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ICTR-00-56-T
03-11-2004
(18788-18783)

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Mwaja

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka De Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 3 November 2004

THE PROSECUTOR

v.

Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-2000-56-T

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**DECISION ON BIZIMUNGU'S MOTION FOR RECONSIDERATION
OF THE CHAMBER'S 19 MARCH 2004 DECISION ON DISCLOSURE
OF PROSECUTION MATERIALS**

The Office of the Prosecutor:

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Christopher Black for Augustin Ndindiliyimana
André Ferran for François-Xavier Nzuwonemeye
Fabien Segatwa and Didier Patry
for Innocent Sagahutu

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

SITTING as Trial Chamber II composed of Judges Asoka De Silva, Presiding, Taghrid Hikmet, and Seon Ki Park (the "Chamber"),

BEING SEIZED of the «*Requête présentée par le conseil d'Augustin Bizimungu aux fins de révision de la décision du 19 mars 2004 relative aux mesures de protections des témoins de l'accusation*», "the Motion" filed on 23 September 2004;¹

HAVING RECEIVED AND CONSIDERED THE

- i. «*Mémoire du Procureur en réponse à la requête présentée par le conseil d'Augustin Bizimungu aux fins de révision de la décision du 19 mars 2004 relative aux mesures de protection des témoins de l'accusation*» filed on 28 September 2004;²
- ii. «*Réplique au 'Mémoire du Procureur en réponse à la requête présentée par le Conseil d'Augustin Bizimungu aux fins de révisions de la décision du 19 Mars 2004 relative aux mesures de protection des témoins de l'accusation'*» filed on 8 October 2004;³

NOTING the 19 March 2004 Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, requiring that the Prosecution disclose unredacted statements to the Defence not later than twenty one (21) days before each witness is due to testify at trial (the "19 March 2004 Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 53, 66, 67, 69, 73, 75, and 90 of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES*The Defence*

1. The Defence requests the Disclosure of unredacted witness testimonies before the start of trial
2. The Defence argues that circumstances have changed since the 19 March 2004 Decision on witness protection and that unless the disclosure deadlines in that

¹ Unofficial Translation: "Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Victims and Witnesses"

² Unofficial Translation: "Prosecutors response to the Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Witnesses."

³ Unofficial Translation: "Reply to the 'Prosecutor's response to the Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Witnesses'".

Decision are extended, the court calendar which was decided on 17 September 2004 provides inadequate time for the Defence to prepare its cross-examinations.

3. Referring to Rule 66, the Defence argues that the Defence cannot conduct a competent cross-examination with only 21 days disclosure for several reasons including: the obligation of counsel to attend trial sessions five days a week; administrative delays; and the extensive nature of redactions of witness statements.
4. The Defence notes that the statements disclosed by the Prosecution in 2000 and 2001 were almost entirely redacted meaning that the documents are often useless.
5. The Defence recognizes the changes to Rule 69 (C) allowing for rolling disclosure, but interprets Article 19-- which requires "full respect for the rights of the accused and due regard for the protection of victims and witnesses"-- to mean that the rights of the Accused prevail.
6. The Defence argues that Rule 75(A) also states that witness protection must be "consistent with the rights of the accused."
7. The Defence refers to Rule 66 (A) as the governing rule on such issues, and argues that the derogation foreseen in Rule 69 (A) is reserved for 'exceptional circumstances'.
8. The Defence believes that no such circumstances have been shown to justify the blanket protection of all witnesses in this case.

Response of the Prosecution

9. On the disclosure of all witness statements in unredacted form before the start of the Trial, the Prosecution notes that Rules 66 (A) and 67 (A) are specifically subject to Rules 53 and 69.
10. The Prosecution also cites Rule 69 (A) (B)(C), and adds that in this case, the Trial Chamber has rendered two decisions related to witness protection. The Decision dated 19 March 2004 states that:

"The Prosecution may initially disclose materials to the Defence in a redacted form in order to protect names..."

"The identities and all previously redacted information pertaining to these protected witnesses be disclosed to the Defence no later than 21 days prior to the date each witness is due to testify."⁴
11. The Prosecution adds that as long as it has not been shown that the threat to witnesses has disappeared, the measures taken by the Court are incumbent on all.

⁴ *Prosecutor v. Augustin Ndindilyimana et al.*, Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses Orders, 19 March 2004, Paragraphs (i) and (j).

12. The Prosecution argues that the Defence has neither proved, nor offered to prove, that there has been a change in the security situation of victims and witnesses such that the protective measures are no longer necessary.
13. The Prosecution adds that the Defence has the same right as the Prosecution to make requests to the appropriate Chambers. It adds that the Defence has also requested protection for its witnesses.
14. The Prosecution states that the Defence has had redacted statements of all 115 witnesses for several years.
15. The Prosecution notes that on 21 September 2004, when the first witness testified in this case, the Defence had had identifying material for at least 35 days.
16. The Prosecution affirms that for those witnesses who will appear in November or December 2004, the Defence will have had the identifying materials at least three or four months in advance of the dates on which they are due to testify. The same will hold for any future sessions.

