



ICTR-04-81-T  
25-05-2009  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
(6518-6576)

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TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Sergei Alekseevich Egorov  
Judge Florence Rita Arrey

**Registrar:** Adama Dieng

**Date:** 25 May 2009

THE PROSECUTOR

v.

Ephrem SETAKO

*Case No. ICTR-04-81-I*

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DECISION ON DEFENCE MOTION FOR DISCLOSURE OF CLOSED SESSION  
TESTIMONY

**The Prosecution**  
Ifeoma Ojemeni-Okali  
Simba Mawere  
Christiana Fomenky

**The Defence**  
Lennox Hinds  
Cainnech Lussia-Berdou

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

**BEING SEIZED OF** the strictly confidential Setako Defence motion for closed session testimony and confidential material of Witness AL, filed on 11 May 2009;

**HEREBY DECIDES** the motion.

1. Prosecution Witness AL testified in *Prosecutor v. Bagosora et al.*, also often referred to as the “Military I case”, on 29 April 2004. According to the Setako Defence, he gave evidence in respect of Bagosora that is directly related to the charges against Setako on a factual, geographic and temporal basis. It now requests the closed session transcripts of his testimony and any related exhibits from that trial, a few days after filing a different application for leave to add him as a potential witness. The Defence agrees to be bound by all of the witness protection measures currently in place as well as any additional measures that may be deemed appropriate. The Prosecution has not filed any response.<sup>1</sup>

**DELIBERATIONS**

2. Pursuant to Rule 75 (G) of the Rules of Procedure and Evidence, witness protection measures ordered by a Trial Chamber in any “first proceedings” will continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rules. The Military I case, that is the first proceedings, were heard by this Chamber – the same that is currently seized of the second proceedings (the *Setako* trial). The motion is therefore properly before it since issues of disclosure of testimony and exhibits have no links with the appeals proceedings.<sup>2</sup>

3. The Appeals Chamber has held:

[A]n accused in a case before the International Tribunal may be granted access to confidential material in another case if he shows a legitimate forensic purpose for such access. With respect to *inter partes* confidential material, it is sufficient for an applicant to demonstrate that “the material sought is likely to assist the applicant’s case materially or at least that there is a good chance that it would”. This standard can be met “by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time”.<sup>3</sup>

<sup>1</sup> “Setako Defence Motion for Disclosure of Closed Session Testimony and Sealed Material”, etc., filed on 11 May 2009, paras. 1-12.

<sup>2</sup> *Prosecutor v. Nahimana et al.*, Decision on Nsengiyumva Request for Access to Protected Material (TC), 14 July 2006, para. 3 and Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, paras. 4-5.

<sup>3</sup> *Prosecutor v. 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. See also *Prosecutor v. Renzaho*, Decision on Bizimungu Request for Closed Session Testimony (TC), 7 June 2007, para. 3; *Prosecutor v. Bagosora et al.*, Decision on Nzirorera Request for Access to Protected Material (TC), 19 May 2006, para. 2.

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4. Witness AL testified on 29 April 2004. He gave testimony in closed as well as open session about the death of one Augustin Maharangari and members of his family. This was one of the charges against Bagosora.<sup>4</sup> Setako is alleged to have handed over Maharangari's two daughters to an *Interahamwe* named "Fidèle" at a roadblock, known as *La Péage*, in the Kiyovu area of Kigali in May 1994.<sup>5</sup>

5. The Chamber finds that the material sought is likely to assist the applicant's case materially, or that there is a good chance that it would. The requested testimony focused on the killing of Maharangari and contains multiple references to the fate of members of his family, including his children. The Chamber has accepted a Defence request to add Witness AL to its witness list.<sup>6</sup> He is therefore a potential Defence witness. In these circumstances, the Setako Defence has articulated a legitimate forensic purpose for the material requested and has also demonstrated that access to it would likely materially assist its case.

6. Pursuant to Rule 75 (F), the Setako Defence shall be bound by the Chamber's Prosecution witness protection orders in the present case.<sup>7</sup>

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Defence motion;

**DECLARES** that the Setako Defence and any persons under its instruction or authorisation shall be bound *mutatis mutatis* by the terms of the Prosecution witness protection orders in the Military I case; and

**DIRECTS** the Registry to disclose the closed session transcripts and any confidential exhibits relating to Witness AL to the Setako Defence.

Arusha, 25 May 2009



Erik Møse  
Presiding Judge



Sergei Alekseevich Egorov  
Judge



Florence Rita Arrey  
Judge

[Seal of the Tribunal]



<sup>4</sup> *Prosecutor v. Bagosora et al.*, Judgement and Sentence (TC), 18 December 2008, filed on 9 February 2009, paras. 940-944, 960-962, 2245 (finding Bagosora responsible under Article 6 (1) of the Statute for the killing of Maharangari). The case is now before the Appeals Chamber.

<sup>5</sup> Setako Amended Indictment, 23 June 2008, para. 42.

<sup>6</sup> Decision on Defence Motion to Vary its Witness List (TC), 25 May 2009.

<sup>7</sup> Decision on the Prosecution Motion for Protective Measures (TC), 18 September 2007.