



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER II

Before:

Judge	Asoka	de	Zoysa	Gunawardana,	Presiding
Judge		Khalida		Rachid	Khan
Judge Lee Gacuiga Muthoga					

Registrar: Adama Dieng

Date: 10 December 2003

The PROSECUTOR

v.

Casimir BIZIMUNGU
Justin MUGENZI
Jerôme BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

DECISION ON PROSPER MUGIRANEZA'S MOTION TO COMPEL DISCLOSURE OF EXCULPATORY EVIDENCE PURSUANT TO RULE 68

Counsels for the Prosecution:

Paul Ng'arua
Ibukunolu Babajide
Elvis Bazawule
George Mugwanya

Counsel for the Defence:

Michelyne C. St. Laurent for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme Bicomumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the “Chamber”);

BEING SEIZED of “Prosper Mugiraneza’s Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68” **AND** the “Confidential Appendix to Prosper Mugiraneza’s Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68” filed confidentially on 13 August 2003, (the “said Motion”);

NOTING the “Prosecutor’s Response to Prosper Mugiraneza’s Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68” filed on 21 August 2003, (the “Response”);

NOTING the “Prosper Mugiraneza’s Request for Rulings on Pending Motions” filed on 27 November 2003, (the “Request”);

TAKING INTO CONSIDERATION the “Decision on Prosecutor’s Motion for Protective Measures for Witnesses” issued on 12 July 2000, (the “Protective Measures Decision”);

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Chamber to order the Prosecution to disclose the identity of witnesses who have given the Prosecutor exculpatory information relevant to Mugiraneza’s defence and that the Prosecutor be ordered to disclose unredacted witness statements. The Defence also requested permission to locate and attempt to interview those witnesses.
2. The Defence argues that Rule 68 of the Rules of Procedure and Evidence (the “Rules”) places a straightforward duty on the Prosecutor to disclose to the Defence as soon as practicable the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence of the accused or to mitigate his guilt or which may affect the credibility of prosecution evidence. In addition, the Defence argues that in determining whether failure to disclose exculpatory evidence deprives an accused of his right to due process of law, the sum total of the withheld material should be examined, not each individual item on an item-by-item basis.
3. The Defence submits that, the Tribunal and its sister Tribunal, The International Criminal Tribunal for the former Yugoslavia (the “ICTY”), have developed a jurisprudence that has a two-prong analysis of the exculpatory evidence. The Prosecutor has the sole responsibility for disclosing to the Defence the evidence under the

supervision of the Chamber and under the possibility of sanctions, in case of violations. If the Defence believes that undisclosed evidence in the possession of the Prosecutor is exculpatory, it must make a *prima facie* showing to the Chamber that the information is in fact exculpatory. If it does so, it is entitled to the information, and if the defence fails to do so, it is not entitled to the information.[\[1\]](#)

4. The Defence argues that the information sought by Mugiraneza is exculpatory and refers to a letter sent to the Office of the Prosecutor on 7 August 2003, wherein it provides its reasoning regarding this claim.

5. The Defence specifies that a key point in the Prosecution's case is that on the morning of 7 April 1994, Mugiraneza went to his home village and made a speech exhorting genocide and urging the people there to begin killing Tutsi, and that this evidence may be the only one directly connecting Mugiraneza to the genocide. The Defence further specifies that a fair reading of some of the redacted statements show that the killings began before the time Mugiraneza allegedly made the purported speech or, that Mugiraneza was not in the village at all on 7 April. Thus, those statements constitute exculpatory evidence in that they contradict and/or impeach the testimony of other prosecution witnesses. The Defence points out another statement which it views as exculpatory in that it says that everyone who knew Mugiraneza had good things to say about him and in that it stated that "we" had not received any statements against him ("we" appearing to refer either to a Rwandan government investigator or an investigator for a non-governmental organization, according to the Defence).[\[2\]](#)

6. The Defence contends that the Prosecutor's position seems to be that it will provide exculpatory information to Mugiraneza but will do everything in its power to prevent him from producing that exculpatory evidence at trial, either to show innocence or as mitigation of guilt and punishment. The Defence also states that it does not object to reasonable protective measures for witnesses, but that the Prosecution cannot act to pervert the course of justice by denying the Accused access to exculpatory information.

7. In regard to the interviews of potential Prosecution witnesses, the Defence states that it will comply with paragraph 3(1) of the Chamber's Protective Measures Decision. Namely, that once the Defence is made aware of who are witnesses for the Prosecution, it will contact potential Prosecution witnesses and their relatives only through the Trial Chamber with notice to the Office of the Prosecutor.