The Defence Reply to the Prosecutor's Response

17. The Defence points out that the accused Bizimungu has not requested any protective measures for its witnesses. Protective measures have only been accorded to witnesses for the defence of the Accused Nzuwomeye.
18. On 17 June 2004, the Defence received for the first time redacted testimonies of all 115 Prosecution witnesses. Therefore, the Prosecution's claim that the Defence has had these documents for several years is wrong.
19. The Defence claims that the practice of the Tribunal is to make unredacted statements available to the Defence before the start of the trial, as in *Prosecutor v Nahimana et al.*, and *Prosecutor v. Ntagerura et al.*
20. The Defence also notes that several Chambers have reconsidered their own protective measures and cites *Prosecutor v. Nyiramasuhuko et al.* and *Prosecutor v. Bagosora et al.*

HAVING DELIBERATED

21. The Chamber agrees with the Defence that a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.
22. The Chamber notes the argument of the Defence that Article 19 (1) should be interpreted to mean that the Rights of the Accused prevail over those of witnesses,

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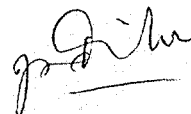
the Chamber believes it has an obligation to “strike a balance between the Right of the Defence and the demonstrated need for protective measures for witnesses.”⁵

23. It is clear that Rule 69 (C) may displace the disclosure requirements under Rule 66 (A) (ii) when the protection of victims and witnesses is at stake. In such a case, the disclosure deadline must allow for ‘adequate time for preparation of the prosecution and defence’. Balancing the interests engaged in Articles 20 and 21 must be the basis for determining what is ‘adequate’. This point is reiterated in Rule 75 (A). What is “adequate” will depend on the facts of each case.
24. Having considered the Defence submission, this Trial Chamber believes that it has not established a basis on which to consider the 19 March 2004 Decision erroneous.
25. The Chamber recalls the *Bagosora* decision on the issue of disclosure of the identities of protected witnesses stating that “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...The Chamber is anxious to ensure the highest 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”.⁶
26. The Chamber must also consider whether there has been a change in circumstances. It recognizes the validity of the Defence arguments regarding the Court calendar. At the Status Conference on 30 April 2004, the Trial Chamber estimated that trial sessions would last two to three months. The actual three month session was not fixed until the 17 September 2004 Pre-Trial Conference. It follows therefore that the Trial calendar could not have been taken into account at the time the 19 March 2004 Decision was made by the Chamber.
27. In those circumstances, the Chamber agrees that it may be difficult to prepare an adequate cross-examination with only 21 days of full disclosure when Defence counsel is expected to attend trial hearings full time in Arusha; when many previously disclosed statements are redacted; and with the potential for a range of administrative delays.
28. The Chamber therefore believes that the balance between the Rights of the Accused and the need to Protect Witnesses must be reviewed in light of the establishment of the actual Court calendar.
29. Moreover, the Chamber is persuaded by the reasoning in the *Bagosora* Decision to the effect that “speedy, focused, and predictable trial proceedings, which fully respect the rights of the Accused, while providing the maximum protection to witnesses and victims, will be served by modifying the existing witness protection”.⁷

⁵ *Musabyimana*, Decision on the Prosecutor’s Motion for protective measures for victims and witnesses, 19 February 2002, as quoted in *Military II* 19 March 2004 Decision (para. 42)

⁶ *Prosecutor v. Bagosora et al.* “Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001”, 18 July 2003.

⁷ *Ibid*, para. 24



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30. The Chamber recalls the Prosecution's assertion that the Defence had had identifying material for the first 21 witnesses approximately 35 days before the first witness testified in this case, and that the same would be true for trial sessions to come. This is a further ground to consider it reasonable to vary the deadline for disclosure of unredacted witness statements, in order to bring the legal regime into conformity with what the Prosecution indicated they have been doing in practice and what they intend to continue doing in the future.
31. The Chamber therefore decides to amend Measure C of the 19 March 2004 Decision to read that "The Prosecution must disclose to the Defence any identifying information relating to protected witnesses no later than 35 days before the start of each trial session."⁸
32. Finally, the Chamber does not exclude the possibility that among the remaining witnesses, there are cases that would constitute exceptional circumstances pursuant to article 69 (A). In such cases, the Prosecution may apply to the Chamber for special protective measures derogating from this Decision.

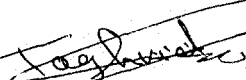
FOR THE FOREGOING REASONS, THE TRIBUNAL

GRANTS IN PART the Defence motion and amends Measure C of its 19 March 2004 Decision to read that "The Prosecution must disclose to the Defence any identifying information relating to protected witnesses no later than 35 days before the start of each trial session"; and

DENIES the Defence Motion in all other respects.

Arusha, 3 November 2004


Asoka De Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge



⁸ Paragraph 50 of 19 March 2004 Decision in *Prosecutor v. Ndindilyimana et. Al* on protective measures for witnesses