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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Joseph Asoka Nihal de Silva, Presiding  
Flavia Lattanzi  
Florence Rita Arrey

**Registrar:** Adama Dieng

**Date:** 9 February 2005

JUDICIAL RECORDS/ARCHIVES  
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**THE PROSECUTOR**  
v.  
**THARCISSE MUVUNYI**

**Case No. ICTR-2000-55A-PT**

**DECISION ON THARCISSE MUVUNYI'S MOTIONS FOR DISCLOSURE OF  
EXCULPATORY AND OTHER RELEVANT MATERIAL AND FOR RELIEF  
PURSUANT TO RULES 66 AND 5 OF THE RULES**

*Rules 66 and 68 of the Rules*

**Office of the Prosecutor:**  
Mr Charles Adeogun-Phillips  
Ms Sola Adeboyejo  
Ms Renifa Madenga  
Mr Dennis Mabura

**Defence Counsel**  
Mr William Taylor  
Mr Jean Flamme  
Ms Cynthia Cline

*gadrh*

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

**SITTING** as Trial Chamber II, composed of Judge Asoka De Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber"),

**CONSIDERING**

- (i) "Accused Tharcisse Muvunyi's Motion for Disclosure of Exculpatory and Other Relevant Material", filed on 18 November 2004 (the "Motion for Disclosure");
- (ii) The "Prosecutor's Response to the Motions of Tharcisse Muvunyi for the Disclosure of Exculpatory Material, the Return of Personal Property and for a Status Conference", filed on 29 November 2004; and
- (iii) "Accused Tharcisse Muvunyi's Motion for Relief Pursuant to Rule 66 and Rule 5", filed on 19 January 2005 (the "Motion for Relief");

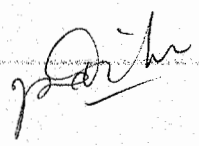
**HAVING HEARD** the parties on the pending disclosure issues during the Status Conference on 7 December 2004 and the Pre-Trial Conference on 20 January 2005;

**DECIDES** as follows.

**ARGUMENTS OF THE PARTIES**

***Defence Motion for Disclosure***

1. The Defence seeks the disclosure of exculpatory material under Rule 68 (A) of the Rules. In particular, it requests the following items:
  - (i) The closed session transcript of Witness D's testimony on 17 June 2004 in the case of the *Prosecutor v. Casimir Bizimungu et al.*, page 65;
  - (ii) The statements that Witness D had previously given to the Prosecutor in the case of the *Prosecutor v. Casimir Bizimungu et al.*, pages K0012002 and K0012003;
  - (iii) The confidential document page K0135220 in the case of the *Prosecutor v. Casimir Bizimungu et al.*;
  - (iv) Unspecified transcripts from the case of the *Prosecutor v. P. Nyiramasuhuko et al.*
  
2. In the alternative to its request for disclosure, the Defence seeks an *in camera* inspection of the transcripts of the *Butare* case and the *Mugiraneza* case in order to determine whether they contain exculpatory evidence.
  
3. Counsel for the Defence submits that, according to members of the *Butare* defence team and lead counsel for Prosper Mugiraneza, the testimonies of witnesses heard in these trials contain material which exculpates the Accused.



4. The Defence could not obtain copies of this evidence since the witnesses had testified in closed session and its efforts to obtain the requested material from the Prosecutor were unsuccessful. The Defence asserts that, initially, the Prosecutor had denied the existence of exculpatory material, but at a later meeting assured the Defence that the requests for disclosure of exculpatory material would be addressed when the return of property of the Accused took place.

5. The Defence appends to the Motion for Disclosure an affidavit of Counsel for Prosper Mugiraneza who declares that the closed session transcripts of the trial of the *Prosecutor v. Mugiraneza* contain exculpatory evidence regarding the Accused in the present case. Counsel for Mugiraneza asserts that he received further confidential documents from the Prosecutor which he considers to be exculpatory for the Accused in the present case.

6. The Defence alleges that the delay in disclosing the requested materials hinders its preparation for the trial thereby infringing upon the rights of the Accused.

#### ***Prosecutor's Response***

7. The Prosecutor avers that he has reviewed the material referred to in the affidavit submitted by the Defence, and that on 26 November 2004, he disclosed the material that he deems to be exculpatory. He prays the Chamber to dismiss the Defence motion as moot.

#### ***Defence Motion for Relief***

8. In its Motion for Relief the Defence seeks an order to require the Prosecutor to deliver unredacted witness statements on or before 28 January 2005. Additionally, the Defence seeks to postpone the commencement of the trial to a date 60 days after the delivery of the said unredacted statements, or any other relief deemed appropriate by the Chamber.

### **DELIBERATIONS**

#### ***Bizimungu Closed Session Transcripts***

9. The Chamber observes that on 2 February 2005, the Trial Chamber in the trial of the *Prosecutor v. Casimir Bizimungu et al.* dismissed the Prosecutor's Motion to lift the seal on the closed session transcripts of Witness D's testimony. The *Bizimungu* Trial Chamber held that the Prosecutor should fulfill his disclosure obligations under the Rules notwithstanding applicable protective orders, and that upon such disclosure, the Defence for Muvunyi would be bound *mutatis mutandis* by the terms of the applicable protective measures in accordance with the provisions of Rule 75 (F) of the Rules<sup>1</sup>. The *Bizimungu*

<sup>1</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence (TC), 2 February 2005, para. 4 - 7.

