



ICTR-99-52-T
17-01-2003
(30650-30644)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

30650
S. MUSA

OR: ENG

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse

Registrar: Adama Dieng

Date: 17 January 2003

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR
v.
FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

**DECISION ON THE PROSECUTOR'S URGENT MOTION FOR AN IMMEDIATE
RESTRAINING ORDER AGAINST THE DEFENCE'S FURTHER CONTACT WITH
WITNESS RM-10 AND FOR OTHER RELIEF BASED ON THE NGEZE
DEFENCE'S VIOLATIONS OF COURT DECISIONS AND RULES**

Office of the Prosecutor:

Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Egbe

Counsel for Hassan Ngeze:

Mr John Floyd, III
Mr Rene Martel

Counsel for Jean-Bosco Baravagwiza:

Mr Giacomo Barletta-Caldarera
Mr Alfred Pognon

Counsel for Ferdinand Nahimana:

Jean-Marie Biju-Duval
Diana Ellis

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding and Judge Erik Møse (“the Chamber”), pursuant to Rule 15*bis* of the Rules of Procedure and Evidence (“the Rules”);

BEING SEIZED of the “Prosecutor’s Urgent Motion For An Immediate Restraining Order Against The Defence’s Further Contact With Witness RM-10 And For Other Relief Based On The Ngeze Defence’s Violations Of Court Decisions And Rules”, filed on 13 January 2003 (“the motion”) and the Addendum thereto filed on 13 January 2003 (“the addendum”);

RECALLING:

- (1) the Chamber’s “Decision on the Prosecutor’s Motion for Witness Protection” of 23 November 1999 in *The Prosecutor v Hassan Ngeze*, Case No. ICTR-97-27-I (“the Protection Order”);
- (2) the Chamber’s “Decision on the Prosecutor’s Motion to Compel the Defence’s Compliance with Rules 73*ter*, 67(C) and 69(C)” of 3 October 2002 (“the 3 October Decision”); and
- (3) the Chamber’s Oral Decision of 2 December 2002 on the Prosecutor’s Urgent Motion for Relief dated 26 November 2002 (“the Oral Decision”);

CONSIDERING the “Summaries on anticipated testimonies of factual and expert defence witnesses”, filed on 7 January 2003 by the Ngeze Defence (“the factual summaries”), and the “Presentation Order of Defence Witnesses for the week of January 13th to January 17th 2003”, filed on 13 January 2003 by the Ngeze Defence (“Presentation Order”);

TAKING INTO ACCOUNT the Parties’ oral arguments on the motion, heard by the Chamber on 14 January 2003;

CONSIDERING the Rules, in particular Rules 67, 69 and 75;

NOTING that the Chamber provided an oral interim ruling on the motion on 14 January 2003;

HEREBY DECIDES the motion.

SUBMISSIONS OF THE PROSECUTOR

1. The Prosecutor submitted that the Ngeze Defence have not provided the Prosecutor with adequate disclosure, in a timely fashion, of information regarding the witnesses they will call, thereby violating the 3 October Decision. The Prosecutor therefore prays that the witnesses be barred from testifying; alternatively, that time is provided to the Prosecutor after examination-in-chief of each witness to prepare the cross-examination and that future factual summaries be provided 21 days in advance of each session.
2. In relation to Witness RM-10, the Prosecutor argues that she is still a protected Prosecution Witness and that therefore, the Ngeze Defence’s contact with the witness was in violation of the Protection Order. The Prosecutor prays for a restraining order

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on the Ngeze Defence to prevent further contact with Witness RM-10; alternatively, she prays that Witness RM-10 appear as a Court-summoned witness.

3. The Prosecutor also complains that the Ngeze Defence have not furnished alibi notices in respect of their alibi witnesses BAZ-1, RM-14, BAZ-4 and BAZ-10, in violation of Rule 67(A)(ii)(a), leaving little time to interview these witnesses and thus causing the Prosecutor prejudice. The Prosecutor submits that in order for the Ngeze Defence to use the defence of alibi under Rule 67(B), they have to show good cause, which they have not done. Consequently the Prosecutor prays that these witnesses be barred from testifying; alternatively, that they testify in the next session to permit the Prosecutor time to interview them.
4. The Prosecutor also seeks to have the number of Ngeze Defence witnesses reduced on the basis that their proposed testimony is either irrelevant or duplicated by other witnesses. In particular, the Prosecutor argues that Julie Sumner's proposed testimony is irrelevant and improper, and that Witnesses RM-300 and RM-200 should be barred from testifying as the Ngeze Defence failed to make a motion under Rule 73ter (E) to vary their witness list by adding these two witnesses. The Prosecutor also objects to the Ngeze Defence position that their witnesses are all protected witnesses as some have already testified for the Prosecution using their own names.
5. In the addendum, the Prosecutor notes that the Ngeze Defence failed to disclose statements made by RM-10 and RM-14 14 days in advance of their testimony, as provided in the 3 October Decision, although such statements had been available since the end of August 2002.

