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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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S. MASON

ENGLISH
Original: FRENCH

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Andresia Vaz

Registry: Adama Dieng

Decision of: 10 October 2002

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THE PROSECUTOR

v.

ELIEZER NIYITEGEKA

Case No. ICTR-96-14-T

DECISION
(PROSECUTOR'S REQUEST TO CONTACT DEFENCE WITNESSES
AND
THEIR FAMILY MEMBERS)

Office of the Prosecutor:

Kenneth C. Fleming
Melinda Y. Pollard
Amanda Reichman

Counsel for the Defence:

Sylvia Geraghty
Feargal Kavanagh
Callixte Gakwaya

Translation certified by LSS, ICTR

CI02-0026 (E)

The International Criminal Tribunal for Rwanda ("the Tribunal"),

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Sitting as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Andréia Vaz, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("the Rules ");

Having been seized by the parties of:

(i) "Extremely Urgent Request of the Prosecutor for Permission to Contact Persons Covered by the Protective Measures Granted for Defence Witnesses", filed under confidential cover on 30 September 2002 ("the Motion"); and

(ii) A Defence Response to the Motion, filed on 7 October 2002 ("the Response").

Considers the Motion solely on the basis of briefs filed by the parties, pursuant to Rule 73 (A) of the Rules.

INTRODUCTION

1. On 14 August 2002, the Chamber granted the Defence protective measures for its witnesses as well as for their family members, in certain respects.

2. Included in the said protective measures was Order (i), which sets out the procedure to be followed by the Prosecution in contacting Defence witnesses. Such contacts are subject to prior notification of the Defence and prior authorization by the Chamber.

3. It is pursuant to this Order that the Prosecution brings its Motion before the Chamber: the Prosecution intends to immediately contact all the Defence witnesses whose names appear on the list previously disclosed to it by the Defence, as well as their family members. The Defence objects to this request.

4. We shall consider the parties' arguments in greater detail in our deliberations.

DELIBERATIONS

5. The Prosecution claims that it received the names of the alibi witnesses belatedly, only 18 days before the presentation of the Defence evidence was to commence on 14 October instant, and that it did not receive the summaries of the expected evidence of the witnesses, although the Scheduling Order issued in the instant case on 19 September 2002 provided that:

(i) The pre-defence brief should be filed no later than 27 September 2002; and

(ii) The summary of the expected evidence of the Defence witness should be filed by the same date, if need be, as part of the brief.

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6. The Prosecution relies on these arguments for the sole purpose of highlighting the urgency, on the eve of the resumption of the trial and of the commencement of the presentation of the Defence evidence on 14 October instant, to contact the 25 witnesses whose names were disclosed to it by the Defence, as early as possible before they testify in court, so as to prepare for the testimony of these witnesses and for their cross-examination.

7. The Chamber notes that the summaries of expected evidence of the Defence witnesses were finally filed on 30 September 2002, three days after the time-limit prescribed in the Order of 19 September 2002. However, as the Defence notes, the said time-limit had been extended in the meantime, and a distinction made between alibi witnesses and the other Defence witnesses, during an informal conference held on 23 September 2002 with the parties in attendance. No record was taken of that conference. However, even if the Defence had filed the documents prescribed in the Order some days after the expiration of the time-limit agreed on by the parties, the Chamber is of the view that a few days' delays did not, in the instant case, cause material prejudice to the Prosecution's preparations for cross-examination of the Defence witnesses and the alibi witnesses, in particular.

8. Regarding the Prosecution's main request for leave to contact the 25 Defence witnesses cited in its Motion and their families before they testify, neither the Statute nor the Rules guarantee the parties the right to contact witnesses called by the opposing party prior to their testimony at trial. No provision of the Statute or of the Rules necessarily prohibits such contact. Protective measures ordered by the Tribunal for witnesses most often prescribe a procedure to be followed in that regard.¹ Trial Chamber II thus laid down the principle that in the Order in force in *Kamuhanda* granting the Prosecution leave to contact protected Defence witnesses, "Defence witnesses can be contacted following a specific procedure."² In any case, the principle had been laid down by the same Trial Chamber (composed differently) on 30 September 1998 as follows:

"We also recognize that there is a need for the Prosecution to contact some Defence witnesses hence under rule 75, the Trial Chamber can *proprio motu* allow the Prosecution to make such contact upon prior notice to the Defence. (...) under the conditions given herein."³

¹ See, in the instant case, "Decision (Defence Motion for Protective Measures for Defence Witnesses)", 14 August 2002, para. 13, Order (i); See moreover, Trial Chamber II, *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR 99-54-T, "Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses", 22 March 2001, Order No. 6; See also, with regard to all contacts by the Defence with Prosecution witnesses, in the instant case, "Decision on Prosecutor's Motion for Protective Measures for Witnesses", 12 July 2000, para. 3, Order (i) and first Order; Trial Chamber I, *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR 96-17-T, "Decision on Witness Protection", 22 August 2000, Order No. 7 (this Order was applicable to contacts with witnesses of either party by the opposing party).

² Trial Chamber II, *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR 99-54-T, "Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor", 29 August 2002.

³ *The Prosecutor v. Emmanuel Bagambiki and others*, Case No. ICTR 97-36-T, "Decision on the Defence Motion for the Protection of Witnesses", 30 September 1998, page 4 of the English version.

