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NATIONS UNIES

ICTR-99-50-T
01-11-2006
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 1 November 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
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DECISION ON CASIMIR BIZIMUNGU, JUSTIN MUGENZI AND JEROME BICAMUMPAKA'S WRITTEN SUBMISSIONS CONCERNING THE ISSUES RAISED AT THE HEARING OF 31 MARCH 2006 IN RELATION TO THE CROSS EXAMINATION OF WITNESS AUGUSTIN KAYINAMURA (FORMERLY INGA)

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
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Mr. Olivier De Schutter

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Ben Gumpert and Mr. Jonathan Kirk for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran and Ms. Marie-Pierre Poulain for Prosper Mugiraneza

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Casimir Bizimungu, Justin Mugenzi and Jérôme Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross-Examination of Witness Augustin Kayinamura (Formerly Inga)", filed on 2 April 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Mugenzi Bizimungu and Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross-Examination of Witness Augustin Kayinamura (Formerly INGA)", filed on 10 April 2006 (the "Response");

RECALLING the Chamber's Oral Ruling of 20 February 2004 regarding access to and use of closed-session testimony from other proceedings before the Tribunal;

HEREBY DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

INTRODUCTION

1. At the hearing of 31 March 2006, during its cross-examination of Defence Witness Augustin Kayinamura (formerly INGA), the Prosecution sought to use the transcript of prior testimony given by the witness in closed session in the matter of the *Prosecutor v. Gacumbitsi*. The Defence objected to the Prosecution's use of the transcript on the grounds that (i) the transcript had not been communicated to the Defence in advance, which was a violation of the established practice of this Chamber; and (ii) the use of closed session testimony from another trial before the Tribunal during open session and without the permission of the Chamber that ordered the closed session is a violation of that Chamber's order as well as prior orders of this Chamber. Alternatively, the Defence argued that if the Prosecution is allowed unfettered access to all closed session transcripts from all proceedings before the Tribunal, then the principle of equality of arms requires that the Defence must also have such access.
2. The Prosecution acknowledged that its use of the transcript in open session was improper, but that the remedy was simply to move to closed session. Nonetheless, the Prosecution argued that its use of the closed session testimony was proper as the Prosecution is a single entity that is party to all proceedings before the Tribunal.



3. The Chamber requested written submissions on the issues raised; the Defence filed its joint Motion on 3 April 2006, and the Prosecution filed its response on 10 April 2006.

DELIBERATIONS

Advance Communication of Documents to be Used in Cross-Examination

4. The Chamber reaffirms its Oral Rulings of 26 October 2004¹ and of 5 October 2006,² where it directed that a party seeking to use a document in cross-examination must, prior to the commencement of its cross-examination, inform the other side and provide a copy of the document to opposing counsel.

Access to, and Use of, Closed Session Transcripts from Other Proceedings

5. The Parties disagree over the interpretation of Rule 75 (F) and the Appeals Chamber's Decision of 16 November 2005 regarding the effect of witness protection measures granted for Defence witnesses on the Prosecution.³ The Prosecution implies that the addition of subsection (F) to Rule 75 and the subsequent Appeals Chamber decision effectively overruled this Chamber's Oral Ruling of 20 February 2004, which required any party who seeks access to closed session transcripts from another proceeding to make an application to the original Chamber which ordered the closed session for permission to access the transcript. The Prosecution argues that the effect of the Appeals Chamber's ruling that the Prosecution is party to all proceedings suggests, by inference, that the Prosecution is not required to seek permission to access and use protected materials in cross-examination. The Defence argues that Rule 75 (F) is limited to the context of the Prosecution's disclosure obligations under the Rules, and that the Appeals Chamber's decisions affirmed this.
6. Rule 75 (F) states, "Once protective measures have been ordered in respect of a ... witness" in one case, such protective measures "shall continue to have effect *mutatis mutandis*" in any other case, but "shall not prevent the Prosecutor from discharging any disclosure obligation" in another case. The original Chamber retains continuing jurisdiction over material and evidence sealed pursuant to a protective order. A protected witness' subsequent actions, including giving unprotected testimony in another trial, are irrelevant to the continuing applicability of the original protective order.
7. In the *Bizimungu* Appeals Chamber Decision, the Appeals Chamber relied on its 6 October 2005 decision on a similar matter in the *Prosecutor v. Bagosora*, where it found that underlying Rule 75 (F) "is the proposition that evidence gained by one

¹ T. 26 October 2004, pp. 26-27.