SUBMISSIONS OF THE DEFENCE

6. The Ngeze Defence opposed the motion. During oral arguments, Co-Counsel for Mr Ngeze, Mr Martel, submitted that the statements of RM-10 and RM-14 were not disclosed 14 days prior to testimony as the Ngeze Defence was not aware of the exact date on which these witnesses would be testifying. Furthermore, they were concerned that Prosecution Counsel would attempt to interview the witnesses. As for disclosure of information relating to the other witnesses, Lead Counsel for Mr Ngeze, Mr Floyd, argued that the Ngeze Defence were having difficulties meeting witnesses and that the information had been provided as soon as it was obtained. He submitted that the factual summaries were sufficient.
7. With respect to Witness RM-10, Mr Floyd submitted that the witness ceased to be a protected witness for the Prosecution when the Prosecutor decided not to call that witness. Therefore the Ngeze Defence did not violate the Protection Order in contacting that witness. Mr Floyd stated that the witness approached the Ngeze Defence herself, and that they were unaware that Witness RM-10 was a protected Prosecution witness.
8. On the issue of alibi notices, Mr Floyd argued that such notices were not necessary as the defence being presented was one of mere denial. The Ngeze Defence only have witness testimony on this issue, not documentary evidence, which they submitted did not reach the level of alibi evidence.

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9. With respect to the Protection Order, Lead Counsel for Ferdinand Nahimana, Mr Biju-Duval, submitted that a Protection Order ceases to apply when the witness ceases to be a witness. Co-Counsel for Ferdinand Nahimana, Ms Ellis, submitted that a Protection Order continues to be in force until the Chamber orders otherwise, or when the conduct of the party who sought the Protection Order indicates clearly that the Protection Order is no longer in force.

DELIBERATIONS OF THE CHAMBER

Disclosure

10. The Chamber notes that 3 October Decision is still in force. Paragraph 1 of the Decision states as follows:

“Under confidential cover, the Defence shall, within twenty-one (21) days of the testimony of the witness concerned, disclose to the Trial Chamber, the Prosecutor and other Defence Counsel, the name, identity, address and whereabouts of each witness intended to be called by the Defence. A list of the said witnesses shall be served by the Defence providing a factual summary and not merely the subject matter on which each witness will testify”.

Paragraph 3 states as follows:

“Disclosure of copies of unredacted written witness statements of each witness, if available, shall be made to the Chamber, Prosecutor and other Defence Counsel, fourteen (14) days before the defence witnesses testify at trial.”

The Chamber notes that at the Pre-Defence Conference on 12 July 2002, the Chamber made clear to Defence Counsel its expectations regarding the disclosure obligations of the Defence outlined in the Rules.

11. With respect to the Ngeze witnesses to be called during the January session, the Ngeze Defence did not disclose identifying data of these witnesses 21 days before their testimony, in violation of the deadlines set out in the 3 October Decision.
12. In addition, the Chamber finds that the identifying data provided in the factual summaries is insufficient according to the terms of the 3 October Decision. The Chamber will consider, at the appropriate time, if so moved by the Prosecutor, the option of allowing the Prosecutor more time to prepare for the cross-examination of these witnesses.
13. With respect to the disclosure of unredacted witness statements, the Chamber notes that the statements of Witnesses RM-10 and RM-14 were furnished out of time, in violation of the 3 October Decision. The Chamber further notes that these statements were taken on 28 and 30 August 2002 respectively, and could have been disclosed earlier. As the Ngeze Defence intended to call 13 witnesses in the January session, they should have taken steps to ensure that they would be in conformity with the 3 October Decision, rather than risk non-compliance or disregard of the same. The

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Chamber will consider giving the Prosecutor more time to prepare for the cross-examination of RM-10 and RM-14 if the Prosecutor so moves at the appropriate time.

Protection Order

14. The Chamber notes that Rule 69 provides that a Protection Order continues in force “until the Chamber decides otherwise”. As the Chamber has not rescinded a Protection Order or made any contrary decision relating to the protection of Prosecution witnesses, the Protection Order remains in force.¹ This is so even in respect of witnesses the Prosecutor or the Defence has not called. The purpose of protective measures is to protect witnesses who may be “in danger or at risk”, as provided by Rule 69, and, more generally, to safeguard their “privacy and security”, as stated in Rule 75. Once witnesses are covered by a Protection Order, the protection mechanism is triggered. A witness who has not been called during presentation of a party’s case may be called at a later stage, for instance, during rebuttal, appeal or review. Potential witnesses who fall under the Protection Order but never testify in a case may similarly be in need of protection. That the witness initiates contact with Counsel with a view to testifying, as is asserted by Mr Floyd in the present case, does not negate Counsel’s obligation to abide by the Protection Order and notify the Prosecutor, nor eliminate the protective measures granted to the witness. The Chamber takes seriously its obligation to protect witnesses and is mindful that a Protection Order is an assurance to the witness that his identity and security will be protected.

