 others*, held that there was no right of appeal in respect of a decision to refuse to confirm an indictment.¹ The Chamber, in its Decision of 10 April 2002 in *the Prosecutor v. Ndindiliyimana, Nzuwonemeye and Sagahutu*, recalled the reasoning of the Appeals Chamber in its aforementioned Decision

¹ See the “Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 others,” of 8 June 1998

and noted that there existed no avenue of appeal against a Decision on the confirmation of the indictment.²

15. Likewise, regarding the Defence request for a review of the Decision on the Confirmation of the Indictment, with regard to the conclusion as to the existence of a *prima facie* case against the Accused, the Chamber recalls the Appeals Chamber Decision of 14 September 2000 in the case of *Barayagwiza*, which found that it is only final judgements that can be reviewed pursuant to Rule 120 of the Rules.³ Accordingly, the Chamber denies the Defence request to review the Decision on the Confirmation of the Indictment on the basis of any of the issues raised.

16. The Chamber notes that the Defence regards the 21 witness statements provided to the Judge during the confirmation procedure to be “anonymous.” However, the Chamber notes that the said statements bore pseudonyms in place of the witnesses’ identities. The Chamber is of the opinion that, simply because the witnesses bore pseudonyms, it does not make them anonymous witnesses.

Regarding the Non-Disclosure Orders

17. The Chamber notes the Defence allegation that the Prosecutor is in violation of the Non-Disclosure Order made in the Decision on the Confirmation of the Indictment. The Defence alleges that the Prosecution is in violation of Rules 53(A), 69 and 75 of the Rules as well as Article 20(2) of the Statute because of its disclosure of statements of 21 “anonymous” prosecution witnesses. Accordingly, the Defence requests that the said statements be suppressed in order to remedy the violation. The Prosecution submits that it has fully complied with its disclosure obligations under Rule 66 of the Rules.

18. The Chamber notes the Non-Disclosure Order found in para 6 of the Decision on the Confirmation of the Indictment, which reads: “In relation to the non-disclosure, the Tribunal is of the view that the fact that the Accused has not been apprehended yet constitutes an exceptional circumstance under Rule 53(A). Further, that the non-disclosure of the indictment and supporting materials to the Accused, his counsel, and the public, including media, and the non-disclosure of the identity of victims and witnesses is necessary to facilitate the arrest and transfer of the Accused and to ensure the safety of victims and witnesses.”

19. The Chamber recalls that the Accused was apprehended on 26 April 2001. According to the above-mentioned Order, the Prosecutor was obliged to disclose to the Defence a copy of the non-redacted Indictment and supporting materials upon the arrest of the Accused.

20. The Chamber notes that following the filing of this Defence Motion, the Prosecution made an *ex-parte* request for the clarification of the above-mentioned non-

² See “Decision on the Defence Motion for Immediate Release and Stay of all Charges Against the Accused Nindiliyimana due to the Prosecutor’s Non-compliance with the Rules,”

³ See “Decision on Prosecutor’s Request for Review or Reconsideration”

Disclosure Order. The Prosecution received, on 28 January 2002, an Interoffice Memorandum with the following clarification: "It is clear from the Confirmation of the Indictment and Order for Non-Disclosure, dated 13 March 2001, that the Order for Non-Disclosure is to be effective up to the point when the indictment is served on the Accused. If the Indictment has already been served on the Accused, then the order ceases to be operative, as is clearly stated in the Order."⁴

21. The Chamber concludes that the Prosecutor was under an obligation to disclose the supporting materials, including the identity of the victims and witnesses to *inter alia* the Accused and his counsel upon service of the Indictment on the Accused. However, the Chamber is of the opinion that although the Prosecution did not proceed to disclose the above documents to the Defence even after clarification was made on 28 January 2002, it did not do so intentionally. The Chamber therefore, finds the Defence's request for the suppression of the 21 statements as a remedy for the Prosecutor's violation of the above-mentioned Order to be unwarranted. The Chamber thus denies the Defence request to suppress the 21 witness statements.

22. Be that as it may, on 19 February 2002, the Chamber recalls that it granted protective measures for victims and potential prosecution witnesses in this case in its "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses." The Chamber ordered *inter alia* pseudonyms for prosecution witnesses and the "[r]edaction of their names, relations, addresses, whereabouts of and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry." This order further provides that, "[p]rovided the protective measures are put in place, all the unredacted statements and identities of witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than twenty-one (21) days before the testimony of the witness."

23. On the basis of the above-mentioned Decision of 19 February 2002, the Chamber finds that the disclosure of the 21 redacted witness statements made to the Defence by the Prosecution is proper.

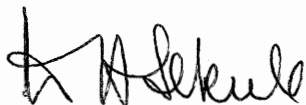
24. Regarding the Defence further request for provisional release pursuant to Rule 65 of the Rules, the Chamber dismisses the request for which the Defence failed to provide any legal basis.

⁴ See the Interoffice Memorandum dated 28 January 2002 from the Deputy Chief and Trial Chamber I Coordinator, under the instructions of Judge Gunawardana to the Prosecutor, following the "Ex-parte Request for Clarification of the Terms of the Order for Non-Disclosure made on 13 March 2001" in the case of *Samuel Musabyimana*.


FOR THE FOREGOING REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 9 September 2002



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

[Seal of the Tribunal]