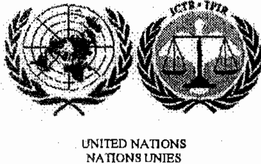

UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
(18765-18761)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

01-03-2004

18765
Ivan

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 1 March 2004

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON RECONSIDERATION OF ORDER TO REDUCE WITNESS LIST AND ON MOTION FOR CONTEMPT FOR VIOLATION OF THAT ORDER

The Office of the Prosecutor
Barbara Mulvaney
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Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

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

BEING SEIZED OF the Defence of Nsengiyumva's "Extremely Urgent Motion for an Order Requiring the Prosecutor to Specify the Sequence in Which Witnesses Will Testify", etc., filed on 15 May 2003; the Prosecution "Motion for Reconsideration of the Trial Chamber's Order of 8 April 2003", filed on 20 June 2003; and the Defence "Motion of Major Ntabakuze to Join Both Anatole Nsengiyumva's 'Extremely Urgent Motion'", etc., filed on 20 June 2003;

CONSIDERING the Prosecution "Response to Extremely Urgent Motion for an Order Requiring the Prosecutor to Specify the Sequence in Which Witnesses Will Testify", etc., filed on 20 May 2003; the Defence for Kabiligi's "Memoire en réponse à la requête du parquet", etc., filed on 4 July 2003; and the "Reply of Colonel Bagosora to: Prosecutor's Motion for Reconsideration of the Trial Chamber's Order of 8 April 2003", filed on 15 July 2003;

HEREBY DECIDES the motions.

INTRODUCTION

1. On 8 April 2003, Trial Chamber III, which was previously seized of this trial, issued an Order ("the Order") requiring the Prosecution to file a revised and final list of the witnesses it intends to call in this case, not to exceed one hundred names.[1] That Chamber found that "pursuant to Rule 73*bis* (D)...the Prosecutor is seeking to call an excessive number of witnesses to prove the same facts". In response to the Order, the Prosecution submitted a revised witness list on 30 April 2003, containing 121 names, excluding two witnesses who had already testified. The case was re-assigned to Trial Chamber I on 4 June 2003, which decided on 11 June 2003, with the consent of the parties, to continue the trial on the basis of the existing trial record and decisions rendered in the case.[2]

2. Both the Prosecution and the Defence have brought motions concerning the Order. As the subject-matter of the motions is substantially identical, they are addressed together in this decision.

SUBMISSIONS

i) Contempt

3. The Defence for Nsengiyumva argues that the 30 April 2003 witness list submitted by the Prosecution violates the Order. One hundred and twenty-one witnesses are listed, excluding two witnesses who had already testified and who were improperly omitted from the witness list. Rather than complying with the Order and subsequently making further submissions for additional witnesses under Rule 73*bis* (E), as suggested by the Chamber, the Prosecution simply protested against the reasons for the Order, and then refused to comply, saying that it was impossible. In consequence, the Prosecutor should be held in contempt. Further, the Chamber should order anew that the Prosecution reduce its witness list to one hundred or, in the alternative, strike twenty-one names from the witness list.

[1] Order for Reduction of Prosecutor's Witness List (TC), 8 April 2003.
[2] Decision on Continuation or Commencement De Novo of the Trial (TC), 11 June 2003, p. 6.

4. The Prosecution claims that it has no contempt for the Chamber, and has shown no contempt. The Prosecution was unable "to meet a numerical parameter" set forth in a "trial management direction" which could be altered by the Chamber at any time. The 30 April witness list was a "respectful submission from counsel concerning trial management directions" which might be adjusted "at any time".

(ii) Reconsideration of the Order

5. The Prosecution argues that the Chamber has power to reconsider, and should change, its previous decision because it was erroneous and has caused prejudice to the Prosecution. The Order was procedurally improper having been issued *proprio motu* and without a prior hearing, thus denying the Prosecution a fair hearing on the issue. The Chamber erred substantively for at least three reasons. First, it ignored that many witnesses on the list were intended only as substitutes, and that given the length of time since witness statements were taken, the uncertain security situation and location of witnesses, and "the inadequate travel budget and policy of not approving travel for counsel until after trial had already commenced", it was impossible to identify with precision who would testify, and which substitutes would be available. Second, the choice of one hundred witnesses is an arbitrary numerical limitation which in no way reflects the actual size of the Prosecution case, as many of those witnesses would be very brief. Third, the Chamber's view that many of the Prosecution witnesses would testify on precisely the same matters was based on a cursory and flawed review of the pre-trial brief.

