International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
06-07-2005
(25134 - 25130)

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UNITED NATIONS
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**TRIAL CHAMBER I**

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

**Registrar:** Adama Dieng

**Date:** 5 July 2005



**THE PROSECUTOR**

**v.**

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

***Case No. : ICTR-98-41-T***

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# DECISION ON SUFFICIENCY OF DEFENCE WITNESS SUMMARIES

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**The Prosecution**
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

**The Defence**
Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,** 25133

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

**BEING SEIZED OF** the Prosecution "Urgent Motion Requesting Information on Second Session Defence Witnesses", filed on 2 June 2005;

**CONSIDERING** the Responses of the Defence for Ntabakuze and Nsengiyumva, filed on 10 and 13 June 2005 respectively; and the Prosecution Reply dated 13 June 2005;

**HEREBY DECIDES** the motion.

## INTRODUCTION

1. The Prosecution requests orders compelling the Defence to provide more detailed summaries of the expected evidence of its witnesses scheduled to appear during the second trial session, and fuller information about their identities. The Prosecution argues that the existing summaries are insufficiently detailed to permit reasonable investigations, and violate the Chamber's instructions, pursuant to Rule 73 *ter*, to the Defence to provide a "factual summary and not merely the subject matter on which each witness will testify".[1]

2. The Ntabakuze Defence responds that its summaries are adequately detailed and that it is endeavouring to obtain and disclose the few items of identifying information which are lacking. The level of detail that must be disclosed by the Defence does not mirror Prosecution obligations, which are substantially more onerous under the Rules.

3. The Nsengiyumva Defence states that it has provided all identifying information in its possession, and that it cannot provide information that it does not have. It also asserts that that it owes no legal obligation whatsoever to provide witness summaries, relying on excerpts of proceedings in the *Milosevic* case before the International Criminal Tribunal for Yugoslavia, and from a separate opinion in the *Tadic* Appeals Judgement. Summaries have been provided on a purely voluntary basis.[2]

## DELIBERATIONS

### *(i) Sufficiency of Defence Witness Summaries*

4. On 16 May 2005, during a status conference, the Presiding Judge announced that:

> [The Prosecution] want[s] a statement similar to paragraph 15 where you refer to the presiding judge's utterances in the *Media* case; namely, that what shall be provided is a list from the Defence providing a factual summary and not merely the subject matter on which each witness will testify. That statement is not difficult. That's established practice in this Tribunal, and this Chamber supports that. The remaining issue is exactly what flows from that, and that would lead us to a concrete assessment of the specifics of each summary. And we note that some of the summaries that you have drawn our attention to now and you have stated that they are deficient, that may not necessarily be the case, depending on how you assess the situation, but this is a case-by-case basis.

[1] T. 16 May 2005 p. 31.
[2] Nsengiyumva Response, paras. 8, 14, 19.

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> So our advice now is simply to note that you have obtained most of the relief in your motion, and when it comes to the specific – but at the same time the Chamber notes that a lot of information could now appear a bit outdated in view of subsequent developments. For instance, some of the statements have been provided since this motion was written. So we will invite you then, based on these principles that we have outlined, to come back, if need be. And we note that the Defence has stated, in particular Mr. Erlinder, that if they are deficient in any way, they will be happy to provide additional information. So we expect now, based on these directions, that the parties will be able to sort it out, and, if not, we will then deal with these matters point by point as we approach the witnesses. And a good start would be to concentrate, I think, on the witnesses that are coming in the first segment.[3]

The authority to require the Defence to provide an indication as to the expected content of its witnesses' testimony flows from Rule 73 *ter* (B)(iii)(b), which permits the Chamber to "order that the Defence ... file ... [a] list of witness the Defence intends to call with ... [a] summary of the facts on which each witness will testify". The Chamber has clearly exercised this authority by virtue of the direction quoted above, which reiterated directions given to the Defence on 14 October and 21 December 2004.[4] In response, as conceded by the Prosecution, the Defence teams have provided additional details as they have become available.

5. As the Chamber has already made clear, no general formulation can determine whether the Defence summaries are adequately detailed. Even if the Chamber were inclined to closely review each of the summaries challenged by the Prosecution, no determination on their sufficiency would be possible until the witness's actual testimony was known. The summaries cannot be evaluated in the abstract: their sufficiency can only be known in relation to actual testimony.[5] Accordingly, ordering the Defence to provide fuller details of the testimony of its witnesses is not an appropriate remedy.

6. Once testimony is elicited which the Prosecution does not believe has been mentioned in the summaries in sufficient detail, a motion can be made for adjournment of the testimony or exclusion. These are precisely the same remedies as are available to the Defence in similar circumstances.[6] The Chamber hastens to add, however, that the Prosecution's disclosure obligations in the Rules and the Statute are more detailed and specific than for the Defence. The level of information about Prosecution testimony does not necessarily provide useful guidance as to the standard of detail required in Defence witness summaries. Testimony of Defence witnesses, unlike the Prosecution witnesses, can be understood as a response to evidence that has already been presented. Nevertheless, the Chamber is mindful of the general principle, applicable to Prosecution and Defence evidence alike, that "[e]vidence whose reliability cannot adequately be tested ... cannot have probative value".[7]

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[3] T. 16 May 2005 pp. 31-32.