8. The Defence argues that the purpose of Rule 68 is to prevent the Prosecutor from hiding exculpatory evidence and that in order to ensure a fair trial Rule 68 requires disclosure of exculpatory evidence so that the Defence may evaluate it and present it to the Chamber. The Defence further argues that the purpose of Rule 68 is not served when the information is disclosed in a way that the Defence cannot make reasonable use of it in trial. The Defence bases its position on *Blaskic* Decision in which the Chamber included as exculpatory evidence going to the authenticity of documents provided pursuant to Rule 68 "so as to enable the Defence to make full use of it".[\[3\]](#) The Defence further references

Article 21 of the Statute and Rule 69 of the Rules, which it are designed to protect witnesses.

9. The Defence requests that, for these reasons, the Chamber should grant Mugiraneza the following relief: hold that the statements of Witnesses GJT, GKT, GKP and GNH contain exculpatory material as defined by Rule 68; Vary its Order in the Protective Measures Decision to the extent that it requires the Prosecutor to accompany the statements of GJT, GKT, GKP and GNH and all other exculpatory information with the full, unredacted statements of witnesses providing the exculpatory information - including that witness' identity and other information, included on the standard cover pages of statements; Compel the Prosecution to provide authenticating information along with all exculpatory material; Authorize the Defence to make contact in writing with those witnesses providing exculpatory information, with reasonable notice to Prosecutor, seeking voluntary interviews; And require the Prosecutor to facilitate the interviews of willing witnesses as required by the Chamber's Order in the Protective Measures Decision.

Prosecution Submissions

10. The Prosecution argues that the relief sought by the Defence is in direct contravention of Protective Measures Decision. The Prosecution notes that, as part of its Brief in support of the said motion, it set forth details, including the insecurity and instability in Rwanda, justifying relief under Rules 69 and 75 of the Rules. The Chamber found that the security situation was of such a nature as to put at risk the lives of victims and potential Prosecution witnesses.^[4] The Prosecution further notes that, after careful consideration of both the rights of the Accused and the need to implement protective measures for the safety and protection of witnesses, the Chamber, granted the Prosecution's Motion, with certain modification.^[5]

11. The Prosecution argues that the suggestion by the Defence that adherence to the terms of the existing protective order somehow violates the rights of the Accused is an argument which has previously been asserted by the Defence and rejected by the Chamber. It is the submission of the Prosecution that the request for witness information and unredacted statements now before the Chamber gives rise to the very issues previously raised and considered by the Chamber in determining the appropriateness of protective measures namely, the appropriate balance between the rights of the Accused and the need to implement protective measures for the safety and protection of witnesses.

12. The Prosecution argues that the information sought by the Defence is not exculpatory material in the true sense, but information, which might assist in cross-examination. Specifically, the Prosecution submits that general objections to redaction do not support a motion of this kind. The Prosecution bases its position on Rule 68, which provides not only for the disclosure of "true" exculpatory evidence but also for information which "may effect the credibility of prosecution evidence". Recognizing its obligation under Rule 68, the Prosecution states that there is no evidence known to the Prosecutor which tends to suggest the innocence or mitigate the guilt of the Accused. The Prosecution

further notes, that in respect to evidence which the Defence contends may affect the credibility of prosecution evidence, the Defence acknowledges that it has already been provided with the witness statements.

13. The Prosecution argues that the Defence has no right in law or pursuant to the Rules, to interview the Prosecution's witnesses before trial. The Prosecution further argues that the information sought by the Defence is information which is appropriate for elicitation at trial.^[6] In addition, while the Prosecution does not concede that the information sought falls within the ambit of Rule 68, it submits that even if it does, the Prosecution has complied with its obligations under Rule 68 by its disclosure of the redacted statements. The Prosecution goes on to argue that it is in the interest of all parties and of international justice, that matters such as those the Defence wishes to put to the witnesses in a pre-trial interview are best reserved for trial, when the at which time the Chamber is in a position to assess the demeanor and overall credibility of the witness.

14. The Prosecution argues that the Defence request for declaratory ruling by the Chamber that the statements of Witnesses GJT, GKT, GKP and GNH contain exculpatory material is premature, as it amounts to a request for pre-trial assessment of evidence.

15. The Prosecution similarly argues that the Defence's request for authenticating information is both vague and inappropriately timed. The proper time for challenging the authenticity of evidence, according to the Prosecution, is during trial, when such item or exhibit is sought to be tendered into evidence.

16. For the reasons stated above, the Prosecution argues that the Defence has failed to establish entitlement to the relief sought, and therefore its motion should be denied in its entirety.

DELIBERATIONS

Disclosure of unredacted statements and cover sheets of Witnesses GJT, GKT and GKP

17. Considering that the requested unredacted statements of Witnesses GJT, GKT and GKP have been disclosed by the Prosecutor to the Defence, on 8 October 2003, the Trial Chamber is of the opinion that this part of the said Motion is now rendered moot and should be dismissed.

18. Regarding the cover sheets, the Trial Chamber considers that the Prosecutor has complied with the "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses"^[7] of 15 October 2003. He has disclosed all the identifying information related to Witnesses GJT, GKT and GKP on 21 October 2003. Therefore, the Trial Chamber is of the opinion that this part of the said Motion is also now rendered moot and should be dismissed.