Trial Chamber found that the Prosecutor's Motion was unnecessary in the light of Rule 75 (F) of the Rules, and that he should forthwith comply with his disclosure obligations<sup>2</sup>.

10. The Chamber notes that these findings by the *Bizimungu* Trial Chamber have clearly affirmed the Prosecutor's disclosure obligations. A second ruling of this Tribunal on the issue is superfluous. Hence, this part of the Defence Motion for disclosure of exculpatory and other relevant material is moot.

***Statements by Witness D and Confidential Document***

11. The Chamber recalls the holding of Trial Chamber III that the burden lies upon the Prosecutor to justify non-disclosure, not upon the Accused to justify disclosure of materials that fall under Rule 68 (A) of the Rules.<sup>3</sup> In his submissions, the Prosecutor has not explicitly addressed the issue of Witness D's statements and the requested confidential document. Hence, the Prosecutor has not discharged his burden to justify non-disclosure. The Chamber further observes that the Defence request for Witness D's statements and a particular confidential document is highly specific. There is no indication that the Defence is engaging in a "fishing expedition". Therefore the Prosecutor is obliged to disclose the requested materials under Rule 68 (A) of the Rules.

12. Furthermore the Chamber recalls that Rule 75 (F) of the Rules applies to "any disclosure obligation under the Rules". According to the jurisprudence of the Tribunal<sup>4</sup>, Rule 75 (F) is intended to create a mechanism for the routine disclosure of materials that might reveal the identity of a protected witness without the need for parties to make individual applications to the Trial Chamber which ordered the protective measures. Upon such disclosure, the party receiving the materials is then bound *mutatis mutandis* by the terms of the applicable protective measures in accordance with the provisions of Rule 75 (F) of the Rules. Hence, the Chamber is of the view that the Prosecutor shall fulfill his disclosure obligations under the Rules, and in particular under Rule 68 (A) of the Rules, notwithstanding applicable protective orders.

***Nyiramasuhuko Transcripts***

13. With respect to the transcripts from the case of the *Prosecutor v. P. Nyiramasuhuko et al.*, the Chamber notes that on 19 January 2005, the Prosecutor disclosed to the Defence the following transcripts of testimony given by Witness TQ in the trial of the *Prosecutor v. P. Nyiramasuhuko et al.*: Transcripts of closed sessions on 6, 7 and 8 September 2004, and transcripts of open sessions on 8 and 9 September 2004. Therefore the Chamber holds that the Defence request is moot.

<sup>2</sup> Loc. cit.

<sup>3</sup> *The Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-PT, Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-Trial Statements of Prosecution Witnesses GBU And GFA, 24 November 2004, para. 8.

<sup>4</sup> *Prosecutor v. Nahimana et. al.* Case No. ICTR-99-52-T Decision on Disclosure of Transcripts and exhibits of Witness X (TC), 3 June 2004 paras. 4 and 5; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case No. ICTR-96-3-A to Disclose to Case No. ICTR-98-42-T (TC), 23 September 2004.

**Motion for Relief**

14. The Chamber recalls its oral ruling during the Pre-Trial Conference on 20 January 2005. On that occasion, the Chamber denied the Defence request for a postponement of the commencement of the trial. The Chamber held that the Defence had received the required disclosures in a timely manner. Hence, the "Defence Motion for Relief pursuant to Rule 66 and Rule 5" is moot.

**FOR THE ABOVE MENTIONED REASONS,** the Chamber

**I. DIRECTS** the Prosecutor to disclose to the Defence under Rule 68 (A) of the Rules

(i) The statements of Witness D in the case of the *Prosecutor v. Casimir Bizimungu et al.*, pages K0012002 and K0012003;

(ii) The confidential document page K0135220 in the case of the *Prosecutor v. Casimir Bizimungu et al.*;

**II. ORDERS** the Defence to preserve the confidentiality of the disclosed materials under all circumstances and in compliance with the Witness Protection Decision rendered by Trial Chamber II on 22 September 2000 in the trial of the *Prosecutor v. Casimir Bizimungu et al.*;

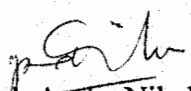
**III. DECLARES** the Defence Motions moot

(i) With respect to the disclosure of the closed session transcript of 17 June 2004 in the case of the *Prosecutor v. Casimir Bizimungu et al.*, page 65;


(ii) With respect to the disclosure of unspecified transcripts from the case of the *Prosecutor v. P. Nyiramasuhuko et al.*;

(iii) With respect to the relief sought pursuant to Rules 66 and 5 of the Rules.

Arusha, 9 February 2005, done in English.

  
Joseph Asoka Nihal de  
Silva,  
Presiding Judge

  
Flavia Lattanzi

  
Florence Rita Arrey

Judge