6. The Defence teams filing responses to the motion argue that there was no procedural irregularity. Although the decision was issued *proprio motu*, the Prosecution had made submissions at a Status Conference after repeated and emphatic requests by the Presiding Judge that the witness list be reduced. Nor is the decision substantively wrong. Rule 73*bis* (B)(iv) permits the Chamber to order the Prosecution to submit a list of witnesses it "intends to call"; whether the final number of witnesses called ends up being less than one hundred is irrelevant to compliance with the order. Though it may be true that it is unrealistic for the Prosecution to know with absolute certainty which of its witnesses will testify, the appropriate mechanism for changing the witness list is by an application brought under Rule 73*bis* (E). Finally, the Chamber was not required to make an exhaustive inquiry into the Prosecution's pre-trial brief before exercising its discretion to limit the witness list and, accordingly, the cursory inquiry upon which its finding of duplication in the Prosecution case was based does not invalidate the Order.

DELIBERATIONS

i) Contempt

7. Rule 77 of the Rules of Procedure and Evidence provides that "The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice…." The Prosecution indirectly acknowledges that it breached the Order knowingly. In a cover-letter accompanying the 30 April witness list, the Prosecution criticized the limit of one hundred witnesses as arbitrary and failing to adequately take into account the scope of the case. It also suggested that the Order was infirm or subject to modification: "it ought to be recalled that the Chamber identified that particular numerical parameter in the absence of submissions and information from counsel, and that the Chamber is fully capable of adjusting such a trial management direction at any time, in

any direction, for any reason."[3] Whatever merit there may be in these submissions, they show that the Prosecution knew the content of the Order and chose to violate it.

8. The Prosecution implies, however, that it did not do so wilfully. In its cover-letter to the 30 April witness list, the Prosecution protested that it "cannot reduce the Witness List below the present number of 121 witnesses and still maintain the charges" against the Accused. In its response to the motion, the Prosecution submitted that it was faced with an "inability...to meet the numerical parameter". These claims are not convincing. First, the Prosecution now admits that it can present its case in less than one hundred witnesses.[4] Second, the Order is itself predicated on the Chamber's assessment that the case could indeed be presented with one hundred witnesses; the Prosecution's disagreement on that point does not constitute a true impossibility. Third, even if the Prosecution continued to genuinely believe that it would be impossible to present its case with one hundred witnesses, then it could have complied with the Order by filing its list of one hundred names, and then requested authorization for additions in accordance with Rule 73*bis* (E).[5]

9. Not every knowing and wilful violation of a court order leads to a finding of contempt. Under Rule 77, the violation must interfere with the Tribunal's administration of justice, and the Chamber must choose to exercise its discretion to hold the person in contempt. In *Prosecutor v. Furundzija*, the Prosecution had displayed a "consistent pattern of non-compliance" with orders concerning the timing of submissions and disclosures.[6] Though sharply rebuking the Prosecution for its misconduct, the Chamber refrained from finding contempt, commenting that its "powers of contempt are to be sparingly used in the most extreme of cases where there has been interference with the course and administration of justice."[7] In *Prosecutor v. Ntakirutimana*, a witness statement had apparently been disclosed by one of the Accused to an Accused in another case, in violation of a witness protection order. The Prosecution in the other case had already conceded that the statement should be disclosed under Rule 68. Under the circumstances, the Chamber was unconvinced that "the two accused persons or members of the Defence team will disregard the protection order in the future", and declined to hold them in contempt.[8] On the other hand, even a single act violating a court order has been held to be contemptuous where the consequences were irremediable, as in the case of disclosure in open session of the name of a protected witness in another case which was not inadvertent, and based on a reckless failure to inquire whether that person was protected.[9]

10. To some extent, the Prosecution has attempted to remedy its non-compliance with the order by filing a motion, albeit on 20 June 2003, requesting reconsideration of the Order. Obviously, the Prosecution should have filed that motion before 30 April 2003 rather than ignoring the Order and challenging its validity in a cover-sheet. However, in light of the

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[3] Para. 12 of the cover-letter.