Disclosure of exculpatory material in relation to Witness GNH

19. Rule 68 provides as follows:

Rule 68: Disclosure of Exculpatory Evidence

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

20. The Trial Chamber notes that Witness GNH does not appear on the Prosecution Witness List filed on 8 October 2003. The Trial Chamber considers further that, without making an assessment of the credibility of the witness or the nature of the evidence that may be given by the witness, the Defence for Prosper Mugiraneza has shown good cause that the said witness may be in possession of exculpatory evidence pursuant to Rule 68.

21. It is therefore of the Trial Chamber's opinion that the Prosecutor should disclose to the Defence the unredacted statement of Witness GNH as well as the accompanying cover sheet in accordance with the "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses" of 15 October 2003.

Defence' Request for Interview of Witnesses GJT, GKT, GKP and GNH

22. The Trial Chamber recalls the provisions of paragraph 3.i) of the Protective Measures Decision:

"[...] the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and [requiring] that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview."

23. The Trial Chamber is satisfied that Witnesses GJT, GKT and GKP are Prosecution witnesses and that GNH is a potential Prosecution Witness. Therefore, the Protective Measures Decision applies to them. The Trial Chamber is also satisfied that the Defence has made a written request on reasonable notice to the Prosecutor and the Trial to contact and interview Witnesses GJT, GKT, GKP and GNH. The Trial Chamber considers that, since the Defence has shown good cause that the said witnesses may be in possession of exculpatory evidence pursuant to Rule 68, the Defence should be granted access to the witnesses and be given the opportunity to interview Witnesses GJT, GKT, GKP and GNH. The Trial Chamber, however, considers that such interviews should take place in accordance with all relevant provisions of the Protective Measures Decision and should take place in the presence of a representative of the Office of the Prosecutor.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the said Motion in the following terms:

(a) The Prosecutor shall disclose the relevant information for the location of Witnesses GJT, GKT, GKP and GNH. The Defence is reminded of the provisions of the Protective Measures Decision, particularly paragraphs 3.e), 3.f) and 3.g).

(b) The parties shall arrange between themselves for the Defence to interview Witnesses GJT, GKT, GKP and GNH in the presence of a representative of the Office of the Prosecutor.

(c) The Registry shall facilitate the interview according to its established procedures, and also according to the laws and procedures of the countries of residence of the witnesses.

(d) **However**, before the interview can take place, the Registrar should satisfy himself that Witnesses GJT, GKT, GKP and GNH are indeed willing to be interviewed by the Defence. Should he not be satisfied on this point, the interview shall not proceed, and the Registrar shall inform the Parties and the Chamber accordingly.

Arusha, 10 December 2003

Asoka de Zoysa
Gunawardana

Khalida Rachid
Khan

Lee Gacuiga
Muthoga

Presiding Judge

Judge

Judge

(Seal of the Tribunal)

[1] The Defence cites *The Prosecutor v. Tihomir Blaskic*, Case No IT-95-14-T (ICTY), “Decision on the Defence Motion for Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence”, 29 April 1998, para 14, (the “*Blaskic* Decision”) as the case in point.

[2] See the said Motion at para. 7(b).

[3] See the said Motion at para 11.

[4] *The Prosecutor v. Prosper Mugiraneza*, Case No ICTR-99-50-I, “Decision on Prosecutor’s Motion for Protective Measures for Witnesses”, 12 July 2000. Prosecution cites in particular paragraphs 3.a) and 3.j) therein, where it sets forth the specific measures sought. The prosecution also cites the jurisprudence of the ICTR and ICTY on the consideration for extending protective measures namely, *Prosecutor v. Dusko Tadic a/k/a “Dule”*, Case No IT-94-1-T (ICTY), “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995 (the “*Tadic* Decision”); And *Prosecutor v. Georges Rutaganda*, Case No ICTR-96-3-T, “Decision on Protective Measures for Defence Witnesses” (the “*Rutaganda* Decision”), 13 July 1998.

[5] The Prosecution argues that the decision of 12 July 2000 is representative of the ICTR jurisprudence on this issue, referencing *The Prosecutor v. Juvenal Kajelijeli*, Case No ICTR-98-44-T, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Witnesses” (the “*Kajelijeli* Decision”), 6 August 2000; *The Prosecutor v. Hormisdas Nsengimana*, Case No ICTR-2001-69-T, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Witnesses” (the “*Nsengimana* Decision”), 2 September 2002; *The Prosecutor v. Augustin Ndindiliyimana*, Case No ICTR-2000-56-I, “Order for Protective Measures for Witnesses” (the “*Ndindiliyimana* Decision”), 12 July 2001.

[6] *Kajelijeli* Decision.

[7] *The Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-I, “Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses”, 15 October 2003.