

ICTR-99-50-T  
17-11-2004  
(19095-19091)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

**TRIAL CHAMBER II**

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr Adama Dieng

**Date:** 17 November 2004

**The PROSECUTOR**  
v.  
**Casimir BIZIMUNGU**  
**Justin MUGENZI**  
**Jérôme-Clément BICAMUMPAKA**  
**Prosper MUGIRANEZA**  
*Case No. ICTR-99-50-T*

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**DECISION ON BICAMUMPAKA'S MOTION FOR DISCLOSURE OF  
EXCULPATORY EVIDENCE (MDR FILES)**

**Office of the Prosecutor:**

Mr Paul Ng'arua  
Mr Ibukunolu Babajide  
Mr Justus Bwonwonga  
Mr Elvis Bazawule  
Mr Shyamlal Rajapaksa

**Counsel for the Defence:**

Mr Pierre Gaudreau and Mr Michel Croteau for *Jérôme-Clément Bicomumpaka*  
Ms. Michelyne C St Laurent and Ms Alexandra Marcil for *Casimir Bizimungu*  
Mr Howard Morrison, QC and Mr Ben Gumpert for *Justin Mugenzi*  
Mr Tom Moran and Mr Christian Gauthier 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 Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

**BEING SEIZED** of "Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 6 October 2004, (the "Motion");

**NOTING** the "Prosecutor's Response to Jerome Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 11 October 2004, attaching and incorporating a document in the same title filed on 7 September 2004 (the "Response");

**NOTING ALSO** "Bicamumpaka's Reply to Prosecutor's Response to Jerome Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 15 October 2004, (the "Reply");

**THE CHAMBER NOW DECIDES** the Motion on the basis of the written submissions.

#### **ARGUMENTS OF THE PARTIES**

##### *Defence Submissions*

1. The Defence requests the Trial Chamber to order the Prosecution to disclose to the Defence three case files of the Kigali Court of First Instance in Rwanda (the "Kigali Court Case Files"). The case files relate to proceedings of that Court concerning the *Mouvement Démocratique Républicain* (the "MDR") political party. The Defence specifically identified those case files as:

- (i) 21.398/93/S1 relating to a suit filed on 26 July 1993 by one Faustin Twagiramungu seeking judicial nullification of
  - (a) the decision by which the Political Bureau of the MDR suspended him on 17 July 1993 as the President of the MDR, and
  - (b) the decisions taken "at the Kabusunzu Congress" on 23 and 24 July 1993;
- (ii) 21.500/93/S1 relating to a suit filed by the MDR against Mr Twagiramungu; and
- (iii) 21.507/93/S1 relating to a suit filed by Mr Twagiramungu against the MDR.

2. According to the Defence, these case files contain materials which (a) tend to exonerate the Accused from the crimes for which he is being tried before the ICTR, (b) mitigate his guilt in that regard, or (c) undermine the credibility of Prosecution Witnesses GBR and GLP whose evidence before the ICTR are contradicted by information to be found in the Kigali Court Case Files.



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3. The Defence theory of exculpation runs as follows. The case for the Prosecution rests upon a theory that the MDR Party was split into two factions at some point before the genocide and the other crimes for which the Accused stands charged; that out of this split, emerged the "Power Faction" of the MDR to which the Accused belonged; that the other faction was the "Moderate Faction" led by Mr Twagiramungu; and that it was the machinations of the "Power Faction" that resulted in the genocide and the other crimes in the Indictment.

4. However, the Defence contends that the Kigali Court Case Files will show that there was in fact no "Power Faction", but rather an attempt by the main party to expel Mr Twagiramungu and a few of his followers, with the result that everyone else who did not belong to the Twagiramungu group was mischievously labelled as belonging to the "Power Faction".

5. The Defence submits that it had amicably sought in vain to obtain those files from the Prosecution.

6. The Defence relies on the authority of the *Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence* rendered by this Trial Chamber on 23 April 2004.<sup>1</sup>

#### *Prosecution Submissions*

7. In response, the Prosecution filed a voluminous set of documents to prove that the Kigali Court Case Files are not in the possession of the Office of the Prosecutor of the ICTR.

8. The remainder of the Prosecution's response alleges that the Moving Party in this Motion is in the habit of filing multiple motions on the same issue; and that the current motion exemplifies this habit. In this connection, the Prosecutor attaches as "Annex B" to its Response an undated document prepared by the Defence which is otherwise identical to the Motion dated 6 October 2004 and filed on the same date.

#### *Defence Reply*

9. In reply, the Defence denies that it has filed multiple motions on the same issue. According to the Defence, the document attached as "Annex B" to the Prosecutor's Response was simply a draft of the present Motion, which was attached to a letter it wrote to the Prosecution demanding the disclosure of the Kigali Court Case Files, and was intended to inform the Prosecution that it intended filing a motion for production of the files if the demand in that letter was not met.

#### **DELIBERATIONS**

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<sup>1</sup> *Prosecutor v Bizimungu et al* (Case No. ICTR-99-50-T).



