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United Nations  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 23 August 2002

JUDICIAL RECORDS SECTION  
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ICTR

**The PROSECUTOR**

v.

**Sylvain NSABIMANA, et al.**

*Case No. ICTR-97-29-T*

**DECISION ON NSABIMANA'S EXTREMELY URGENT MOTION FOR  
IMPLEMENTATION OF THE DECISION OF 16 APRIL 2002, IN THE  
PRESENCE OF THE FORMER INVESTIGATOR WITH THE DEFENCE  
JOSEPH NZABIRINDA**

Office of the Prosecutor

Silvana Arbia  
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Jonathan Moses  
Gregory Townsend  
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Counsel for the Defence

Josette Kadji  
Charles Patie Tchacounte

KM

*Prosecutor v. Sylvain Nsabimana, et al.* (Case No. ICTR-97-29-T)

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING AS** Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the “Chamber”);

**BEING SEIZED** of:

- i. The Defence “Extremely Urgent Motion for Implementation of the Decision of 16 April 2002, in the Presence of the Former Investigator with the Defence of Joseph Nzabirinda”<sup>1</sup>, filed on 19 June 2002; The “Report on the opening of seals on seized items return thereof and restitution” signed by M. Matar Diop of the Registry and Me Josette Kadji of the Defence of Nsabimana<sup>2</sup>, of 31 May 2002, annexed to the Defence Motion;
- ii. The Prosecutor’s “Response to Nsabimana’s Extremely Urgent Motion to Further Execute the Decision of 16 April 2002 in the Presence of his Former Investigator, Joseph Nzabirinda”, filed on 24 June 2002;

**RECALLING** the “*Décision relative à la requête de la défense aux fins d’obtenir des mesures de protection pour les témoins de la Défense*”<sup>3</sup> of 15 February 2000 (The “Decision on Witness Protection”); and the “Decision on Nsabimana’s Motion to Return to Nsabimana’s Defence Documents Seized from Nzabirinda at the Time of Nzabirinda’s Arrest” of 16 April 2002 (The “Decision on the Return of Documents”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW CONSIDERS** the matter solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules.

**RELEVANT FACTS**

1. In accordance with this Chamber’s Decision on the Return of Documents, the Defence of Nsabimana and a representative from the Registry met on 31 May 2002 to review and distribute items seized from Nzabirinda at the time of his arrest.

<sup>1</sup> *Requête en extrême urgence, aux fins de suites de l’exécution de la décision du 16 avril 2002, en la présence de l’ex-enquêteur de la Défense Joseph Nzabirinda*, original filed in French ; LCSS official English translation filed 19 July 2002 ;

<sup>2</sup> *Procès-verbal d’ouverture de scelles et de restitution*, original filed in French ; LCSS official English translation filed 19 July 2002

<sup>3</sup> “Decision Regarding the Defence Motion to Obtain Protective Measures for Defence Witnesses” (unofficial translation, no LCSS translation available)

2. This meeting did not fully resolve issues of distribution relating to two video cassettes, two paper diaries, an electronic diary, and a cellular telephone—all of which remain in the possession of the Registry—and a third videotape that is now in the possession of the Defence.

## ARGUMENTS OF THE PARTIES

### *Submissions by the Defence*

3. The Defence notes that several items, specifically two video cassettes, two paper diaries, one electronic diary, and a cellular phone, are still in the possession of the Registry and have not been distributed due to difficulty in executing the Decision on the Return of Documents.
4. The Defence further notes that there are items which are not named in the “*Procès-verbal d’ouverture de scelles et de restitution*” but are mentioned in the transcript of the 31 May 2002—including three electronic mail messages, a written message, a facsimile, and a typewritten letter—that have not been properly distributed under the Decision on the Return of Documents.
5. The Defence asserts that each of the above mentioned items may contain information identifying Defence witnesses or potential Defence witnesses.
6. The Defence asserts that in order to properly distribute these items under the Decision on the Return of Documents it is necessary to have the advice of both a legal expert, who can pass judgment on the relevance of each item to the investigation and prosecution of Joseph Nzabirinda, and of Joseph Nzabirinda, whose judgment is needed to determine which items are related to the Defence and to Defence witnesses.
7. The Defence therefore requests that these materials be reviewed in the presence of a legal expert, a representative of the Registry, the Defence, and Joseph Nzabirinda in order to determine whether the information contained in each can or does reveal the identity of witnesses or potential witnesses for the Defence.
8. The Defence requests that any of these items that may identify witnesses or potential witnesses for the Defence be placed in the custody of the Defence.
9. The Defence allows that any items or materials that are relevant to the Prosecutor’s investigation of Joseph Nzabirinda should be put in the custody of the Prosecutor.
10. The Defence further requests that materials not directly relevant to either the identification of Defence witnesses or the investigation of Joseph Nzabirinda should be returned to the custody of Joseph Nzabirinda.

