

-0532

ICTR-98-41-T
30-9-2002
(12247-12243)

12247
#m



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER III

Original: ENGLISH

Before: Judge Lloyd George Williams, QC, Presiding
Judge Pavel Dolenc
Judge Andréia Vaz

Registrar: Adama Dieng

Date: 30 September 2002

JUDICIAL INVESTIGATION
ICTR
2002 SEP 30 P 4 23
Adama Dieng

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE
ANATOLE NSENGIYUMVA

Case No. ICTR-98-41-T

**DECISION ON THE DEFENCE FOR BAGOSORA'S MOTION FOR
POSTPONEMENT OR QUASHING OF THE TESTIMONIES OF WITNESSES
RUGGIU, XAM AND ZF**

Office of the Prosecutor:
Barbara Mulvaney
Chile Eboe-Osuji
Drew White
Segun Jegede
Christine Graham

Defence Counsel for Bagosora:
Raphaël Constant

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),

SITTING as Trial Chamber III (the Chamber) composed of Judges Lloyd George Williams, QC, presiding, Pavel Dolenc and Andréia Vaz;

BEING SEISED of the “Requête en demande de report ou d’annulation des Témoignages de Ruggiu, XAM et ZF” (the Motion) filed 10 September 2002;

CONSIDERING the Prosecutor’s Response to the “Requête en demande de report ou d’annulation des Témoignages de Ruggiu, XAM et ZF” (the Response) filed 16 September 2002;

NOTING that the other Defence Counsel did not file any written submissions;

RECALLING the Chamber’s Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses of 5 December 2001, and the Chamber’s Decision on the Prosecution Motion for Special Protective Measures for Witnesses ZA, ZF and ZZ, pursuant to Rules 66(C), 69(A), and 75 of the Rules of Procedure and Evidence, of 10 July 2002;

NOW decides the matter solely on the basis of the briefs filed, pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the Rules).

Submissions of Counsel for Bagosora

1. Counsel submits that in June 2002 the Prosecution served notice of its intention to call 8 witnesses during the segment of the trial of September 2002. Statements of three witnesses out of the eight scheduled to testify were not disclosed on time, as required in Rule 66(A)(ii) of the Rules or in the Chamber’s Decision of 5 December 2001.
2. Counsel first points out that Ruggiu is not a protected witness. Counsel states that Ruggiu’s statements were disclosed in four parts, respectively on 21 January, end of June, 9 July and 7 August 2002. Counsel contends that these disclosures are in breach of Rule 66(A)(ii) which provides that disclosure is to be made 60 days prior to the Trial. The trial having been set for 2 April 2002, Prosecution should have disclosed all the statements of unprotected witnesses by 1 February 2002. Counsel stresses that 2 April 2002 was the date of the commencement of the trial although no evidence was called and the trial was adjourned until 2 September 2002, following the Prosecution’s opening statement.
3. Counsel asserts that the Prosecution’s failure to comply with its disclosure obligations despite repeated requests from the Defence can no longer be remedied and that it constitutes an infringement upon the Defence rights pursuant to Rule 5. Counsel requests therefore, that Ruggiu be barred from giving testimony. Counsel adds that Ruggiu’s anticipated testimony is of no relevance to the indictment.
4. With respect to Witness XAM who is protected, Counsel states that the Defence received his un-redacted statement in French, its working language, on 20 August 2002. Counsel contends that XAM cannot testify before 24 September 2002 given the Chamber’s decision of 5 December 2001 ordering that the Defence be supplied with identifying data of Prosecution protected witnesses 35 days before the day set for their testimonies.

5. Regarding Witness ZF, Counsel asserts that the Prosecution has requested and obtained special protective measures pursuant to the Chamber's decision of 10 July 2002. However, the time frame of disclosure of the identity of ZF is still governed by the Chamber's decision of 5 December 2001 because the Prosecution's request to shorten the time frame for disclosure was denied. Despite that, the Prosecution has thus far still withheld ZF's identifying data. Therefore, the testimony of ZF is to be postponed until complete compliance with the Chamber's decision.

Submissions of the Prosecution

6. The Prosecution suggests that the letter of Rule 66(A)(ii) should not override its underlying purpose which is to put the Defence on notice as to the nature of the evidence so as to enable it to prepare for cross-examination. On this basis the Prosecution submits that since no evidence was called after the Prosecution opening statement and the trial was adjourned immediately thereafter until 2 September 2002, the latter date becomes the pertinent date of the commencement of the trial.

7. The Prosecution stresses that the Defence received disclosure of Ruggiu's statements on 9 July 2002, that the pre-trial brief filed on 21 January 2002 contained a detailed summary of his expected testimony and Ruggiu's plea agreement with the Prosecutor was disclosed on 7 August 2002. Ruggiu's evidence expected to be given in mid-September is now likely to be heard during the November/December trial segment. The Prosecution concludes that in taking 2 September 2002 as the reference point, the Defence received Ruggiu's full statement 55 days prior to the calling of the evidence, thus with a 5 day delay justified by the need to avoid to prejudice ongoing investigations.