9. Similarly, apart from the protective measures for witnesses and the enforcement of such measures, the instant Trial Chamber recently ordered the Defence of Accused Nahimana, Ngeze and Barayagwiza to take the necessary measures to enable the Prosecution to question Defence witnesses, be they alibi witnesses or not. That Order is not necessarily limited to protected Defence witnesses.⁴

10. Similar precedents exist at the International Criminal Tribunal for the Former-Yugoslavia.⁵

11. This therefore offers an opportunity, if need be, to either party which intends to contact the witnesses of the other party, to follow the procedure laid down for that purpose.

12. In the Order applicable to the instant case,⁶ the Chamber:
"Orders that the Prosecution shall submit a request in writing to the Chamber or to one of the Judges thereof, when it seeks to contact any person covered by the present measures or any member of their family, upon the Defence being given reasonable notice thereof and orders the Defence to take all necessary measures to facilitate the holding of the interview so granted"

13. The Defence objects to the Prosecution contacting its witnesses for several reasons, which we shall consider one by one:

(i) The Prosecution has not set out the reasons why it intends to contact the Defence witnesses and their families.

The Chamber notes in this regard that the applicable Order does not require the Prosecution to give reasons for its request. Consequently, the objection must fail;

(ii) The Prosecution did not cite any case-law in support of its request. This argument does not seem relevant to the Chamber. The applicable Order does not provide that the Prosecution must submit in support of its request for leave to contact Defence witnesses, examples of judicial precedents, even where, as we have shown, such case-law exist. Consequently, this objection must fail;

(iii) The Prosecution has not submitted a list of the questions it intends to put to the Defence witnesses if leave is granted to interview them.

Once again, the applicable law does not subject the conduct of such interviews to prior notification of a related questionnaire. Consequently, this objection must fail.

⁴ *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean-Bosco Barayagwiza*, Case No. ICTR 99-52-T, 3 October 2002, "Decision on the Prosecutor's Motion to Compel the Defence's Compliance with Rules 73 *ter*, 67(C) and 69 (C)", para. 6 (c).

⁵ See, with respect to contacts between the Defence and Prosecution witnesses: ICTY, Trial Chamber, *Prosecutor v. Dragan Kolundzija*, Case No. IT 95-8-PT, "Order for Protective Measures", 19 October 1999, including Order No. 7; See, with respect to contacts between the Prosecution and Defence witnesses, *idem*, Trial Chamber, *Prosecutor v. Dragoljub Prcać*, "Decision on Prosecution Motion for Protective Measures and Particularly for Witness N", 14 April 2000, Order No. 4

⁶ See Note 1 above.

14. The Chamber notes, however, that the Defence implicitly lays down two conditions for granting interviews: on the one hand, that the witnesses concerned must consent to the interviews and on the other hand, that the Defence must be present at the interview.

15. With respect to the Defence's first concern, it goes without saying that the Chamber cannot allow the Prosecution to conduct interviews with Defence witnesses if the witnesses refuse to be interviewed. This means that any authorization granted by the Chamber to that end must be subject to consent by the witnesses concerned or, if they are under the age of 18, to the consent of their parents or guardians. This, in any case, is consistent with the case-law of the Tribunal.⁷

16. Regarding the second Defence concern, the Prosecution, in fact, noted that it wanted to conduct the interviews whether or not the Defence was present. There again it should be noted that the conduct of such an interview is not subject to any condition.

17. It emerges from the foregoing that the Chamber must, in principle, rule in favour of the Prosecution's request. The Prosecution's request was aimed at all the Defence witnesses whose names were disclosed to it, as they appear in its Motion, together with their family members. Given that the Defence has not objected to any of the witnesses being interviewed, the Chamber grants the Prosecution's request, on the following conditions:

(i) Given the general manner in which the Prosecution notified the Defence of its intention to contact the 25 witnesses listed in the Motion, each time that the Prosecution may wish to contact a particular Defence witness or a member of that witness's family, it will have to notify the Defence of this specific intention at the appropriate time;

(ii) The Defence shall inform the Prosecution, without delay, whether or not it intends to call the witness concerned to testify;

(iii) If the Defence intends to call the witness to testify, it shall contact the person concerned as soon as possible;

(iv) If the person concerned consents to the interview, or is under the age of 18, if his/her parents or guardian consent, the Defence will immediately inform the Prosecution and take the necessary measures for the interview to proceed as soon as possible;

(v) In all these procedures, the Defence could, if need be, request the assistance of the Witnesses and Victims Support Section of the Tribunal;

(vi) Lastly, the Defence could attend the interview if it so wishes.

⁷ See for example Trial Chamber I, *The Prosecutor v. Jean Mpambara*, Case No. ICTR 2001-65-I, "Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses)", 30 May 2002, para. 20.

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18. In order to facilitate the steps to be taken by the Prosecution and the procedures in general, the Defence should also inform the Prosecution and the Chamber, as soon as possible, of its final list of witnesses.

For the foregoing reasons,

The Tribunal

1. **Grants The Prosecution Leave** to contact the 25 Defence witnesses whose names appear in its Motion, in accordance with the procedure set out above.
2. **Directs** the Defence to inform the Prosecution and the Chamber as soon as possible of its final list of witnesses.

Arusha, 10 October 2002

(signed)

Judge Navanethem Pillay
presiding

(signed)

Judge Erik Møse

(signed)

Judge Andréia Vaz

(Seal of the Tribunal)