*Submissions by the Prosecution*

11. The Prosecutor contends that there should be no further distribution of items seized from Nzabirinda until Nzabirinda is properly represented and has an opportunity to be heard on issues relevant to these items.
12. The Prosecutor argues that the Decision on the Return of Documents was only concerned with documents. The Prosecution further asserts that the Registrar violated this Decision by passing a videotape to Nsabimana's Defence.
13. The Prosecutor asserts that the Defence request for review and examination of items other than documents is an inappropriate motion for modification, review, or appeal of the Decision on the Return of Documents.
14. The Prosecutor objects to the Defence request to allow Nzabirinda to make selective choices about which items seized at his arrest should be sent to Nsabimana's Defence. The Prosecutor claims that she has sole authority to determine what materials are necessary to the prosecution of Nzabirinda and expresses deep concern that Nzabirinda has a personal interest in limiting what materials come before the Prosecutor.
15. The Prosecutor requests that all materials that are not documents be forwarded immediately to her office. In the alternative, the Prosecutor requests that all materials be returned to her after they have been redacted or otherwise censored to protect potential Defence witnesses. The Prosecutor further requests that any redaction or editing of videotapes be conducted under the supervision of a Judge and in the presence of an appropriate translator.

**DELIBERATIONS**

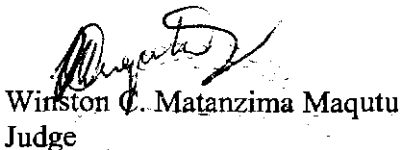
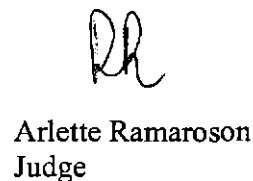

16. As a preliminary matter, the Chamber does not accept the Prosecutor's restrictive interpretation which would confine the scope of the Decision on the Return of Documents only to documentation. The Chamber's Decision related to all items and information that had been seized on the arrest of Nzabirinda and were held by the Registry. Consequently, there was no violation of the Chamber's order by the Registry by transferring items to the Defence, where it viewed it as appropriate to do so.
17. The Chamber deems that Defence Counsel, in bringing this Motion, is aware of the information that her former investigator Nzabirinda had regarding these contested materials. To this extent she should have been specific as to which items contain information identifying persons protected by the Decision on Witness Protection. The Chamber finds that the application, as framed, is speculative. No specific details are provided by Counsel as to which items are covered by the Decision on Witness Protection.



18. The Chamber finds that the Defence has failed to show that the materials in question were collected on behalf of Nsabimana, or that they contain information that would, if disclosed to the Prosecutor, violate the Decision on Witness Protection.
19. Nzabirinda is not an Officer of the Court; he is an accused person before this Tribunal. Furthermore, as he is no longer working for the Defence of Nsabimana, he no longer holds any fiduciary duty towards Nsabimana. The Chamber finds that it would not be appropriate for Nzabirinda to have a role in these proceedings.
20. Therefore, the Chamber finds that all remaining items held by the Registry should be handed over to the Office of the Prosecutor pursuant to the Order to that effect in the Warrant of Arrest. The Prosecutor, as an Officer of the Court, is bound to respect the witness protection measures of this Chamber and to forward immediately to the Defence any information which would be covered by the Decision on Witness Protection, or any information which would be useful to the Defence of Nsabimana.

**FOR THE ABOVE REASONS, THE TRIBUNAL****DENIES** the Defence Motion;**DIRECTS** the Registry to transfer all remaining items to the Office of the Prosecutor;**ORDERS** the Prosecutor, upon receipt of the remaining items, to forward immediately to the Defence of Nsabimana any information contained therein which relates to the preparation of the Defence case or which should properly remain with the Defence pursuant to the Decision on Witness Protection.

Arusha, 23 August 2002

William H. Sekule  
Presiding Judge  
Winston C. Matanzima Maqutu  
Judge  
Arlette Ramarason  
Judge  
[Seal of the Tribunal]