

ICTR-98-41-T
19-05-2006
(27458-27455)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

27458

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 19 May 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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**DECISION ON NZIRORERA REQUEST FOR ACCESS
TO PROTECTED MATERIAL**

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
Gershon Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the “Motion for Disclosure of Closed Session Transcripts and Exhibits Under Seal for Certain Defence Witnesses”, filed by the Defence for Nzirorera on 2 May 2006;

HEREBY DECIDES the motion.

1. Joseph Nzirorera, an Accused in the trial of *The Prosecutor v. Karemera et al.*, requests disclosure pursuant to Rule 75 (G)(i) of the closed session transcripts and exhibits filed under seal in respect of seven Defence witnesses heard in the present case: BDR-1, LIG-1, NR-1, LM-1, BZ-1, LK-2 and YD-1. These witnesses are said to have been called to rebut the testimony of Prosecution Witnesses ZF and XBM, both of whom are also about to testify for the Prosecution in the *Karemera et al.* trial.¹

2. Confidential *inter partes* material may be disclosed to a party in another case provided that the applicant demonstrates that it “is likely to assist that applicant’s case materially, or [...] there is a good chance that it would.” This standard can be met by showing that there is a factual nexus between the two cases.²

3. Nzirorera submits that he wishes to confront Witnesses ZF and XBM with contradictory testimony offered by the seven Defence witnesses in this case, and that he needs to know their identities and the content of their closed session testimony for this purpose. The Chamber accepts that there is a good chance that this information would materially assist the Defence. Moreover, disclosure would place the Defence on an even footing with the Prosecution, which under an Appeals Chamber decision of October last year, ~~has access to this material~~ for the purpose of discharging its obligation to identify and disclose exculpatory information which might be heard in other trials.³

¹ The first four are said to be relevant to the testimony of Witness ZF, whereas the last three are germane to Witness XBM.

² *Blagojević and Jokić*, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 4; *Prosecutor v. Galić*, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3 (with further references).

³ *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46. Parity of access is an argument for disclosure: *Prosecutor v. Blagojević and Jokić*, Decision on Motions for Access to Confidential Materials (AC), 16 November 2005, para.11 (“The Prosecution has access to those filings, and given Mr. Nikolić’s demonstration of the nexus between the two cases, the principle of equality of arms supports giving Mr. Nikolic a similar chance to understand the proceedings and evidence in the Blagojević and Jokić case and evaluate their relevance to his own case”); *Bagosora et al.*, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190 (TC), 16 May 2006, para. 5. The applicant has not here argued that the requested testimony is exculpatory. If that were the case, as suggested by the Appeals Chamber, the information would be automatically disclosable under Rule 75 (F). *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-45. In fact, access by the

4. Disclosure orders of this kind routinely require that the party in receipt of the confidential material shall be bound, *mutatis mutandis*, by the applicable witness protection orders.⁴ The Chamber is concerned, however, that those conditions may not be sufficient in the present circumstances. The record does not show whether any particular sensitivities or witness protection interests might be engaged by broader disclosure of these witnesses' identities. The present case is distinguishable in that respect from two recent disclosure decisions, in which it was apparent that the witnesses in question had already revealed their participation as protected witnesses in the first proceedings to Defence counsel in the second proceedings.⁵

5. In similar circumstances, the Appeals Chamber has additionally required that the party in receipt of the confidential material:

shall not, without express leave of the Appeals Chamber based on a finding that it has been sufficiently demonstrated that third-party disclosure is necessary for the preparation of the defence of the Applicant:

- (a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- (b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or
- (c) contact any witness whose identity was subject to protective measures.⁶

Counsel may use the closed session testimony of the seven Defence witnesses in order to elicit responses to the substantive propositions therein, but may not disclose their identity, or information which likely would do so, to the Prosecution witnesses. The contrary would mean that the identity of a protected witness could be revealed to any other protected witness, a practice which would seriously undermine witness protection.

Prosecution team in *Karemera et al.* to protected Defence witness information in the *Bagosora et al.* case enables it to comply with its obligations under Rule 68 to disclose exculpatory material. This is not to suggest that the material actually is exculpatory, but simply that the record does not show whether this more direct avenue of disclosure has been pursued.

⁴ See e.g. *Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003, p. 3.

⁵ *Rwamakuba*, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Witness 3/13 (TC), para. 5 (witness already scheduled to appear as a protected witness in the second proceedings); *Bagosora et al.*, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190 (TC), 16 May 2006, para. 5 (witness had met with Defence counsel in second proceedings and expressed willingness to testify as a protected witness).

⁶ *Blagojević and Jokić*, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 9.

6. The Chamber authorizes the other Accused in the *Karemera et al.* trial to have the same access to this material, on the same conditions.

FOR THE ABOVE REASONS, THE CHAMBER

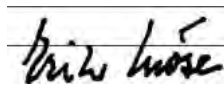
GRANTS the motion;

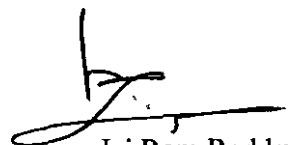
DECLARES that the Nzirorera Defence and the Accused personally, and any other Accused and Defence team, shall be bound *mutatis mutandis* by the terms of the applicable witness protection orders upon receipt of the confidential material;⁷

ORDERS that in addition to the existing witness protection measures, the party in receipt of material under this order shall not, without express leave of this Chamber based on a finding that it has been sufficiently demonstrated that third-party disclosure is necessary for the preparation of the defence of the Applicant:

- (a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- (b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or
- (c) contact any witness whose identity was subject to protective measures.

Arusha. 19 May 2006


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁷ 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 Ntabakuze order was declared applicable to all Nsengiyumva witnesses by virtue of: *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005. The orders were modified again, but not in any manner relevant to the present application, by *Bagosora et al.*, Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.