

ICTR-98-41-T
17-12-2003
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(17942-17939)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 16 December 2003

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL PROCEEDINGS
IN
ICTR
2003 DEC 17 A 8:41

**DECISION ON THE REQUEST FOR DOCUMENTS ARISING FROM JUDICIAL
PROCEEDINGS IN RWANDA IN RESPECT OF PROSECUTION WITNESSES**

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 “Requête conjointe de la défense aux fins d’obtenir la coopération de l’état Rwandais conformément à l’article 28 du Statut du Tribunal”, filed on 28 July 2003 (“the Joint Defence Motion”), to which is appended an annex submitted by the Defence for Nsengiyumva requesting the Rwandan judicial records of Prosecution witnesses DO and XBK; the “Requête en extrême urgence de la Défense aux fins de...communication de Dossiers Judiciaires de témoins”, etc., filed by the Defence for Kabiligi on 22 September 2003 (“the Kabiligi Motion”); the “Addendum de la Défense de Théoneste Bagosora à la requête conjointe”, filed on 17 November 2003 (“the Bagosora Addendum”); and the “Liste commune des documents réclamé”, etc., including in particular section VI, which requests judicial documents concerning certain named individuals, some of whom appear to be Prosecution witnesses;

HEREBY DECIDES the motions.

INTRODUCTION

1. This decision addresses the Defence motions to the extent that they seek documents created as part of judicial proceedings in Rwanda against individuals who are scheduled to appear as witnesses before this Tribunal. Judicial documents concerning other individuals, and other documents requested, are addressed in a separate decision.

2. The Defence for Kabiligi requests that the Prosecution disclose any “judicial dossiers” arising out of any judicial proceedings or procedure against any of its witness that it may possess; and, if not in possession of such documents, that it be required to diligently seek disclosure of these documents from the Government of Rwanda.¹ Should these requests fail, the Chamber is asked to issue an Article 28 request to the Government of Rwanda for the disclosure of these documents.² Noting that the Prosecution has frequently cited its inability to obtain the judicial dossiers of its witnesses from the Rwandan Government, the Joint Defence Motion asks the Chamber to issue an Article 28 request without awaiting any further Prosecution efforts.³ Both motions request that the testimony of any witness for whom such statements exist should be adjourned until these documents are made available to the Defence.⁴

SUBMISSIONS

2. The Defence motions locate the Prosecution’s obligation to obtain and disclose these statements under Rule 68 of the Rules of Procedure and Evidence (“the Rules”). Relying on previous decisions of this and other Trial Chambers, disclosure of prior witness statements before the Rwandan authorities is said to be essential for a full and complete defence, and for a fair and equitable proceeding.

¹ The Kabiligi Motion, para. 66.

² *Ibid.* para. 67.

³ The Joint Defence Motion, pp. 4-6.

⁴ *Ibid.* para. 25; The Kabiligi Motion, para. 71.

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3. The Prosecution made no submissions in response, but has denied that it is in possession of the requested documents.⁵

DELIBERATIONS

4. Rule 68 provides that

The Prosecution 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 the prosecution evidence.

In order for Rule 68 to apply, the Prosecution must not only know of the existence of the evidence, but it must also have sufficient knowledge of the material to be able to determine that it tends to exculpate the Accused, or affect the credibility of its evidence. In the absence of possession of the evidence in question, knowledge of the exculpatory character of evidence will seldom be imputed to the Prosecution. Thus, previous decisions have equated the "known" requirement to actual possession of the evidence.⁶

5. The Defence has not made a *prima facie* showing that the witness statements before the Rwandan authorities affect the credibility of any witness or are otherwise exculpatory.⁷ Statements which do not conflict with testimony before the Chamber would not fulfil that condition and, based on the materials before the Chamber, there is no showing of any such conflicts. Even Witness DAS's testimony, raised in the Bagosora Addendum, does not satisfy the requirement of Rule 68. Witness DAS simply acknowledged that his prior statement was different from his testimony before the Chamber because he had been asked different questions, not that there was any conflict in the content of the testimony.⁸ Accordingly, the Chamber rejects the argument that the Prosecution is required to obtain and disclose these statements under Rule 68.