[4] T. 14 October 2004 p. 15; T. 21 December 2004 pp. 25-26.

[5] The sufficiency of Prosecution disclosure is evaluated in relation to the testimony as actually given by the witnesses. *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, paras. 16-23; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003.

[6] *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, paras. 24-26; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003; *Nyiramasuhuko et al.*, T. 24 February 2003 pp. 5-6; *Nyiramasuhuko et al.*, T. 28 May 2002 pp. 106-07; *Nahimana et al.*, T. 1 March 2001 pp. 35-38. Although, as discussed below, the disclosure obligations on the Prosecution are not the same as those incumbent on the Defence, the same methodology for determining sufficiency must apply in both cases.

[7] *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, para. 8. The purpose of Defence witness summaries largely coincides with the purpose of Prosecution disclosure, even if the extent of the obligations may be different: *Nyiramasuhuko et al.*, T. 23 February 2005 ("The importance of timely disclosure, be it in the form of a summary, a will-say statement, is to give the other party time and opportunity to prepare their case. When it is not made in a timely manner, prejudice may certainly arise or could arise in the preparation of the other party's case"); *Galic*, T. 13177 ("Perhaps this is not the very moment to discuss these kind of matters. I would like as a matter of fact, to sit the parties together in respect of the first witnesses,

The Chamber will be guided by these principles in considering objections to Defence testimony on the basis of the insufficiency of their summaries.

7. The authorities relied upon by the Nsengiyumva Defence to establish that it owes no duty of disclosure whatsoever are inapposite. The proceedings in *Milosevic* show only that the Trial Chamber decided not to order more detailed summaries than had already been provided by the Defence. The comments cited do not assist the Chamber in determining what particular standard of detail is adequate, much less how that standard should be applied.[8] The opinions expressed in the *Tadic* Appeals judgement concern the power of the Trial Chamber to order disclosure of existing statements of Defence witnesses.[9] This question is quite distinct from the level of detail which must be provided by the Defence once the Chamber has exercised its discretion to require summaries of Defence witness testimony. This Chamber expects the Defence to continue to provide reasonably informative witness summaries so as to avoid the prospect of postponement or even exclusion of the testimony.

*(ii) Defence Witness Identities*

8. The Chamber has ruled pursuant to Rule 73 *ter* (B)(iii)(a) that personal information of each Defence witness must be provided in the same format as had been provided by the Prosecution in respect of its witnesses.[10] The information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence. Exigent witness protection measures are in place to satisfy those concerns. The Defence cannot rely upon expressions of insecurity by witnesses as a basis for refusing to provide witness identifying information.

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because we have to develop a practice which is -- which enables the Prosecution to cross-examine the witness effectively and not to be with empty hands and be taken by surprise").

[8] T. 32124. Furthermore, the Chamber notes that the Prosecution's argument was based on a significantly narrower footing (the need for the Chamber to manage the presentation of the case) than has been argued by the Prosecution here (its need to conduct reasonable investigations in order to meaningfully test the evidence).

[9] *Tadic*, Judgement (AC), 15 July 1999, para. 306.

[10] T. 21 April 2005 p. 2 ([Prosecution Counsel]: "So the key information that potentially disrupts the cross-examinations, leads to the identification, is with respect to parentage, location, and the location specifically with respect to birth and location in Rwanda in 1994. We are not so concerned about location at the present time; merely a country of origin is satisfactory with respect to that. We don't need addresses or postal codes or phone numbers or anything of that sort. But with respect to 1994 and birth, what we really need is to get information down to at least the *secteur* level, the *préfecture*, *commune*, and *secteur*. And the purpose of that is simply to make sure that we're dealing with the same person. You heard me say this morning that when it came to this other fellow on the spelling list, there were some seven different persons that we know of that that could potentially have been. And this is common. There's a lot of similarity in names, and we need to have that kind of information to determine it. MR. PRESIDENT: Yes. Any problem with this? Should be no problem. So we just decide now that there is a need to provide this to the Prosecution. T. May 2005 p. 30 ([The Presiding Judge reading Prosecution requests]: "Roman II: 'Provide comprehensive witness personal information for all of these witnesses by following the standard for attached'. You have the Chamber's support there as well").

**FOR THE ABOVE REASONS, THE CHAMBER** 25130

**GRANTS** the Prosecution request, insofar as witness identifying information provided by the Defence is deficient;

**DENIES** the motion in all other respects.

Arusha, 5 July 2005

| Erik Møse | Jai Ram Reddy | Sergei Alekseevich Egorov |
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| Presiding Judge | Judge | Judge |

[Seal of the Tribunal]