



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
03-11-2004
(18794 — 18789)

18794
smhys

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

2004 NOV - 3 A 11: 56
JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

**DECISION ON SAGAHUTU'S MOTION FOR RECONSIDERATION OF
19 MARCH 2004 DECISION ON DISCLOSURE OF PROSECUTION
MATERIALS, FOR LEAVE TO CONTACT A PROSECUTION
WITNESS, AND FOR ACCESS TO TESTIMONY OF PROTECTED
WITNESSES IN THE MILITARY I CASE**

The Office of the Prosecutor:

Ciré Aly Bâ
Alphonse Van
Moussa Sefon
Ifema Ojemeni
Segun Jegede
Abubacarr Tambadou
Faria Rekkas (Case Manager)

Counsel for the Accused:

Gilles Saint-Laurent for *Augustin Bizimungu*
Christopher Black for *Augustin Ndindiliyimana*
André Ferran for *François-Xavier Nzuwonemeye*
Fabien Segatwa and Didier Patry
for *Innocent Sagahutu*

[Signature]

18793

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 en extrême urgence présentée par le conseil d'Innocent Sagahutu aux fins de communication de pièces et pour être autorisé à entrer en contact avec un témoin de l'accusation* » filed on 15 September 2004.¹

HAVING RECEIVED AND CONSIDERED THE

- i. « *Mémoire du Procureur en réponse à la requête en extrême urgence présentée par le Conseil d'Innocent Sagahutu aux fins de communication de pièces et pour être autorisé à entrer en contact avec un témoin de l'accusation* » filed on 20 September 2004,²
- ii. « *Additif au mémoire en réponse du procureur en date du 20 Septembre 2004, faisant suite à la requête du Conseil d'Innocent Sagahutu aux fins de communication de pièces du 15 septembre 2004* », filed 23 September 2004,³
- iii. « *Duplique à la réplique du Procureur à la requête en extrême urgence aux fins de communication des pièces du procureur et de demande d'autorisation d'entrer en contact avec un témoin du Procureur* », filed on 23 September 2004.⁴

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") and in particular Rules 73bis, 75 and 90;

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 for Sagahutu stresses Rule 66 (A) which requires that the Prosecution disclose all witness statements and identities prior to the start of the trial. It also notes the decision of the Chamber granting the Prosecutor rolling disclosure up to 21 days before the date the witness is due to testify at trial. The Defence, however, asks that the Tribunal order the Prosecutor to disclose all prosecution witness statements at least 21 days before the start of the trial.
2. The Defence notes Rule 67 (A) (i) on the disclosure of the names of Prosecution witnesses. The Defence argues that the statements disclosed by the Prosecutor in 2000

¹ Unofficial Translation: "Extremely Urgent Motion for disclosure of Prosecution materials, and for leave to contact a prosecution witness"

² Unofficial Translation: "Prosecution's Response to Sagahutu's Motion"

³ Unofficial Translation: "Addition to the Prosecutor's response dated 20 September 2004 to the request from the Defence for Innocent Sagahutu for disclosure dated 15 September 2004"

⁴ Unofficial Translation: "The response of Counsel for Sagahutu to the Prosecutor's Response to the 'Extremely Urgent Motion for disclosure of Prosecution materials, and for leave to contact a prosecution witness'"

18792

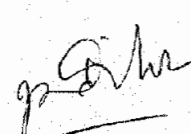
and 2001 were almost entirely redacted meaning that the documents are, for all intents and purposes, useless. The Defence thus requests the disclosure of the unredacted statements of all Prosecution witnesses.

3. The Defence requests that the Prosecution disclose all witness identities subject to Rule 69.
4. The Defence requests access to judicial files related to Prosecution Witnesses from all other jurisdictions.
5. The Defence for Sagahutu also submits that certain witnesses in the Military I Case referred to the Accused Sagahutu in their testimony. The Defence requests that all testimonies by these witnesses be disclosed to it. The Defence adds that even if the Prosecution does not use these testimonies, the Defence is entitled to use them pursuant to Rule 90 (g), and that they should therefore be disclosed prior to the start of the trial.
6. Finally, the Defence for Sagahutu requests permission to meet with Prosecution Witness DA in the presence of the Prosecutor and anyone else of the Chamber's choosing. The Defence refers to paragraph (f) of the Order of the Tribunal in its Decision dated 19 March 2004 requiring that the Defence ask for such permission in writing when "he wishes to enter into contact with one of the witnesses whose identity is known by the Defence".⁵
7. The Defence submits that the Accused knows Witness DA well, and that the witness was contacted by the Defence before the Defence learned that he would be a Prosecution witness. The Defence would like to use some of the statements made by the witness during this meeting to address the credibility of Witness DA.

Response of the Prosecution

8. 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.
9. The Prosecution also cites Rule 69 (A), (B), and (C), and adds that in this case, the Trial Chamber has rendered two decisions related to the protection of witnesses. 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.
10. With respect to the Disclosure of witness testimony mentioning Innocent Sagahutu in other trials, the Prosecution alleges that it cannot disclose trial proceedings which may contain information allowing for the identification of protected witnesses without the approval of the Chamber.
11. The Prosecutor argues that protective measures remain in force after the end of proceedings, and the new Rule 75 does not allow derogation from this Rule, as long as the conditions in paragraphs (C) and (E) have not been met.

