

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
18-07-2003
(14418 - 14412)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 18 July 2003

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE TRIAL
CHAMBER'S DECISION AND SCHEDULING ORDER OF 5 DECEMBER 2001**

The Office of the Prosecutor

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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 Joint Defence “Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001”, filed on 11 July 2003;

CONSIDERING the Prosecution “Response to the Joint Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001”, filed on 15 July 2003;

HAVING HEARD the parties’ oral submissions on 17 July 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 5 December 2001, Trial Chamber III, which was previously seized of this trial, issued a Decision (“the 5 December Order”) permitting the Prosecution to disclose to the Defence non-redacted witness statements no later than thirty-five days prior to their expected date of testimony.¹ This Decision conformed with a prior witness protection order in respect of two of the defendants, but differed from decisions in relation to other Accused.² The case was subsequently re-assigned to Trial Chamber I. On 11 June 2003, the Chamber decided, with the consent of the parties, to continue the trial on the basis of the existing trial record and decisions rendered in the case.³ Accordingly, the 5 December Order governs the Prosecution’s disclosure obligations to the Defence in respect of the trial proceedings before Trial Chamber I.

SUBMISSIONS OF THE PARTIES

2. The Defence requests, first, that the 5 December Order be reconsidered, and that the Prosecution be ordered to disclose the unredacted version of the statements of all Prosecution witnesses by the end of the current trial session on 18 July 2003. Second, it requests that the Prosecution be ordered to provide the Defence with a list showing the sequence of witnesses for each trial session by the end of the previous trial session, or sixty days before the commencement of a trial sessions, whichever is earlier.

3. The Defence submits that previous decisions may be reconsidered and should be revised where justified by new circumstances, or where shown to be both erroneous and prejudicial. Several new circumstances have increased the security of protected witnesses.

¹ *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001, p. 9.

² *Prosecutor v. Anatole Nsengiyumva*, Decision on the Prosecutor’s Motion for Protection of Victims and Witnesses, 26 June 1997, p. 5 (requiring disclosure “with sufficient time prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself”); *Prosecutor v. Théoneste Bagosora*, Decision on the Prosecutor’s Motion for Protection of Victims and Witnesses, 31 October 1997, p. 5 (information “not to be disclosed to the defence until further orders”); *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Decision on Motion By the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, 19 May 2000, p. 4 (disclosure “not later than twenty-one (21) days before the protected witness is to testify at trial”).

³ *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Decision on Continuation or Commencement De Novo of Trial, 11 June 2003, p. 6.

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First, the Prosecution has now been ordered to reduce its witness list to 100, of which even fewer are protected witnesses, whereas the 5 December Order makes reference to the impossibility of the Registry immediately placing more than 200 witnesses under its protection. Second, the greatly accelerated pace at which the trial is now proceeding substantially shortens the potential period between disclosure of witness information and testimony, thus reducing the potential threat to witnesses by virtue of advance disclosure of protected witness information. Third, incursions from the Congo into western Rwanda that were occurring in 2001, and potentially threatening protected witnesses, are said to have stopped.

4. The prejudicial effect of the 5 December Order on the rights of the Accused is also said to have changed in light of the accelerated pace of the trial. The Defence cannot conduct a competent cross-examination with only thirty-five days' disclosure and the obligation of attorneys to attend trial sessions five days per week; the delays in approval of expenses for investigators; and the extensive nature of the redactions, which excise large portions of the witness statements.

5. The 5 December Order is also impugned by the Defence as erroneous and prejudicial. Article 19 of the statute requires "full respect for the rights of the Accused and due regard for the protection of victims and witnesses." The priority of the rights of the accused must still prevail, notwithstanding the amendment of Rule 69(C) of the Rules of Procedure and Evidence ("the Rules") which permits a Chamber to order witness disclosure "to allow adequate time for preparation" by the other party, and not "in sufficient time prior to trial" as previously provided.

6. The Defence further argues that advance disclosure is necessary to fulfill the Trial Chamber's goal of proceeding in a fair and expeditious manner. Immediate disclosure of unredacted witness statement would enhance the predictability of the Prosecution case and, therefore, permit the Defence to focus its cross-examinations; allow the attorneys to more effectively co-ordinate their work; and facilitate better use of the periods when trial is not in session so as to ensure the smooth functioning of trial sessions.

7. The Prosecution accepts that prior decisions may be reviewed, but suggests that the Defence should not be allowed to seek the review here, having in a previous motion argued that witness protection orders, issued by another Trial Chamber formerly seized of the matter, should not be reviewable.

8. The 5 December Order was based on consideration of all the relevant facts and law and, therefore, should not be reviewed. The rights of the Accused are not hierarchically superior by virtue of Article 19, but must be balanced with the interests of witness protection. The 5 December Order appropriately strikes that balance and should not be revisited.

