



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-7
14-07-2006
(29000-28995)

29000

S. Muna

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding

Registrar: Adama Dieng

Date: 14 July 2006

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR
v.
FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE

Case No. ICTR-99-52-T

DECISION ON NSENGIYUMVA REQUEST
FOR ACCESS TO PROTECTED MATERIAL

The Prosecution (*Bagosora et al.*)

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence (*Bagosora et al.*)

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 Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

BEING SEIZED of the “Extremely Urgent Confidential Motion for Disclosure of Closed Session Testimony of Witnesses RM-14 & Unredacted Statements and Closed Session Testimony of AHB in *Prosecutor v. Nahimana Ferdinand et al.* (ICTR-99-52-T)”, filed by the Defence for Nsengiyumva on 2 June 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. Anatole Nsengiyumva, an Accused in the *Bagosora et al.* trial, requests access to confidential material associated with the testimony of Witness RM-14 and Witness AHB, two protected witnesses in the *Nahimana et al.* trial. Nsengiyumva submits that their testimony is temporally and geographically connected to the events at issue in the *Bagosora et al.* case, and that the testimony would materially assist his case, or would be exculpatory.¹ The Nsengiyumva Defence agrees to comply with the terms of the relevant Prosecution witness protection orders issued in *Nahimana et al.*²

DELIBERATIONS*(i) Jurisdiction*

2. Rule 75 (G) of the Rules of Procedure and Evidence provides that:

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seized of the first proceedings; or
- (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

3. Contrary to the Defence submission, there is a trial chamber which is still seized of the *Nahimana et al.* case. An appeal from the judgment in that case is still pending. During the pendency of an appeal, the trial chamber before which the trial was conducted remains seized of all matters not related to the appeal, including requests to modify

¹ Motion, paras. 10-14.

² Motion, para. 19.

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witness protection orders.³ Accordingly, the present application is properly before this Chamber under Rule 75 (G)(i).

(ii) *Merits*

4. Confidential *inter partes* material from one case may be disclosed to a party in another case, where the applicant demonstrates that the material sought "is likely to assist that applicant's case materially, or at least that there is a good chance that it would."⁴ This standard can be met by showing that there is a factual nexus between the two cases, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time.⁵ The Defence also requests disclosure of the material on the basis that it is exculpatory under Rule 68.

(a) *Witness RM-14*

5. Witness RM-14 testified about an occasion on which soldiers saved people at Umuganda stadium. Although the Defence has not made detailed submissions on the nature of the testimony or its precise relevance to the *Bagosora et al.* case, the Chamber is satisfied, in light of the position alleged to have been held by the Accused, that there is a good chance that the witness's testimony would materially assist the Defence in the preparation of its case. The confidential materials may be relevant to understanding the publicly available testimony.⁶

(b) *Witness AHB*

6. Nsengiyumva submits that the testimony of Witness AHB contradicts that of Witness XBM, a witness in the *Bagosora et al.* trial, in respect of two specific incidents: the alleged distribution of weapons by Jean Bosco Barayagwiza in Mutura Commune; and the allegation that Witness AHB saw Barayagwiza coming to Mount Muhe on the occasion of the installation of the RTLM antenna in 1993. The Chamber accepts that, on this basis, there is a good chance that the testimony of Witness AHB would materially assist the Defence.

(iii) *Modalities*

7. 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

³ *Prosecution v. Nahimana et al.*, Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, paras. 3-6.

⁴ *Prosecutor v. Galic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Galic Case (AC), 16 February 2006, para. 3 (citations omitted); *Prosecutor v. Blagojevic and Jokic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 4.

⁵ *Id.*; *Bagosora*, Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para. 2.

⁶ *Bagosora et al.*, Decision on Disclosure of Prosecution Informant (TC), 24 May 2006 para. 5.

protection orders.⁷ The Chamber finds, however, that, in the absence of submissions as to whether any particular sensitivities or witness protection interests might be engaged by broader disclosure of these two witnesses' identities, those conditions may not be sufficient.

8. In such 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: ... (c) contact any witness whose identity was subject to protective measures.⁸

9. The Chamber authorizes the other Accused in the *Bagosora et al.* trial to have the same access to this material, on the same conditions.⁹

⁷ See e.g., *Nahimana et al.*, Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, p.3; *Bagosora et al.*, Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003, p. 3.

⁸ *Blagojevic and Jokic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 9.

⁹ The Prosecution already has such access, on the basis of an Appeals Chamber decision: *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to immediately identify and disclose to the Defence any confidential transcripts of, or exhibits entered during, the testimony of Witnesses RM-14 and AHB in the *Nahimana et al.* case;

DECLARES that the Nsengiyumva 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;

ORDERS that in addition to the existing witness protection measures, parties 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, contact any witness whose identity was subject to protective measures.

Arusha, 14 July 2006



Erik Møse
Presiding Judge

[Seal of the Tribunal]

