

ICTR-98-41-T  
03-07-2003  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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(13682 - 13678)

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**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

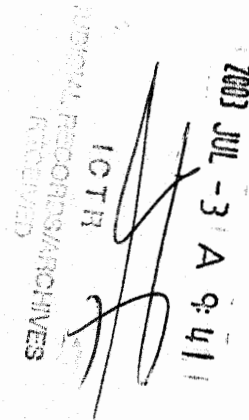
**Date:** 3 July 2003

**THE PROSECUTOR**

v.

**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*



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**DECISION ON DEFENCE OBJECTION TO ELEMENTS OF TESTIMONY OF  
WITNESS XBH**

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**The Office of the Prosecutor**

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Segun Jegede  
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Rashid Rashid

**Counsel for the Defence**

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

**SITTING** as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the Defence “Notice of Intended Objection to Elements of Testimony of Witness XBH”, filed on 30 June 2003;

**HAVING HEARD** the parties’ oral submissions on 2 July 2003;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. By a Decision of 26 June 2003, the Chamber permitted the Prosecution to add Witness XBH to its list of intended witnesses.<sup>1</sup> This witness’s statement was signed on 10 September 2002; his name was first added to the witness list on 14 November 2002; his redacted statement was disclosed to the Defence in early December 2002; and the unredacted version of the statement was disclosed on 7 May 2003.<sup>2</sup> According to the Decision:

The Defence has had notice of the intention to call Witnesses XBG, XBH and Tefnin since 14 November 2002. To the extent that a witness list existed at that moment, these three witnesses appeared amongst the 182 “active” Prosecution witnesses. Under these circumstances, the Defence has known for many months that the Prosecution intended to call these witnesses, and that there was a strong probability that their appearance had already been accepted by the Trial Chamber. Even if they are called to testify immediately, the Defence cannot reasonably claim unfair surprise or prejudice.<sup>3</sup>

2. The Chamber also stated, however, that:

The Chamber notes that it is impossible to know at this stage, with sufficient particularity, how closely the testimony relates to allegations in the indictments and the pre-trial brief. The proposed areas of testimony could present evidence squarely within those allegations, or it may raise entirely new material facts not previously identified. The Chamber is satisfied that at least some portion of the proposed testimony is probative of allegations in the indictments. To the extent testimony impermissibly raises new material facts, the Chamber will entertain motions to exclude such testimony.<sup>4</sup>

**SUBMISSIONS OF THE PARTIES**

3. The Defence objects that the facts contained in parts of Witness XBH’s previous statements to the investigators do not support any particulars in the Indictments but raise new material facts which must be excluded. Moreover, the Prosecution has not complied with an order of Trial Chamber III to indicate the events, circumstances, or paragraphs in the indictments on which the witness will testify. According to the Defence, the proposed testimony indicated in the statement is not probative of any allegation in the indictments. The Accused will suffer serious prejudice from the admission of the proposed testimony.

<sup>1</sup> *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E), 26 June 2003.

<sup>2</sup> *Id.* para. 4.

<sup>3</sup> *Id.* para. 16.

<sup>4</sup> *Id.* para. 7.

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4. The Prosecution argues that the testimony raises no new material facts, and is relevant to and probative of matters alleged in the indictments of Nsengiyumva and Bagosora, particularly in respect of reference to the preparation of lists of people to be killed. It also argues that Witness XBH is not subject to the order of Trial Chamber III invoked by the Defence.

## DELIBERATIONS

### (i) New Material Facts

5. The Chamber must address, first, whether the events to be described by the witness are new, in the sense of not having been materially alleged in the indictments. This requires an analysis of individual paragraphs of the indictments, in which the Chamber has been assisted by the arguments of Counsel on both sides.

6. Paragraph 5.1 of both the Nsengiyumva and Bagosora indictments refers to a plan to exterminate the Tutsi population, which included “the preparation of lists of people to be eliminated.” The Defence contended that this paragraph was deprived of any significance by a decision of Trial Chamber III which found the paragraph to be imprecise.<sup>5</sup> But that decision also went on to hold that, though imprecise, the language of paragraph 5.1 should be interpreted in light of the specific conduct of the Accused with respect to the allegations in the remainder of the Indictment.<sup>6</sup> The present Chamber concurs with that opinion.

