



UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

29-07-2005

(25228 - 25224)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 29 July 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL RECORDS DIVISION
ICTR
2005 JUL 29 P 1:11
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**CERTIFICATION OF APPEAL CONCERNING ACCESS TO PROTECTED
DEFENCE WITNESS INFORMATION**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

blm

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

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 "Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decision on Motion to Harmonize and Amend Witness Protection Orders Dated 1 June 2005", filed on 9 June 2005;

CONSIDERING the Responses of the Defence for Kabiligi and for Ntabakuze, filed on 15 and 16 June 2005, respectively;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution seeks leave to appeal the Chamber's decision not to modify the Defence witness protection orders insofar as they require "[t]he Prosecution team in this case [to] keep confidential to itself all information identifying any witness".¹ The Prosecution had proposed that the "Prosecution team" be replaced by the words "the Prosecution", thus permitting dissemination of the identity, or information disclosing the identity, of protected Defence witnesses to any person working for the Office of the Prosecutor.

DELIBERATIONS

(i) *Standard for Granting Certification of an Interlocutory Appeal*

2. Leave to appeal may be certified under Rule 73 (B) of the Rules of Procedure and Evidence ("the Rules") where a decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". Interlocutory appeals under Rule 73 (B) have been described as exceptional; on the other hand, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.²

¹ *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 3 June 2005 ("the Modification Decision"). Three of the Defence witness protection orders are, in substance, identical: *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. The Nsengiyumva witness protection decision was rendered long before the joinder of the four accused in a single trial: *Nsengiyumva*, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 5 November 1997. The latter order does not make any reference to, or distinction between, the Prosecution or the "Prosecution team in this case". The Modification Decision declared that the Ntabakuze witness protection order would henceforth apply to the Nsengiyumva Defence and its witnesses.

² *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004; *Nyiramasuhuko et al.*, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15 ("It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73(B) must be exceptional indeed"); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal, etc., (TC), 20 May 2004, para. 16 ("The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B)"); *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4 ("Immediate resolution by the Appeals Chamber will ensure that a substantial category

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(ii) *Effect of the Decision on Other Proceedings, and Reciprocal Effect on this Trial*

3. As a preliminary matter, the Chamber observes that Rule 73 (B) requires the Chamber to assess the significance of the decision in relation to "the proceedings" and "the trial". This would appear to refer to the proceedings and the outcome of the trial in the case in which the impugned decision was made. The arguments advanced by the Prosecution, summarized below, primarily concern the impact of the present decision on other trials and other accused persons – in particular, the Prosecution's ability to disclose exculpatory information to other accused, in accordance with its obligations under Rule 68 of the Rules. The Defence argues that these effects are irrelevant under Rule 73 (B).

4. The Chamber accepts that the effect of the present decision on other trials, and the reciprocal effect of a similar holding by other Trial Chambers on this trial, may be considered in determining whether the criteria in Rule 73 (B) are met. If the interpretation in the Modification Decision is adopted by other Chambers, then the effects described by the Prosecution are equally significant for the present trial. In this sense, the decision does affect the "the proceedings" and "the trial" in this case, albeit indirectly. If such reciprocal effects were ignored, then this would lead to the unreasonable conclusion that important decisions would be immunized from interlocutory appeal as long as their immediate effect was felt only on other trials, even if all Trial Chambers had adopted precisely the same approach and were, therefore, mutually affected by the same approach.

(iii) *Fair and Expeditious Conduct of Proceedings or Outcome of the Trial*

5. The first requirement for certification of an appeal under Rule 73 (B) is that the decision "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial". The Prosecution argues that restricting access to witness identities to "the Prosecution team in this case" prevents this trial team from sharing information which may suggest the innocence or mitigate the guilt of an accused in another case. This is contrary to Rule 68, which is fundamental to the fairness of the proceedings. The Modification Decision is also incompatible with Rule 75 (F), which is designed precisely to permit the Prosecution to comply with its disclosure obligations to Defence teams in other trials. The restriction interferes with the Prosecutor's mandate to investigate and prosecute other accused, and will impair the Prosecution's ability to effectively cross-examine witnesses in other cases. The Prosecution employees act under the authority of the Prosecutor, as part of a single entity. Furthermore, no legitimate witness protection purpose is served: the Prosecution, as with the Registry, should be treated as capable of ensuring that witness identities are kept secret.

6. The Chamber observes that the effect of the decision for which certification is sought depends on two factors: the scope of the information which is restricted; and the effect of that restriction on the Prosecution's ability to identify evidence which may be relevant to, or exculpatory of, accused in other trials before the Tribunal. The Modification Decision confirmed the restriction in the witness protection orders that "information identifying any [protected] witness" must be kept confidential by "the Prosecution team in this case". As is customary in witness protection orders, the kind of information which could identify a

of potential evidence is being correctly evaluated under the Rules"); *Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 11 March 2003, para. 4 ("The admissibility of pre-1994 events is a question which ... has a bearing on the nature of the case which the Defence must confront; the range of evidence which the Chamber should hear; and the scope of evidence relevant to the crimes charged. Further, the Chamber's authority to ensure focused proceedings in the context of criminal charges of broad scope will be materially advanced by an immediate ruling on this addition pre-1994 event").

witness is not further defined. Other operative paragraphs refer to the confidential information as “[t]he names, addresses, whereabouts, and other identifying information concerning the protected witnesses”.

