



ICTR-98-41-T
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
02-12-2005
(25956-25954)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 2 December 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2005 DEC -2 A 11: 11
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DECISION AMENDING DEFENCE WITNESS PROTECTION ORDERS

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

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

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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 Appeals Chamber Decision on Interlocutory Appeals of Decision on Witness Protection Orders, filed on 6 October 2005, remitting an issue to this Chamber for further consideration;

CONSIDERING the oral submissions of the parties on 1 November 2005 ; and the Joint Defence Brief, filed on 2 November 2005;

HEREBY RENDERS its decision.

1. By its decision of 1 June 2005, this Trial Chamber affirmed the wording of its witness protection orders to the effect that automatic access to protected Defence witness information should be limited to members of “the Prosecution team in this case”.¹ Leave to appeal that decision was granted on 29 July 2005, and on 6 October 2005, the Appeals Chamber held that the restriction contradicts the Prosecutor’s obligation to disclose exculpatory material to accused in other trials, pursuant to Rule 68 of the Rules of Procedure and Evidence (“the Rules”), and that it interfered with the Prosecutor’s discretion to delegate to his Office as “a whole, undivided unit”.² The matter was remitted to this Trial Chamber for “further consideration consistent with this Decision”.³

2. Paragraph 7 of the witness protection orders applicable for all Defence witnesses presently reads:

The Prosecution team in this case shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information.⁴

Paragraph 8 requires the Prosecution to designate “all persons working on the Prosecution team in this case who will have access to any identifying information concerning any protected witness”, and to attest that any confidential materials have been remitted by persons leaving the team.

3. The Defence suggests that paragraph 7 need be modified only by adding the words “except in so far as it is necessary to disclose such information to such personnel of the Office of the Prosecution who have a genuine need to know such information in order to discharge the Prosecutor’s disclosure obligations under the Rules of Procedure and Evidence”. The Defence also wishes to retain paragraph 8, which would henceforth be applicable to all persons “working on the Prosecution team in this case or others within the

¹ *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders and to Permit Investigations (TC), 1 June 2005.

² *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005; *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005 (“Appeals Decision”), paras. 44-46.

³ *Id.* para. 47.

⁴ *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. By virtue of the Chamber’s 1 June 2005 *Decision on Motion to Harmonize and Amend Witness Protection Orders*, the Nsengiyumva witness protection decision was superseded, and replaced by the order applicable to Ntabakuze witnesses.

office of the Prosecution who will have access to any identifying information".⁵ The Prosecution considers paragraph 8 to be redundant, in light of the Appeals Chamber decision.

4. The Appeals Chamber decision specifically holds that "the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations".⁶ The Appeals Chamber reached this conclusion notwithstanding the Trial Chamber's view that its decision would not preclude sharing the content of potentially exculpatory witness testimony with other trial teams, and that its only practical consequence was that specific applications would have to be brought before this Trial Chamber for disclosure of the identities of the witnesses in question.⁷ Against this background, the Appeals Chamber decision must be taken to mean that the Prosecutor is endowed by the Rules with an unfettered discretion to give anyone within the Office of the Prosecutor access to any confidential information to which he is entitled to have access. Witness protection orders which purport to constrain or qualify the exercise of this unfettered discretion are, accordingly, contrary to the Rules.

5. The present restriction to the "Prosecution team in this case" undoubtedly violates the Appeals Chamber's guidance.⁸ Even an exception for those within the Office of the Prosecutor "who have a genuine need to know such information", as proposed by the Defence, would represent an impermissible incursion on the Prosecutor's power to treat his office as "a whole, undivided unit". It is now up to the Prosecutor, not the Chamber, to determine the modalities for sharing information within his Office. Similarly, there is no scope for the continued application of paragraph 8, requiring the Prosecution to designate all persons with access to confidential information. The Prosecutor is, of course, bound to ensure that confidential information is not disclosed by his Office to other persons; but the mechanism to prevent such disclosure rests within his sole discretion.

FOR THE ABOVE REASONS, THE CHAMBER

DELETES the words "team in this case" from paragraph 7 of the Defence witness protection orders;

DELETES paragraph 8 of the Defence witness protection orders.

Arusha, 2 December 2005



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

⁵ Joint Defence Brief, 2 November 2005, para. 8.

⁶ Appeals Decision, para. 43.

⁷ *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 7 ("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").

⁸ See e.g. *Rwamakuba*, Decision on Prosecution Motion for Variation, Or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses (TC), 2 November 2005 (where, based on the Appeals Chamber decision, the Trial Chamber *proprio motu* removed the words "team in this case").