² T. 5 October 2006, pp. 2-8.

³ *Prosecutor v. Bizimungu*, Decision on the Prosecution Appeal of Witness Protection Measures (AC), 16 November 2005 ("*Bizimungu* Appeals Chamber Decision").

Prosecution team without the knowledge of others 'may suggest the innocence or mitigate the guilt of an accused in another case, or affect the credibility of Prosecution evidence in that other case'".⁴ The *Bagosora* Appeals Chamber Decision held that witness protection orders should not be construed as restricting the Prosecution's disclosure obligations under Rule 68 of the Rules. Members of the Prosecution working on any proceedings before the Tribunal should be able to access any exculpatory material for purposes of disclosure, even if that material is protected by order of another Trial Chamber.⁵ The *Bizimungu* Appeals Chamber Decision confirmed this ruling.⁶ In the Chamber's view, the Appeals Chamber's rulings are limited to circumstances involving the Prosecution's disclosure obligations under Rule 68.⁷ The Appeals Chamber did not state that the Prosecution shall have access to all closed session transcripts in all cases for all purposes.

8. Based upon the above-referenced decisions of the Appeals Chamber, Rule 75 (F), and this Chamber's Oral Ruling of 20 February 2004, the Chamber finds that the Prosecution is obliged to seek the permission of the original Trial Chamber if it wishes to use closed session testimony from other proceedings for any reason other than to fulfil its disclosure obligations under the Rules. Here, the Prosecution should have sought the permission of the *Gacumbitsi* Chamber before using the closed session testimony for the purpose of cross-examination.

Exclusion of the Testimony Elicited Using the Closed-Session Transcripts

9. The Parties also disagree as to the appropriate remedy, if any. The Defence requests that the portions of the cross-examination arising from the closed session transcript be stricken from the record pursuant to Rule 95 of the Rules. The Prosecution argues that it obtained the evidence by proper means, and that Rule 95 was therefore inapplicable in this instance. In addition, the Prosecution argues that although it has not complied with the Chamber's practice direction regarding the provision of materials to the opposing party before their use during cross-examination, any potential resulting prejudice was avoided. Moreover, any violation of the *Gacumbitsi* Chamber's closed session order was cured when the Chamber ordered that the cross-examination proceed in closed session.

⁴ *Prosecutor v. Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 45 ("*Bagosora* Appeals Chamber Decision").

⁵ *Bagosora* Appeals Chamber Decision, para. 44.

⁶ *Bizimungu* Appeals Chamber Decision, para. 4.

⁷ While the *Bagosora* and *Bizimungu* Appeals Chamber Decisions involved disclosure under Rule 68, the plain language of Rule 75 (F), which refers explicitly to "any disclosure obligations under the Rules", and the jurisprudence of other Trial Chambers suggests that Rule 75 (F) authorizes the Prosecution to disclose otherwise protected materials in fulfilment of any disclosure obligation under the Rules. For example, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 June 2004, paras. 4, 6 (disclosure of closed session testimony pursuant to Rules 66 (A) (ii) authorized without prior permission of original Trial Chamber pursuant to Rule 75 (F)).