[4] T. 4 December 2003, p. 16 ("We won't call any more witnesses than we absolutely have to, and we're hoping it's much less, I don't know how much less – than 100"); T. 17 December 2003, p. 17 ("...we're comfortable with the idea that we're already practically under 100...").

[5] Order, para. 5 ("If the Prosecutor wishes as any time to add any 'inactive' witnesses to its 'active' list, then she must request leave of the Chamber pursuant to Rule 73*bis* (E) to vary the list").

[6] The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution (TC), 5 June 1998, para. 2.

[7] *Ibid.* para. 11.

[8] *Ntakirutimana*, Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure Etc. (TC), 16 July 2001, para. 12.

[9] *Aleksovksi*, Decision Portant Condamnation Pour Outrage au Tribunal (TC), 11 December 1998; reversed on the basis of factual findings, *Aleksovksi*, Judgment on Appeal by Anto Nobilo Against Finding of Contempt (AC), 30 May 2001, paras. 46-54 (reversed on the basis of different factual findings).

isolated nature of this non-compliance, and the subsequent effort to place the issue properly before the Chamber, a finding of contempt is not warranted.

ii) Reconsideration of the Order

11. The Prosecution has not shown that the Order was erroneous in law or an abuse of discretion when decided. The Order was issued after extensive discussion of the question at pre-trial and status conferences, and repeated requests from the Chamber for reduction in the witness list. The discretion to limit, and order the reduction, of the number of Prosecution witnesses is expressly conferred by Rule 73*bis* (D). Limitation of the witness list does not arbitrarily truncate the length of the Prosecution case, as it is the Prosecution which has the final choice of which witnesses to call.

12. The Chamber does not see any basis for amending the Order based on changed circumstances. If anything, the Order is less burdensome now than it was on 8 April 2003. The Prosecution has now repeatedly stated that it intends to call less, and possibly "much less", than one hundred witnesses.[10] The claim that the Order must be modified is not now based on the claim that the Prosecution must present more than one hundred witnesses, but rather that it is unable to know which witnesses will be able to testify. That problem is substantially reduced as compared to 8 April 2003 when the Order was issued. More than forty-five Prosecution witnesses have been heard to date, leaving about seventy-five potential Prosecution witnesses to be heard. Accordingly, the Order would now require the Prosecution to choose fifty-five from amongst these remaining seventy-five. The Chamber is well aware of the difficulties that the Prosecution and the Registry are having ensuring the attendance of witnesses in Arusha. Significant latitude is granted under Rule 73*bis* (E) to permit alteration of a witness list, with leave of the Chamber, based on inability to obtain attendance of witnesses. Requiring the Prosecution to choose fifty-five of its remaining seventy-five potential witnesses, and make an application in respect of substitutions which are required due to inability to secure attendance, does not represent an undue burden.

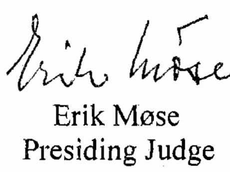
13. The witness list of no more than one hundred witnesses which is to be filed by the Prosecution in compliance with the Order must include the names of all Prosecution witnesses who have testified so far, so that the total number of witness who have been, and who will be, called does not exceed one hundred.

FOR THE ABOVE REASONS, THE CHAMBER

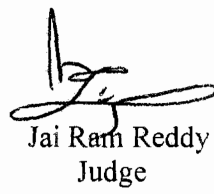
DENIES the motion requesting that the Prosecution be held in contempt for violation of the 8 April 2003 Order;

ORDERS the Prosecution to comply with that Order by filing a list of all of its witnesses, not to exceed one hundred in number, not later than 12 March 2004.

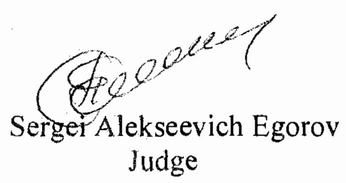
Arusha, 1 March 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

[10] *Supra* note 4.