10. The Trial Chamber will first address the Prosecution's allegation that the Defence has filed multiple motions on the same issue raised in this Motion. Having examined "Annex B" to the Prosecutor's Response, the Chamber is satisfied that the Defence did not file the document before this Tribunal. It appears that it was the Prosecution that attached it to its Response. The document bears no registry stamp showing that it had been filed nor does it have a date or a signature. Moreover, paragraph 5 of the Defence's letter dated 30 July 2004, and attached by both sides to their Motion papers, clearly states that the document in question was a "draft Motion." In view of these facts, there was no basis for this allegation by the Prosecution.

11. As regards the issue raised by the Motion, the Chamber recalls its *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI*, dated 14 September 2004, where is stated as follows:

[T]he Trial Chamber considers that Rule 68(A) does not impose an obligation on the Prosecutor to search for materials which he does not admit having knowledge of nor does it entitle the Defence to embark on a fishing expedition to obtain exculpatory material. *It does, however, mean that where the Defence has specific knowledge of any information covered by the Rule and which is not currently within the possession or control of the Prosecutor, and the Defence requests that information in specific terms, the Prosecutor should attempt to obtain that information where the Prosecutor is in a better position than the Defence to do so. Once this is successfully done, that material should be disclosed to the Defence. This obligation stems from the Prosecutor's inherent and ongoing duty to fully investigate a case before this Tribunal.*<sup>2</sup> [Emphasis added.]

12. This was essentially a restatement of the principle stated earlier in this Chamber's *Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence* rendered on 23 April 2004, which is relied upon by the Defence. There, the Chamber held as follows:

The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; *provided it is shown that the Defence had made prior efforts to obtain such document by its own means.* This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, [footnote omitted] where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.<sup>3</sup> [Emphasis added.]

13. It follows from the case law that the Prosecution may not avoid its duty to disclose a specifically identified exculpatory material, merely by declaring that the

<sup>2</sup> *Prosecutor v Bizimungu et al* (Case No. ICTR-99-50-T), para 10.

<sup>3</sup> *Prosecutor v Bizimungu et al* (Case No. ICTR-99-50-T), para 9.



material is not within its possession or custody. As the foregoing jurisprudence shows, the Prosecution has a duty to make every effort to obtain known exculpatory materials in the hands of third parties.

14. This duty of the Prosecution may require it to carry out investigations at the instance of the Defence. However, it does not entitle the Defence to embark on a fishing expedition for exculpatory material. In view of this special nature of the duty, the jurisprudence has seen fit to temper its engagement in the following way. First, the duty does not warrant a fishing expedition. Hence there is the need for the Defence to identify the material in specific terms and to show that it is exculpatory. The Defence may not avoid these requirements by making submissions that do not identify the material in specific terms or do not show precisely how the material is exculpatory. Second, the duty recognises certain other prerequisites, including the following: the circumstances must show that the Prosecutor is in a better position than the Defence to obtain the material in question from the third party; and the Defence must show that it has made every effort to obtain the materials.

15. First, notwithstanding that the materials sought have been specifically identified, the Defence has still not managed to take the Motion outside the realms of a fishing expedition, for it is not clear how the materials are exculpatory. The Defence has not established that the Kigali Court Case Files contain information which "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". To say that the Kigali Court Case Files will show that there was no "Power Faction" of the MDR does not assist the Chamber in determining whether the application meets the requirements of Rule 68. The submissions of the Defence have failed to show that the materials have more than an abstract logical relationship to the innocence of the Accused, or that the materials are significantly helpful to an understanding of the innocence of the Accused.<sup>4</sup> Second, as has been settled by case law, where the exculpatory material is in the hands of a third party, the Defence must show that it has made every effort to obtain the material from such a third party. The Defence has not, in the present Motion, shown what, if any, efforts it has made to obtain the materials.

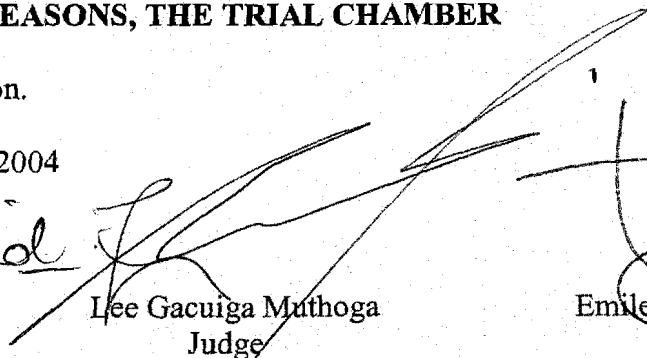
**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DISMISSES** the motion.

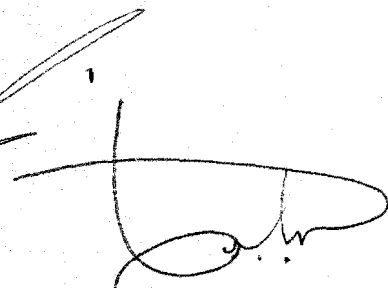
Arusha, 17 November 2004



Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge



Emile Francis Short  
Judge

*(Seal of the Tribunal)*

<sup>4</sup> See *Prosecutor v Delalić* (IT-96-21-T) Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence of 26 September 1996 at para 7 (Trial Chamber II).