15. The Protection Order states in paragraph 7 of the operative section that:

“The Defence Counsel and any representative acting on his behalf, shall notify the Prosecution prior to any contact with any of the prosecution witnesses, and the Prosecution shall make arrangements for such contacts.”

16. In the present case, Defence Counsel for Mr Ngeze have been in contact with a protected Prosecution witness without first notifying the Prosecution. They have emphasized, however, that they did not approach the witness; the witness had approached them. The Chamber is of the view that a Protection Order applies also in a situation when a witness for one party approaches Counsel for the other party. Consequently, the Ngeze Defence was under an obligation to inform the Prosecution before they entered into contact with the witness. This interpretation is important to ensure the efficient protection of witnesses and to avoid any ambiguity. Moreover, Counsel for the Defence are expected to be aware of all Prosecution witnesses falling under a Protection Order. Mr Floyd and Mr Martel are hereby found to have acted in violation of the Protection Order.

¹ See “Decision on Prosecution Motion to Withdraw Protective Measures for Witness L of 5 December 1996 in *Prosecutor v Dusko Tadic aka “Dule”*, Case No. IT-94-1-I; “Order on Prosecution Request for Hearing on the Issue of Defence Non-Compliance with Trial Chamber Orders” of 25 November 1998 in *Prosecutor v Milan Kovacevic*, Case No. IT-97-24; “Decision on the Motion by Momir Talic for Access to Confidential Documents” of 31 July 2000; and “Second Decision on Motions by Radoslav Brdjanin and Momir Talic for Access to Confidential Documents” of 15 November 2000.

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17. The Chamber now varies paragraph 7 of the operative section of the Protection Order quoted above to the following extent: the Ngeze Defence may contact protected Prosecution witness RM-10 who has not been called by the Prosecutor.

Alibi Notice

18. The Chamber is not convinced that the evidence to be offered by some witnesses for Hassan Ngeze is not alibi evidence. Alibi evidence is evidence that the accused was elsewhere at the time he is alleged to have committed a crime. Whether this is in the form of witness testimony or documentary evidence does not alter its character as alibi evidence. Consequently, the Ngeze Defence should have filed alibi notices in respect of such witnesses in order to allow the Prosecutor time to interview them.
19. The Chamber notes that Rule 67(B) permits the accused to rely on the defence of alibi despite lack of notice. However the Chamber agrees with the reasoning in the "Decision on the Prosecution Motion for a Ruling on the Defence Continued Non Compliance with Rule 67 (A)(ii) and with the Written and Oral Orders of the Trial Chamber" of 3 September 1998 in *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, that, in order to give effect to Rule 67(A)(ii)(a), good cause must be shown before Rule 67(B) is invoked, and where good cause is not shown, the Trial Chamber may take this into account when weighing the credibility of such alibi evidence.

FOR THE ABOVE REASONS, THE TRIBUNAL

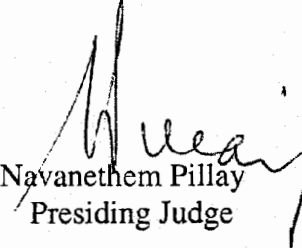
GRANTS the motion in part as follows:

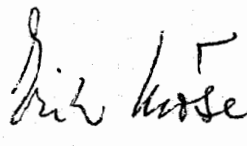
- (a) The Ngeze Defence shall furnish the name, identity, address and whereabouts of all their witnesses to be called in the January session by 20 January 2003, and all other witnesses 21 days in advance of their testimony;
- (b) The Ngeze Defence shall disclose unredacted written witness statements of their witnesses, where available, 14 days before the witness testifies;
- (c) Paragraph 7 of the operative section of the Protection Order is hereby varied to exclude Witness RM-10;
- (d) Witness RM-10 is hereby removed from the list of Prosecution protected witnesses and is now protected under the "Decision on Hassan Ngeze's Urgent Motion for Orders for Protective Measures for Defence Witnesses and Co-operation and Judicial Assistance from States" of 23 September 2002;
- (e) The Ngeze Defence shall file alibi notices of future alibi witnesses testifying after the January session by 20 January 2003. In respect of Witnesses RM-14, RM-10 and any other alibi witnesses to be called in the January session, the Ngeze Defence shall show good cause before the alibi evidence is permitted to be adduced;

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- (f) The Ngeze Defence shall file its final list of witnesses by 20 January 2003. If witnesses additional to those named in their last list are sought to be called, the Ngeze Defence shall file a motion to vary their witness list pursuant to Rule 73ter(E);
- (g) Pursuant to Rule 73ter(D), the Chamber may review this final list to determine if there is an excessive number of witnesses being called;
- (h) The interim ruling barring the Ngeze Defence from consultation with Witness RM-10 is hereby rescinded. The interim ruling is inapplicable to Witness RM-13.

Arusha, 17 January 2003


Navanethem Pillay
Presiding Judge


Erik Møse
Judge

[Seal of the Tribunal]