6. Previous decisions have required the Prosecution to obtain statements of its witnesses before Rwandan judicial authorities under Rule 66(a)(ii).⁹ In the absence of submissions from the parties on this rule, with its obligation of disclosure before commencement of the trial, the Chamber refrains from any comment on its application.

7. Nonetheless, this Trial Chamber has in the past ordered the disclosure of records of Rwandan judicial proceedings of Prosecution witnesses under Rule 98 of the Rules, which

⁵ T. 17 September 2003, p. 4.

⁶ *Prosecutor v. Bagilishema*, 95-1A-T, Decision on the Request of the Defence for an Order for Disclosure By the Prosecution of the Admissions of Guilt of Witnesses Y, Z, and AA (TC), 8 June 2000, para. 7.

⁷ Previous decisions have rejected Defence applications in the absence of *prima facie* proof of fulfilment of the conditions of Rule 68. *Prosecutor v. Pauline Nyiramasuhuko*, 97-21-T, Decision on the Defence Motions for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect (TC), 18 September 2001, para. 17; *Prosecutor v. Blaskic*, Decision on the Production of Discovery Materials (TC), 27 January 1997, para. 50; *Prosecutor v. Delalic et al.*, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June 1997, para. 13.

⁸ T. 6 November 2003, pp. 16-17.

⁹ *Prosecutor v. Kajelijeli*, 98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001, para. 20; *Prosecutor v. Ndayambaje and Nsabimana*, 96-8-T and 97-29A-T, Decision on the Defence Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses (TC), 15 November 2001, para. 25; *Prosecutor v. Pauline Nyiramasuhuko*, 97-21-T, Decision on the Defence Motions for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect (TC), 18 September 2001, para. 17.

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provides that “[a] Trial Chamber may *proprio motu* order either party to produce additional evidence”.¹⁰ The Chamber considers these records to be important for the preparation of the defence. As these are the statements of Prosecution witnesses, and as the Prosecution is best placed to know the sequence of its witnesses, the Chamber orders the Prosecution under Rule 98 to immediately make formal requests for such statements from the Rwandan Government, which shall be filed with the Registry. The Prosecution need not make requests for such documents already disclosed to the Defence.

8. The request for adjournment of the testimony of witnesses for whom such statements have not been obtained is denied. The Defence may draw the Chamber’s attention to inconsistencies between testimony of witnesses before this Chamber and any declarations obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness’s explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witnesses will not be recalled. However, the Chamber appreciates that the Defence brings such inconsistencies to the Chamber’s attention.

FOR THE ABOVE REASONS, THE CHAMBER

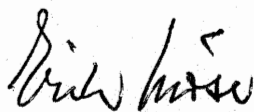
GRANTS THE MOTION IN PART

ORDERS the Prosecution pursuant to Rule 98 to immediately request the Government of Rwanda to provide all records of proceedings concerning Prosecution witnesses before judicial authorities in that country, and to file this request with the Registry;

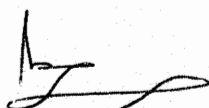
ORDERS the Prosecution to disclose to the Defence any such documents received from the Government of Rwanda and to inform the Chamber of any response by the Government of Rwanda to the request;

DENIES the Defence request for adjournment of the testimony of witnesses for whom such statements have not been obtained.

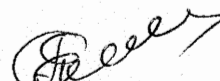
Arusha, 16 December 2003



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



¹⁰ *Prosecutor v. Bagilishema*, 95-1A-T, Decision on the Request of the Defence for an Order for Disclosure By the Prosecution of the Admissions of Guilt of Witnesses Y, Z, and AA (TC), 8 June 2000, para. 7; *Prosecutor v. Ngeze et al.*, 99-52-T, T. 4 September 2001, pp. 41-42.