

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR - 98-41-T
16-05-2006
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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 16 May 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 MAY 16 A.D. 15
ICTR
NATIONS UNIES

**DECISION ON ZIGIRANYIRAZO MOTION FOR DISCLOSURE OF CLOSED
SESSION TESTIMONY OF DM-190**

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 Getto
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 “Motion Requesting Closed Session Transcripts and Exhibits under Seal with Respect to Protected Witness DM-190”, filed by the Zigiranyirazo Defence on 11 April 2006;

CONSIDERING the Prosecution Response, filed on 19 April 2006; and the Defence Reply, filed on 21 April 2006;

HEREBY DECIDES the motion

INTRODUCTION

1. The Defence of Protais Zigiranyirazo, currently being tried before Trial Chamber III, requests disclosure of the closed session transcripts of, and the sealed exhibits associated with, the testimony of Witness DM-190, who appeared as a Defence witness in the *Bagosora et al.* trial on 3 and 4 May 2005. The Defence avers that it has met with Witness DM-190 on numerous occasions, that he is willing to testify, and that he is likely to be called.¹ The closed session transcripts, it is said, will assist the Defence in deciding whether to call the witness.

2. The Prosecution opposes the motion, arguing that the Defence has not shown the relevance of the material to the trial of the Accused Zigiranyirazo.

DELIBERATIONS

3. The Zigiranyirazo Defence has correctly applied to this Trial Chamber seeking variation of the witness protection orders applicable to the closed session testimony of Witness DM-190 in the trial of *Bagosora et al.* Rule 75 (G) of the Rules of Procedure and Evidence (“the Rules”) provides that a party to other proceedings before this Tribunal must apply for variation of witness protection measures to “any Chamber, however constituted, remaining seised of the first proceedings”. Accordingly, whether the closed session transcripts and related exhibits of this trial may be released to the Zigiranyirazo Defence is properly a matter for this Trial Chamber.²

4. Article 19 of the Statute prescribes that hearings of the Tribunal shall be public unless otherwise ordered in accordance with the Rules. Acting under Article 21 of the

¹ Motion, para. 4; Reply, paras. 4-5.

² The Chamber has an inherent power to reconsider and modify its own decisions. *Bagosora et al.*, Decision on Prosecutor’s Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E)” (TC), 15 June 2004, para. 7 (“[A]lthough the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions”). This inherent power has been codified in respect of witness protection orders, in particular, by virtue of Rules 75 (G), (H) and (I).

Statute and Rule 75 of the Rules, this Chamber issued a witness protection order for the benefit of Ntabakuze witnesses which, among other things, authorizes non-disclosure to the public of any information which could be used to identify them.³ The purpose of placing exhibits under seal and hearing testimony in closed session is to conceal the identity of the protected witness from the public at large.

5. The Zigiranyirazo Defence submits that the witness has disclosed that he testified on behalf of the Accused Ntabakuze. Accordingly, no witness protection purpose would be served by denying the Zigiranyirazo Defence access to the Tribunal's records of the witness's testimony. Such disclosure also enhances trial fairness. The Appeals Chamber has held that any person within the Office of the Prosecutor may be designated to have access to protected information in any case before this Tribunal.⁴ Denying the same access to the Defence in respect a witness who has revealed his status would be unfair.⁵

³ *Bagosora et al.*, Decision on Ntabakuze Motion for Protective Measures of Witnesses (TC), 21 September 2005 ("Defence Witness Protection Order"), para. 2. The order was subsequently amended in respects not material to the present application by: *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005; *Bagosora et al.*, Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.

⁴ *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46.

⁵ Requests in similar circumstances have been routinely granted on numerous occasions: *Rwamakuba*, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13 (TC), 24 February 2006, para. 5; *Bagosora et al.*, Decision on Disclosure of Confidential Material Requested By Defence for Ntahobali (TC), 24 September 2004; *Nahimana et al.*, Decision on Disclosure of Transcripts and Exhibits of Witness X (TC), 3 June 2004; *Nyiramasuhuko et al.*, Decision on Aloys Simba's Motion for Disclosure of Closed Session Transcripts and Unredacted Statements of Witness FAI in the Nyiramasuhuko et al. Trial (TC), 27 May 2004; *Bagosora et al.*, Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003.

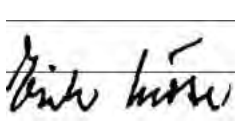
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witness DM-190 to the Zigiranyirazo Defence;

DECLARES that the Zigiranyirazo Defence, including the Accused, are bound by the terms of the Ntabakuze Defence Witness Protection Order in respect of Witness DM-190.

Arusha, 16 May 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