8. The Prosecution posits that even if its interpretation of Rule 66 does not stand, no remedy ought to be awarded to the Defence under Rule 5, given the lack of material prejudice, the Defence failure to comply with Rule 5(B) which requires to make the objection at the earliest opportunity, and lastly the disproportionate relief sought in requesting the exclusion of relevant evidence. The Prosecution adds that should Rule 5 be deemed applicable, a postponement of the testimony of the concerned witness would suffice to cure any material prejudice.

9. With respect to Witness XAM, the Prosecution submits that it has discharged its disclosure obligation on time by filing on 30 January and 3 June 2002 the English statements available to it. Although its obligation does not go beyond that, the Prosecution managed to get from the Tribunal's Language Section the French version of the statement supplied to the Defence on 7 August 2002. The Prosecution adds that the Defence objection is not made in good faith since there are English speakers among its team members. The Prosecution concludes that the Defence complaint is in any event moot because Witness XAM will no longer be called during the September trial segment.

10. Regarding Witness ZF, the Prosecution contends that it has the right to withhold his identity which is part of his "personal particulars" which the Prosecution is not required to disclose to the Defence pursuant to the Chamber's decision of 10 July 2002.

DELIBERATIONS

11. Rule 66(A)(ii) in its relevant portions, with emphasis, reads:

The Prosecution shall disclose to the Defence:

No later than 60 days *before the date set for trial*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial;

12. The time frame set out in this Rule is clear enough to be complied with without any elaboration in respect of any alleged purpose of the Rule. What triggers the Prosecution obligation is the setting of a trial date. There is here no dispute that 2 April 2002 was the date set for the trial at the pre-trial conference held on 4 December 2001. Therefore, the Prosecution should have complied with its disclosure obligation in respect of unprotected witnesses 60 days before 2 April 2002. Moreover, the Prosecution's attempt to justify any delay by the need to preserve ongoing investigations cannot stand, for Rule 66(C) does not allow the Prosecution to withhold unilaterally statements subject to disclosure. Rather, only a Chamber may decide to relieve the Prosecution from its obligation, under the conditions set forth in Rule 66(C).

13. The Chamber does not find however, as proposed by Defence, that barring Witness Ruggiu from giving evidence would be an appropriate remedy for the Prosecution's failure to comply with its disclosure obligation on time. Granting a delay to the Defence to prepare its case in respect of the witness would suffice to remedy any potential prejudice. In the instant case, given the rescheduling of the witnesses' appearance, Ruggiu will testify, at the earliest, during the November/December 2002 trial segment, instead of September 2002 as previously scheduled. This delay gives the Defence more than three months of preparation upon receipt of the last statement of Ruggiu. Therefore, any prejudice which might have been caused by the late disclosure of the witness statement, is now cured. As to the alleged lack of relevance of the anticipated testimony of Ruggiu, it rests upon the Chamber's assessment at the appropriate time, pursuant to Rule 90(F). The Defence request is therefore denied in this respect. The Chamber however, censures the Prosecutor for its failure to abide by the Rules.

14. Regarding Witness XAM, the rescheduling of his testimony to November 2002, at the earliest, gives the Defence more time than the 35 days prescribed in the decision of 5 December 2001. The Defence request in this respect is no longer a live issue and is therefore denied.

15. Pursuant to the 5 December 2001 decision, the witness ZF's identity and un-redacted statements may be withheld from disclosure to the Defence until 35 days before his scheduled testimony. The Chamber, in its decision of 10 July 2002, also qualified ZF for additional protective measures by dispensing from disclosure to the Defence of his *current* whereabouts and personal particulars. The scale of the redaction of ZF's statements in this respect was to be determined by the Chamber, after being supplied with un-redacted versions of those statements.

16. In referring to the *current* whereabouts and personal particulars to be withheld pursuant to the decision of 10 July 2002, the Chamber drew a line between the current and the former whereabouts and identity of the witness. Only the current data are to be withheld forever while the former data are to be disclosed in the terms and time frame set in the 5 December 2001 decision, for the Chamber refused to shorten the period within which the anonymity of the witness is to be unveiled. Therefore, the Prosecutor will disclose the former

identifying data of ZF at least 35 days before his testimony. As to the extent to which ZF's statement will be redacted so as to preserve his anonymity with respect to his *current* whereabouts and personal particulars, the parties will be guided by the Chamber's forthcoming decision, upon review of the un-redacted statements and the Prosecution proposed redaction.

FOR THE FOREGOING REASONS the Chamber:

CENSURES the Prosecutor for its failure to disclose the statements of witness Ruggiu on time, pursuant to the Rules;

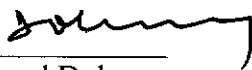
ORDERS the Prosecutor to supply the Defence with the former identifying data of witness ZF at least 35 days before his testimony. Further guidance will be provided to the parties upon the Chamber's review of ZF un-redacted statements;

DENIES the Motion in all other respects.

Arusha, 30 September 2002.



Lloyd George Williams QC
Judge, Presiding



Pavel Dolenc
Judge



Andréia Vaz
Judge

Seal of the Tribunal