9. No new circumstances justify the formulation of a new witness protection order. The accelerated pace of the trial does not alter the premises of the 5 December Order. The resources of the Registry to protect witnesses is no greater than at the time of the 5 December Order and Rwanda is now no safer for witnesses. Many hundreds of perpetrators of genocide previously in jail have been released, posing a continued or enhanced threat to the security of witnesses, which is unaffected by the resolution of the situation in the Congo. Witnesses continue to fear for their safety and the Prosecution has unconfirmed reports of continued intimidation and violence against witnesses.

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10. The Prosecution rejects the claim of prejudice, noting that some cases before the Tribunal have permitted rolling disclosure as late as twenty-one days before the witness's testimony. The thirty-five day disclosure period is not insufficient to prepare effective cross-examination, and the redacted portions of protected witness statements are minimal.

11. In respect of the sequence of witnesses, the Prosecution argues that such factors as the location of witnesses or sudden reluctance to testify make it impossible for it to guarantee the sequence of witnesses that will testify during a particular session. In recognition of this difficulty, and to comply with the 5 December Order, the Prosecution has made it a practice to disclose the statements of all witnesses in a particular session thirty-five days before the commencement of that session.

DELIBERATIONS

12. Rule 66(A) provides:

The Prosecutor shall disclose to the Defence:

...

- ii) No later than 60 days before the date set for trial, copies of the statements of all witness whom the Prosecutor intends to call to testify at trial.

A voluminous case law has emerged out of the exception to this general rule provided in Rule 69, "Protection of Victims and Witnesses":

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

...

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

13. Rule 69 (C) modifies the timing of disclosure, displacing the fixed rule of sixty days before trial with a more flexible standard of "adequate time for preparation of the prosecution and the defence". What is "adequate" must be assessed in light of the rights of the accused set out in Article 19 and 20 of the Statute. Rule 75 describes the measures that may be taken to "safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused." These measures include the non-disclosure to the public of the name of the witness or any other identifying information, and to hold closed trial sessions to prevent such information from being publicly disseminated.

14. Article 19 (1) expressly requires that the rights of the accused and the interests of witness and victims both be accommodated by trial proceedings:

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The rights of the accused in Article 20 include the right to a public hearing (which is expressly made subject to Article 21, which permits measures to protect victims and witnesses); the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her; to have adequate time

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and facilities for the preparation of his or her defence; and to examine, or have examined, the witnesses against him or her.

15. The amount of time that will afford the Defence an adequate opportunity to prepare depends largely on the factual circumstances of each individual case, as is reflected in the variety of the periods of disclosure from case to case. In some cases, disclosure has been ordered on a rolling basis, that is, according to a fixed period of time before the particular witness is to testify. The shortest disclosure period to which the parties have drawn the attention of the Chamber is twenty-one days before the witness is to testify.⁴ Such rolling disclosure means that the trial will proceed and Prosecution witnesses will be heard before the Defence knows the names of all Prosecution witnesses or has the entirety of their statements. Rule 69(C), which had originally required disclosure before the commencement of trial, was amended on 6 July 2002 to expressly permit such rolling disclosure.⁵

16. Notwithstanding the broadened discretion under Rule 69(C) to authorize disclosure on a rolling basis, disclosure before trial is still often required. In some cases, disclosure has been required to be made twenty-one days before the start of trial.⁶ Other cases have ordered immediate disclosure some days before the commencement of trial, as in *Prosecutor v. Nyiramasuhuko et al.*, in which the Prosecution intended to call a number of witnesses similar to that in the present case.⁷

17. The 5 December Order describes with precision the factual basis for rolling disclosure. At that time, the Prosecution intended to call more than 200 protected witnesses. Ordering immediate disclosure of the identity of all these witnesses at once “would place an untenable burden” on the witness protection service of the Registry, which would then be immediately responsible for ensuring their security. In addition, given the number of Prosecution witnesses, the trial was expected to take a year or more. Thus, an order to disclose identities before trial would mean that the period of insecurity “might amount to one year or more before a particular witness might be called to testify.”⁸

18. Whether changes in these or other circumstances of this case are significant must be assessed in light of the twin obligations in Article 19 of the Statute to respect the rights of the accused, with due regard to the interests of witness protection. Under the Rules and practice of this Tribunal, witness protection is accomplished, first, by permanently safeguarding the witness’s identity against public disclosure; and second, by delaying disclosure of the witness’s identity to the Defence later than the Rules usually provide in order to reduce the chance of unauthorized disclosure of the witness’s identity and intimidation or interference before coming to testify. The issue before the Chamber is not whether to disclose the witness’s identity to the Defence, but how long before testifying that identity is to be disclosed to the Defence. The length of that period and the number of witnesses involved will affect the scope of the measures that the Registry, with its limited resources, can provide.