10. Rule 95 of the Rules provides that “no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”.
11. The Chamber is of the view that the methods used by the Prosecution to obtain the closed session transcripts did nothing to cast any doubt on their reliability, or the reliability of the cross-examination testimony arising from these transcripts during the 31 March 2006 hearing.⁸
12. The remaining question is whether admission of testimony elicited using the closed session transcripts obtained in violation of a prior ruling of this Chamber as well as the protective orders of the *Gacumbitsi* Chamber is “antithetical to, and would seriously damage, the integrity of the proceedings”. The Chamber notes that Rule 95 does not require automatic exclusion of all unlawfully obtained evidence.⁹ Rather, “in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged”.¹⁰
13. The closed session transcripts from *Gacumbitsi* were used to ask the Witness questions regarding his ethnicity, his knowledge of an alleged warrant for his arrest for genocide in Rwanda, and whether he was involved in killing a household servant named Bimenyimana. The Prosecution argues that the Defence needed no prior preparation for these three simple questions and thus was not prejudiced. The Accused do not claim they were prejudiced or otherwise explain why exclusion of the relevant testimony is necessary in order to avoid serious damage to the integrity of the proceedings. Indeed, during the hearing of 31 March 2006, Defence Counsel for Accused Mugenzi, stated “in this particular case, the mischief, if any, may be small. And we’re not talking about, if I can use the crude expression, putting the toothpaste back in the tube.”¹¹
14. The Chamber considers the following circumstances relevant to the issue raised regarding the integrity of the proceedings under Rule 95:
- The prejudice to the Accused, if any, caused by the Prosecution’s violation of the *Gacumbitsi* Chamber’s protective order was small;

⁸ Compare, *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on Ndayambaje’s Confidential Motion to Have Detainee Testimony Declared Inadmissible (TC), 25 October 2004, para. 18 (“Given that the concerned evidence were testimonies given under oath or affirmation before the Chamber, the Chamber finds that, the Defence fails to show that the evidence these detained witnesses has given was obtained by methods which cast substantial doubt on its reliability ...”).

⁹ *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence” (TC), 3 October 2003, para. 54.

¹⁰ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugimaeza’s Renewed Motion to Exclude His Custodial Statements from Evidence, 4 December 2003, para. 29; *Brdjanin*, Decision on the Defence “Objection to Intercept Evidence”, para. 61.

¹¹ T. 31 March 2006, p. 35.

- It is in the interest of justice that the parties place all available evidence before the Trial Chamber and that the Chamber hears and evaluates such evidence;¹²
- The Prosecution's use of the closed-session transcript was based on a colourable, if mistaken, interpretation of Appeals Chamber jurisprudence that it mistakenly believed had changed the prior procedure regarding use of closed-session testimony from other proceedings, as opposed to a blatant disregard of that procedure;
- The evidence sought to be excluded is not the wrongfully obtained closed-session transcripts themselves, but rather testimony given under oath in answer to questions arising from these transcripts, and subject to re-examination by the Defence for Mugenzi.

In the Chamber's view these circumstances do not require exclusion in order to prevent serious damage to the integrity of the proceedings.

15. The Chamber stresses that the admission into evidence of the testimony arising from the wrongfully obtained closed-session transcripts does not imply approval by the Chamber of the means by which the transcripts were obtained.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion in part;

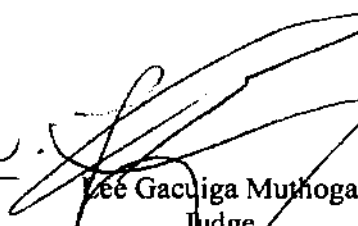
DECLARES that it is the general practice established by this Chamber that a party seeking to use a document in cross-examination must, prior to the commencement of its cross-examination, inform the other side and provide a copy of the document to opposing counsel;

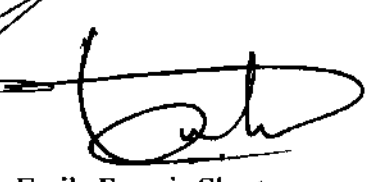
ORDERS that the Prosecutor shall not, without leave of the original Trial Chamber, use material sealed by that Chamber for any purpose other than in fulfilment of its disclosure obligations under the Rules;

DENIES the Defence Motion in all other respects

Arusha, 1 November 2006


Khalida-Rachid Khan
Presiding Judge


Lee Gacigira Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]



¹² *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-12-T, Decision on the Motion of the Defence to Strike the Testimony of Witness YY, 5 November 2001 para. 13.