⁵ *Prosecutor v A. Ndindiyimana et al.*, Decision of the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004. Order (f)



18791

12. The Prosecution adds that the Defence has the same right as the Prosecution to make requests to the appropriate Chambers.
13. On the Defence's request to meet with Witness DA, the Prosecution states that it asked witness DA whether he would be willing to meet with the Defence on 18 September 2004. Witness DA refused, both orally and in writing.

Addition to the Prosecution Response

14. The Prosecution states that in accordance with the Chambers' 17 September 2004 Order, it has sent to the Defence 14 transcripts as well as unredacted statements of the 21 witnesses to be heard in the first trial session.
15. The Prosecution notes that the first five witnesses have never given testimony before the Tribunal, and that their testimony is expected to last at least until 15 October 2004.
16. The Prosecutor undertook, on 23 September 2004, to send a letter that same day to the Rwandan authorities asking for judicial files related to all Prosecution witnesses.⁶

Sagahutu's Reply

17. The Defence submits that Rule 75 on measures for the Protection of Victims and Witnesses must be 'consistent with the rights of the accused'. This is why the Defence believes it is entitled to all Prosecution evidence before the start of the trial.
18. The Defence again seeks access to previous statements made by witnesses in Rwanda or before the Tribunal.

HAVING DELIBERATED

On Disclosure of Unredacted Statements Before the Start of Trial

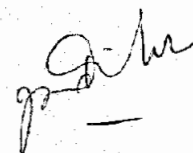
19. The Chamber notes that this issue has been addressed in the Chamber's Decision dated 3 November 2004.⁷ In that Decision, the Chamber amended its 19 March 2004 Decision, based on changed circumstances, and ordered the Prosecution to disclose unredacted statements of its witnesses no later than 35 days before the start of the trial session in which they are scheduled to testify. This similarly disposes of the same prayer in this motion.

On the Request for Statements Made by the Accused in Other Jurisdictions

20. The Chamber recalls the Prosecution's undertaking, made on 23 September 2004, to ask the Rwandan authorities for the judicial files of Prosecution witnesses. The

⁶ The Chamber has not received a copy of this letter

⁷ Decision on Bizimungu Defence Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, 2 November 2004.



18790

Chamber orders the Prosecution to inform the Chamber of developments on this issue by 12 November 2004.

On the Request to Meet with a Prosecution Witness

21. The Chamber decides that in the interests of justice it will grant the Defence permission to meet with Witness DA subject to the agreement of the witness to such a meeting
22. However, the Chamber notes the Prosecution's response in which it states that it has asked Witness DA whether he would be willing to speak to the Defence team and that he has indicated both orally, and in writing, that he is unwilling to do so.
23. In this connection, the Chamber directs the WVSS to do the following: (a) explore, as a preliminary matter, the willingness of the witness to meet with the Defence Counsel; (b) supervise the resulting meeting, where the witness is agreeable to the meeting, subject to other applicable witness protection measures; and (c) permit the attendance of a representative of the Office of the Prosecutor.

On the Request for Access to Testimony from the Military I Case

24. The Chamber notes that the Defence has not indicated in its Motion whether the witnesses in the *Bagosora* case will also be witnesses in this case, or whether that testimony might be exculpatory.
25. The Chamber observes that if the said witnesses were potential witnesses in this case, any testimony which they gave in closed session in the *Bagosora* case would be subject to disclosure obligations pursuant to Rules 66, 67, and 75(f) (ii). The same is true for any testimony that might be exculpatory, pursuant to Rule 68.
26. The present Defence Motion, however, is not founded on any of the legal considerations discussed in the preceding paragraphs. The Chamber concludes, therefore, that there is no legal basis for the Defence request as it is currently formulated, and the request is therefore denied.

FOR THE FOREGOING REASONS, THE TRIBUNAL:

Grants in part the Defence request relating to the disclosure of unredacted witness statements in accordance with the Chamber's Decision of 3 November 2004 on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision.

Orders the Prosecution to inform the Chamber by 12 November 2004 of any developments regarding its undertaking to request the judicial files of Prosecution witnesses from the Rwandan authorities.

Grants the Motion with regards to the Defence request to meet with Witness DA, in the terms indicated in paragraph 23 above.

Denies the Motion in all other respects.

padman

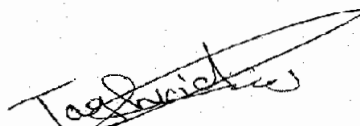
18789

Prosecutor v Ndindilyamana et al, Case No. ICTR-2000-56 -T

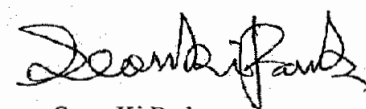
Arusha, 3 November 2004



Asoka De Silva
Presiding Judge



Taghrid Hikmet
Judge



Seon Ki Park
Judge