⁴ *Prosecutor v. Eliezer Niyitegeka*, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, 12 July 2000, p. 6.

⁵ Rule 69(C) had formerly read: “Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence.”

⁶ *Prosecutor v. Anathase Seromba*, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses, 30 June 2003, p. 4.

⁷ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, 8 June 2001, p. 7, 10. The Prosecutor also made full disclosure before trial on a voluntary basis in the *Media* case.

⁸ 5 December Order p. 7.

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19. In its assessment, the Chamber will take into account the vulnerability of the witness or witnesses and the nature of the threat in the particular case, weighed against assuring the rights of the accused. Measuring the dangers to prospective witnesses is a difficult task, and the consequences of miscalculation are profound, both for the rights of the Accused and the availability of witnesses.

20. The Chamber believes that the factual premises of the 5 December Order have changed substantially, in two respects, and with several significant consequences. First, instead of more than 200 protected witnesses who will require protection, statements by the Prosecution indicate that the number is now clearly less than 100. After consultations with the Registry, the Chamber believes that the addition of the remaining witnesses to the Registry's roster of protected witnesses does not present an unmanageable burden. Second, the reduction in the list of witnesses, combined with the Prosecution's stated aspiration to complete rapidly (possibly by the end of 2003, if there were no significant break during the second half of the year) substantially reduces the period during which the protected witnesses' identity would be known by the Defence before testimony.

21. The Chamber is anxious to ensure the highest possible level of protection for witnesses, and is mindful of the need to inspire confidence that those who come before the Tribunal will not be subject to intimidation. However, given the remaining length of the Prosecution case, complete witness disclosure at this stage does not appreciably decrease that protection, real or perceived. Any increased threat would have to be founded on allegations of disclosure made by the Defence or the Accused. Though the Chamber is cognizant of the difficulty in proving such misconduct, there is no evidence, direct or indirect, to substantiate such an allegation. The Chamber notes that during the hearing, Defence Counsel undertook in strong terms to ensure that no such misconduct flowed from their teams, and recognized that any failure to strictly abide by their obligations of confidentiality would militate strongly against their interest.

24. The expected duration of the trial has not only reduced the risks to protected witnesses, but also increased the Defence's need for immediate disclosure of all witness information in order to adequately prepare its Defence. For trial sessions that last more than thirty-five days, it would be difficult for Defence teams to conduct adequate investigations regarding new disclosures while concurrently attending to their duties in the courtroom. Indeed, the Chamber observes that such disclosure may give the Prosecution somewhat greater flexibility should it face unforeseen difficulties in presenting witnesses in the sequence planned.⁹ The interests of speedy, focused, and predictable trial proceedings, which fully respect the rights of the Accused, are served by modifying the existing witness protection

25. After a careful balancing of the interests the Chamber concludes that the decision of rolling disclosure contained in the Order of 5 December should be modified in view of new circumstances. However, the Chamber does not exclude that, among the remaining witnesses, there may be one or more witnesses in a precarious position or particularly likely to be threatened. If information to this effect is available to the Prosecution, it may file motions for special protective measures which may, if granted, derogate from this decision.

⁹ The Chamber notes that the Prosecution stated on at least one occasion during this trial session that it had a witness available to substitute for another who was unable to come as scheduled. However, that witness could not be presented because of the lack of 35-day disclosure. T. 30 June 2003, p. 94. Requiring full disclosure of all witnesses obviates this problem.

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26. The Defence motion also requests that the Chamber order the Prosecution to present a list of witnesses to be called at each session as well as their sequencing. The Chamber notes that on 15 July 2003, the Prosecution provided the Prosecution with a list of witnesses to be called from 1 September 2003, and it has also stated in court that it is willing to indicate the order in which some of these witnesses will be called, subject to changes because of unforeseen circumstances. In order to ensure the orderly conduct of the trial, with a minimum of interruptions, the Chamber considers it useful to issue an order, it being understood that the sequence of witnesses may depend on circumstances outside the control of the Prosecution.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS THE MOTION IN PART by requiring that the Prosecution disclose to the Defence the identity and unredacted statements of the remaining protected witnesses it intends to call during the presentation of its case no later than thirty-five days prior to the next trial session;

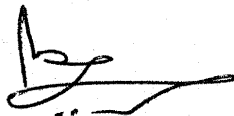
ORDERS, in accordance with this decision, the Prosecution to make such disclosure no later than 28 July 2003;

DIRECTS the Prosecution to indicate, by Friday 8 August 2003, the order in which its witnesses during the session from 1 September to 3 October 2003 will be called, subject to circumstances outside its control.

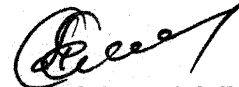
Arusha, 18 July 2003



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

