



**ICTR-98-41 T**  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
**24-09-2004**  
**(21866 - 21863)**

**21866**  
**Ivan**

OR: ENG

**TRIAL CHAMBER I**

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

**Registrar:** Adama Dieng

**Date:** 24 September 2004

**THE PROSECUTOR**

v.

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

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

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2004 SEP 24 P 12:31  
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**DECISION ON DISCLOSURE OF CONFIDENTIAL MATERIAL REQUESTED BY  
DEFENCE FOR NTAHOBALI**

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21865

**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 a motion by the Defence for Ntahobali, an Accused in the case of *Prosecutor v. Nyiramasuhuko*, for access to confidential material arising from the testimony of Witnesses A and BY, filed on 9 September 2004;

**HAVING CONSIDERED** the Response filed by the Defence for Bagosora on 15 September 2004; and the Response filed by the Prosecution on 20 September 2004;

**HEREBY DECIDES** the request.

**SUBMISSIONS**

1. The Defence for Ntahobali, an Accused in the case of *Prosecutor v. Nyiramasuhuko et al.*, requests that it be given access to the closed session testimony and prior statements, in unredacted form, of Witnesses A and BY. It contends that Witnesses A and BY testified at length about the *Interahamwe* in Rwanda, and in Butare prefecture in particular. This testimony could be useful and necessary to the Defence of the Accused, who is alleged to have been a leader, or member, of the *Interahamwe* in Butare. In particular, the Defence indicates that it wishes to review the testimony and statements in order to prepare for the cross-examination of a Prosecution expert witness, André Guichaoua, scheduled to begin on or around 27 September 2004. Relying on caselaw from the International Criminal Tribunal for the former Yugoslavia, the Defence argues that it has a right, under Article 20 of the Statute, to confidential material in other proceedings which may be of assistance to the defence of the Accused.

2. The Prosecution does not oppose the request. It concedes that it has an obligation to disclose the material requested under Rule 66 (B), and offers to provide copies of the closed session transcripts of the witnesses' testimony, and of their unredacted statements, provided that the statements are not copied “to parties outside of this request”, and that the statements are returned to the Prosecution at the end of the proceedings.

**DELIBERATIONS**

3. The designation and control of protected witness information in the present case is governed by the witness protection order issued by Trial Chamber III, dated 29 November 2001.<sup>1</sup> A subsequent witness protection decision in respect of Witnesses A and BY specifically ordered that “[i]nformation and documents disclosed by the Prosecution under this order ... shall not be disclosed to any person, including any Accused in any other case or member of their Defence team, who is not an officially designated member of a Defence team, or an Accused, in this case”.<sup>2</sup>

4. The Defence correctly notes that witness protection orders from one proceeding are routinely modified to permit disclosure of confidential statements to parties in another proceeding where a protected witness from the first proceeding is scheduled to testify in the

<sup>1</sup> *Bagosora et al.*, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001.

<sup>2</sup> *Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003, p. 5.

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second proceeding. Such disclosure is required by Rule 66 (A)(ii). A recent amendment the Rules of Procedure and Evidence, Rule 75 (F), was intended to create a mechanism for the routine disclosure of confidential statements, without the need for individualized applications to the Chambers.<sup>3</sup> In relevant part, it reads:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

...

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

5. Rule 75 (F)(ii) applies to "any disclosure obligation under the Rules". Accordingly, the Chamber is of the view that if the Prosecution is under a disclosure obligation in respect of these materials, then it has a responsibility to disclose the material notwithstanding the existence of protective measures. The party in receipt of the materials is then bound *mutatis mutandis* by the terms of the applicable protective measures in accordance with the provisions of Rule 75 (F).

6. The Prosecution here concedes that it has an obligation to disclose the material requested, under Rule 66 (B). Accordingly, Rule 75 (F) is applicable and the Prosecution is obliged to fulfil its disclosure obligations notwithstanding the applicable protective orders. Upon such disclosure, the party in the second proceeding is automatically bound *mutatis mutandis* by the protective orders. The authorization to make such disclosure, and the imposition of the witness protection obligations on the party in receipt of the materials, is automatic.

7. The Chamber sees no need in the present case to review the Prosecution's concession that an obligation does exist under Rule 66 (B) in relation to the materials sought by the Defence for Ntahobali. It notes, however, that the Appeals Chamber of the ICTY has held that "a party is always entitled to seek material from any source to assist in the preparation of its case if the documents sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown".<sup>4</sup> Access to confidential

<sup>3</sup> See *Nahimana et al.*, Decision on Disclosure of Transcripts and Exhibits of Witness X (TC), 3 June 2004, para. 4.

<sup>4</sup> *Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case Prosecutor v. Tihomir Blaškić (AC), 24 January

material in one case has been granted to a party in a second case where the party has shown that there is a geographic, temporal and substantive overlap between the cases, and where the material requested is likely to be of material assistance to the applicant.<sup>5</sup>

8. The Prosecution requests that two conditions be imposed on the Defence for disclosure of the confidential material: that the statements not be copied or distributed to parties outside of this request; and that the statements be returned to the Prosecution at the end of the proceedings. However, such measures are already implicit in the provisions of the applicable witness protection order and are, therefore, unnecessary.

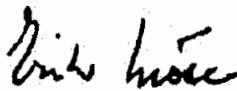
9. The Chamber concludes that the Prosecution may, in accordance with the terms of Rule 75 (F), disclose the material requested by the Defence for Ntahobali, which is then automatically bound *mutatis mutandis* by the witness protection orders applicable in this case, namely, those of 29 November 2001 and 3 October 2003, cited herein.

10. As explained above, this result follows directly from Rule 75 (F) and does not, strictly speaking, require any decision by the Chamber. In view of the parties' submissions, however, the Chamber makes an explicit declaration.

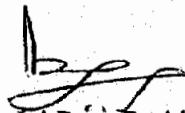
**FOR THE ABOVE REASONS, THE CHAMBER**

**DECLARES** that the Prosecution may disclose, pursuant to Rule 75 (F), the material requested by the Defence for Ntahobali.

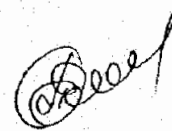
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Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



2003, p. 4. See *Kordic*, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordic and Cerkez Case* (AC), 19 July 2002.

<sup>5</sup> *Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić* (AC), 24 January 2003, p. 4.