7. The vast majority of testimony of protected witnesses is given before the Tribunal in open session and is, therefore, accessible to anyone in the Office of the Prosecutor. When testimony is heard in closed session, the Chamber’s witness protection orders do not necessarily prevent Prosecution Counsel in other cases from being informed of material that may be exculpatory, provided that the identity of the witness is not revealed. For instance, Prosecution staff in supervisory roles may simultaneously be designated as members of multiple trial teams and assist in identifying evidence which is exculpatory.³ The burden caused by the Modification Decision is that a party must make an application to the Chamber showing reasonable grounds for disclosure, rather than being automatically entitled to the identities of protected Defence witnesses.⁴

8. The Chamber acknowledges that denying automatic access to protected information by all employees of the Office of the Prosecutor may make compliance with Rule 68, and sharing of evidence relevant to other trials, somewhat more burdensome. Extra effort will be required by trial teams who wish to exchange salient information without disclosing protected witness identities. Though the Chamber does not believe that this burden conflicts with Rule 68 or the mandate of the Prosecutor, important interests are affected. The Appeals Chamber has stated that “[t]he disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal”, and has described the obligation as equal in significance to the Prosecution’s obligation to prosecute.⁵ Consequently, the Chamber accepts that the restriction “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings”.

(iv) *Would Immediate Resolution Advance the Proceedings?*

9. The Chamber must next consider whether “immediate resolution by the Appeals Chamber may materially advance the proceedings”. The Prosecution submits that the issues raised by the present certification request are of such importance that they cannot await the ultimate result of the present trial. Similar restrictive language in other witness protection orders has not been subject to the interpretation it has received in the Modification Decision, and the issues are important to the operations of all of the Trial Chambers and of the Appeals Chamber itself.

10. The Chamber has broad discretion under Article 21 of the Statute and Rules 69 and 75 to fashion effective and fair witness protection measures. The Chamber must exercise its power in accordance with the rights of the accused. Allowing the Prosecution as a whole to have access to protected Defence witness information in this case could have profound witness protection implications. Under Rule 75 (F), “protective measures ... shall not prevent

³ This is explicitly recognized in the decision at para. 7 of the Modification Decision: “[t]he Prosecution may designate anyone, including support staff or senior management, who is actively and directly engaged in work pertaining to this trial”.

⁴ The Chamber need not here determine whether Rule 68 obliges the Prosecution to make the application. Material which is “reasonably accessible to the Defence” may “arguably” not be subject to any disclosure obligation under Rule 68, according to the Appeals Chamber. *Blaskic*, Judgement (AC), 29 July 2004, para. 296. Furthermore, there is no need to decide whether the Defence is equally well-placed to make such an application on the basis of access to public transcripts or other information disclosed by the Prosecution. One such application was made by a Defence team in the present case, on the basis of disclosure of a redacted witness statement: *Bagosora et al.*, Decision for Disclosure Under Rule 68 (TC), 1 March 2004.

⁵ *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Kordic and Cerkez*, Judgement (AC), 17 December 2004 para. 183.

the Prosecutor from discharging any disclosure obligation under the Rules". If Defence witness identities in this case were disseminated to all Prosecution trial teams, then those identities could, under Rule 75 (F), be disclosed to Defence teams in other cases without any application to this Trial Chamber. The Defence argues that such automatic disclosure could lead to wide distribution of the witness's identity to other accused and, in turn, deter the appearance of Defence witnesses.

11. The Chamber is of the view that the contested part of the Modification Decision raises important questions of principle, including the role of the Prosecution, the need for effective and meaningful witness protection measures, and the necessity to preserve the flow of information that might concern the accused. An interlocutory appeal will ensure that proper procedures are followed in respect of this important and sensitive category of information. Procedures which are subsequently found to be improper could give grounds for appeal at the conclusion of this trial. The legal questions involved affect the proper conduct of every trial before the Tribunal, and the relationship of proceedings to one another. Consequently, the Chamber accepts that an interlocutory resolution of this question "may materially advance the proceedings".

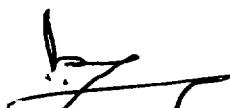
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS certification of an interlocutory appeal under Rule 73 (B) from that part of the Chamber's "Decision on Motion to Harmonize and Amend Witness Protection Orders", dated 1 June 2005, which denies the Prosecution motion to modify the Defence witness protection orders so as to permit the dissemination of protected witness information to any person working for the Office of the Prosecutor.

Arusha, 29 July 2005



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

