



ICTR-99-52-T  
03-~~06~~-2004  
(34979-34976)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

34979  
S. Mushi

OR: ENG

TRIAL CHAMBER I

**Before:** Judge Erik Møse  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 3 June 2004

2004 JUN -3 A.M. 11:30  
JUDICIAL REGISTRY  
S. Mushi

THE PROSECUTOR

v.

FERDINAND NAHIMANA  
JEAN-BOSCO BARAYAGWIZA  
HASSAN NGEZE  
Case No. ICTR-99-52-T

DECISION ON DISCLOSURE OF TRANSCRIPTS AND EXHIBITS OF WITNESS X

**The Prosecution – Bizimungu et al.**

Paul Ng'arua  
Ibokunolu Babajide  
Justus Bwonwonga  
George Mugwanya  
Elvis Bazawule

**The Defence – Bizimungu et al.**

Michelyne St. Laurent  
Alexandra Marcil  
Howard Morrison  
Ben Gumpert  
Pierre Gaudreau  
Michel Croteau  
Tom Moran  
Christian Gauthier

**The Prosecution – Nahimana et al.**

Stephen Rapp  
Charity Kagwi  
William Egbe  
Alphonse Van

**The Defence – Nahimana et al.**

Jean-Marie Biju-Duval  
Diana Ellis, Q.C.  
John Floyd III  
René Martel  
Giacomo Barletta-Caldarera

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the Prosecution “Motion for an Order to Disclose Closed Session Testimony and Exhibits Received Under Seal for Prosecution Witness X to the Defence”, filed on 24 May 2004;

**HEREBY DECIDES** the motion.

1. The Prosecution in the case of *Prosecutor v. Bizimungu et al.*, being heard before Trial Chamber II, requests disclosure of closed session transcripts, and exhibits under seal, in the trial of *Prosecutor v. Nahimana et al.* of the testimony of a witness who is also expected to testify in the *Bizimungu* case. This disclosure is sought to permit the Prosecution in the *Bizimungu* case to fulfil its obligation under Rule 66(A)(ii) to disclose prior statements of the witness to the Defence.

2. Rule 75 was amended during the Plenary meeting of the Judges of the Tribunal on 23 and 24 April 2004. Following circulation of the written texts proposed at that meeting, amendments to the Rules were adopted by the Judges on 14 May 2004. The relevant parts of Rule 75 now read:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

...

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence by the party calling that witness that his testimony and his identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

...

(E) When making an order under paragraph (A) above, a Judge or a Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal.

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

(i) shall 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 this Rule; but

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- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

In accordance with Rule 6, the amendments entered into force immediately upon adoption. Accordingly, the present motion is subject to this newly amended Rule 75.

3. Before the adoption of these amendments, motions for the disclosure of closed session testimony were frequently made by both the Defence and the Prosecution to the Chamber which had issued the applicable witness protection order. These requests were without exception granted. The decisions recognized the obligation of the Prosecution to disclose the prior statements; the legitimate need of the Defence for the prior statements; and the ongoing authority of the Chamber which had issued the witness protection order to modify its witness protection decisions as it considered appropriate.<sup>1</sup> Disclosure of the closed session testimony was always granted on condition that the Defence, on behalf of itself and the Accused, agreed to be bound by the terms of the witness protection order in the case in which the testimony was heard. Further, the timing of disclosure of such statements was to be determined in accordance with the witness protection order applicable in the case in which the disclosure was requested.

4. Rule 75 (F) was intended to create a mechanism for the routine disclosure of closed session testimony, and obviate the need for individualized applications to the Chambers. Rather than requiring the prior consent of the Defence and the Accused in the second proceedings to be bound by the applicable witness protection order, Rule 75 (F)(i) dictates that the terms of the witness protection order in the first proceedings shall automatically apply *mutatis mutandis* to the parties in the second proceedings, unless modified. Rule 75 (F)(ii) prohibits the Prosecution from using the terms of a witness protection order in a prior case as an excuse for failing to comply with its disclosure obligations, and requires the Prosecution to notify the Defence of the nature of the protective measures in the first proceedings. Therefore, without any intervention of the Chamber, the Prosecution is required to disclose the prior closed session testimony and related exhibits of the witness in accordance with Rule 66 (A)(ii).

5. Rule 75 (F) is not conditional upon Rules 75 (C) or 75 (E). Rule 75 (C) requires the Registry to inform witnesses that their testimony may be disclosed in other proceedings in accordance with Rule 75 (F). Such a requirement ensures transparency between the Tribunal and the witnesses who appear before it. Failure to notify the witness of the effect of Rule 75 (F) cannot relieve the Prosecution of its obligation to disclose the testimony. The fact that the

<sup>1</sup> *Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al. (TC), 18 February 2004; *Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003.

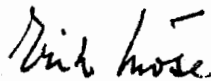
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Prosecution and the Defence in the second proceeding are bound *mutatis mutandis* by the terms of the witness protection order in the first provides a sufficient safeguard of the non-disclosure of the witness's identity. Rule 75 (E) allows a Chamber "wherever appropriate" to state prospectively whether the transcript shall be made available in other proceedings. Rule 75 (F) is not expressly conditional upon such a provision. Such an interpretation would almost completely frustrate its purpose.

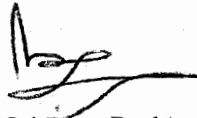
6. The present Prosecution request is for authorization to disclose closed session testimony and exhibits heard in the trial of *Nahimana et al.* to the Defence in the trial of *Bizimana et al.*, in compliance with its obligations under Rule 66 (A)(ii). Such authorization is no longer required following the newly adopted Rule 75. The Prosecution is reminded of its obligation under Rule 75 (F)(ii) to inform the Defence of "the nature of the protective measures ordered in the first proceedings", by which the parties are automatically bound upon disclosure of the protected material.

**FOR THE ABOVE REASONS, THE CHAMBER DECLARES** that the motion is moot.

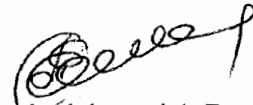
Arusha, 3 June 2004



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]