7. Of relevance in this context is section 5 of the indictments, in particular paras. 5.25-5.29 of the Nsengiyumva Indictment (which are identical to paragraphs 5.37-5.40) of the Bagosora Indictment). Based on the available material, the Chamber accepts the arguments of the Defence that paragraphs 5.26, 5.27 and 5.28 of the Nsengiyumva indictment do not relate to the events described in Witness XBH’s statement. Paragraphs 5.27 and 5.28 precede the events described by Witness XBH. Paragraph 5.26 appears to refer to a specific order which does not seem to be connected to the preparation of lists described by Witness XBH.

8. In contrast, paragraph 5.29 (corresponding to paragraph 5.40 of the Bagosora Indictment) states that “From 7 April to late July, military and *Interahamwe* massacred members of the Tutsi population and moderate Hutu *by means of pre-established lists*, among other things” (emphasis added). Though there is no reference here to any specific meeting, Witness XBH’s testimony is that the particular list of which he has knowledge was used to determine, in advance, who was to be killed in Gisenyi. The fact that this meeting occurred outside of Gisenyi does not carry it beyond the ambit of this allegation.

9. Though paragraphs 5.26, 5.27 and 5.28 refer to particular lists, there is no indication that these references are meant to be exhaustive of the lists mentioned in paragraphs 5.1 or 5.29. Nor does the Chamber consider that allegations in the indictments must include the precise location at which a list was created in order to be sufficiently specific. The fact that they were pre-established, and that their purpose was to assist in the killings described in the indictments, provides sufficient particularity.

<sup>5</sup> *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on the Defence Motion on Defects in the Form of the Indictment, 16 May 2000, para. 16.

<sup>6</sup> *Id.*

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10. Having found that the evidence concerning this list relates to an allegation in the indictments, the issue of similar fact evidence raised by the Defence in oral argument does not arise.

11. The events described by Witness XBH are relevant to the allegations contained in paragraph 5.1 and 5.29 of the Nsengiyumva Indictment, and the corresponding paragraphs of the Bagosora Indictment. His testimony includes descriptions of the alleged creation of such a list; its communication amongst different officials; and its use in killings which are the object of the indictments. The statement does not in itself provide a basis for excluding the proposed evidence based on Rule 90 (C), which requires relevance and probative value. The credibility of the testimony will be decided when it has been tested through examination and cross-examination.

(ii) Compliance with Trial Chamber III's 23 May 2002 Decision

12. A decision of Trial Chamber III ordered the Prosecution to "indicate to which events, circumstances, or paragraphs in the concise statement of facts in the Indictments each of the witnesses will testify."<sup>7</sup> The Defence argues that the Prosecution has failed to do so and, therefore, that the evidence of Witness XBH is inadmissible. The Prosecution argues that the 23 May 2002 Decision was intended to apply only to existing Prosecution witnesses, not witnesses discovered after that date, such as Witness XBH.

13. The Chamber dismisses the Prosecution's contention; the principle expressed in the 23 May 2002 decision must apply to all its witnesses. The Chamber notes, however, that the purpose of that decision was to place an obligation on the Prosecution of reasonable organization of its case at a time when it was insisting that it would call more than 275 witnesses. As mentioned above, Witness XBH figured on the Prosecution's witness list of 14 November 2002 and the redacted statement was disclosed to the Defence in early December 2002. Witness XBH's statement contains precise references to an alleged list (also referred to as the Butare list) and clearly relates to the paragraphs in the indictments concerning lists (see above). Despite expressions to the contrary by the Defence, there can be no confusion as to the allegations of the indictments to which this testimony relates.

(iii) Prejudice

14. The Chamber recalls its decision of 26 June 2003 on the question of prejudice in respect of additional witnesses, including Witness XBH. The Chamber recognized that "the Defence is justified in its objection that it may not have the same opportunity to investigate the statements and background of these additional witnesses as it would for those already figuring on its witness list." However, as the Chamber found in that decision, the Defence has known for seven months of the contents of Witness XBH's testimony.<sup>8</sup> This does not mean to say that no prejudice has been caused to the Defence by the addition of these witnesses after commencement of the trial. Nevertheless, the Chamber considers the notice to be sufficient to permit admission of the testimony, but subject to a latitude to the Defence to introduce evidence at a later stage that may impeach the witness's testimony, or to recall witnesses whose cross-examination might be needed in light of information subsequently discovered.

<sup>7</sup> *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-motion, 23 May 2002, para. 12.

<sup>8</sup> *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E), 26 June 2003, para. 16.

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**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence's objection.

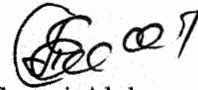
Arusha, 3 July 2003



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]