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NATIONS UNIES

ICTR-99-50-T  
28-09-2006  
(23408-23404)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

## TRIAL CHAMBER II

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 28 September 2006

JUDICIAL RECORDS/ARCHIVES  
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**THE PROSECUTOR**  
v.  
**CASIMIR BIZIMUNGU**  
**JUSTIN MUGENZI**  
**JÉRÔME-CLÉMENT BICAMUMPAKA**  
**PROSPER MUGIRANEZA**

Case No. ICTR-99-50-T

### DECISION ON PROSPER MUGIRANEZA'S MOTION FOR RECORDS OF ALL PAYMENTS MADE DIRECTLY OR INDIRECTLY TO WITNESS D

*Rule 68 of the Rules of Procedure and Evidence*

#### Office of the Prosecutor:

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Justus Bwonwonga  
Mr. Elvis Bazawule  
Mr. Shyamlal Rajapaksa  
Mr. Olivier de Shutter  
Mr. William Mubiru

#### Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**  
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**  
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**  
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** ("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 "Prosper Mugiraneza's Motion Pursuant to Rule 66 for Records of All Payments Made Directly or Indirectly to Witness D", filed on 23 June 2006 (the "Motion");

**CONSIDERING** the "Prosecutor's Request for Leave to Respond Out of Time to Mr. Prosper Mugiraneza's Motion Pursuant to Rule 66 for Records of All Payments Made Directly or Indirectly to Witness D", filed on 22 August 2006 (the "Response");

**RECALLING** the Chamber's Oral Ruling of 16 June 2004 ordering Defence Counsel to avoid questions relating to the nature of Witness D's witness protection programme;

**NOW DECIDES** the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

**INTRODUCTION**

1. On 16 June 2004, this Chamber ordered the Defence for Casimir Bizimungu to refrain from cross-examining Prosecution Witness D regarding the specifics of the witness protection programme he is in. The Defence for Prosper Mugiraneza (the "Defence") now requests that the Chamber order disclosure of the financial details of that programme, as well as any other payments made directly or indirectly to Witness D by the Tribunal and "other entities", arguing that this information is exculpatory under Rule 68.

**PRELIMINARY MATTERS**

2. The Prosecution states that its failure to respond to the Motion within five days of receiving it, as required under Rule 73 of the Rules, was inadvertent.<sup>1</sup> It invokes the Chamber's inherent power to admit the response in the interests of justice.
3. The Chamber notes the importance of the issue raised by the Defence motion, specifically the Chamber's duty to strike an appropriate balance between its responsibility to protect witnesses and its obligation to guarantee the rights of the Accused. Despite the Chamber's concern regarding the length of the Prosecution's delay, the Chamber recalls that Witness D has already testified and finds that the delay did not impact the proceedings. Thus, given the importance of the issues before it, the Chamber will consider all submissions before it in the interests of justice.

**DISCUSSION**

4. The Chamber notes that Prosper Mugiraneza refers to Rule 66 of the Rules in the title of his Motion but exclusively to Rule 68 of the Rules in the body of the Motion. The Chamber assumes that the reference to Rule 66 in the title is in error and rules on the request pursuant to Rule 68.

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<sup>1</sup> The Prosecution filed its response some two months after the filing of the Motion.

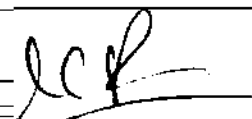
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5. The Defence avers that the extent of the financial benefit received by Witness D is relevant to the Witness's motivation for providing testimony favourable to the Prosecution and therefore relevant to the Witness's credibility. The Defence suggests that the statement of payments submitted by the Prosecution on 15 June 2004 (Prosecution Exhibit 56) is incomplete.
6. Despite the Chamber's Oral Ruling preventing cross-examination regarding the specifics of the witness protection programme, the Defence submits—on the basis of a recent decision in *Karemera et al.*<sup>2</sup>—that the Prosecution should be forced to disclose not only *direct* payments made by the Prosecution to Witness D, but also all other “funds expended on Witness D's behalf by the Tribunal and other entities”, including funds expended in connection with Witness D's witness protection programme. It submits that disclosure of these funds and explanations for their expenditure on the Witness's behalf will not reveal Witness D's identity or location or otherwise threaten the Witness's security.
7. The Defence acknowledges the Trial Chamber's concerns expressed in the *Karemera et al.* Decision regarding the possibility that future informants might use information of payments made to a witness as a bargaining tool. Therefore, the Defence does not request that the disclosure be made public.
8. According to the Prosecution, the Defence admits: (i) that the Prosecution has already made sufficient disclosures regarding payments to Witness D; and (ii) that the Trial Chamber forbade cross-examination regarding the specific benefits of Witness D's witness protection programme. Therefore, the Prosecution avers that Prosper Mugiraneza's Motion is a “disguised appeal” of the Chamber's prior Oral Ruling.
9. The Prosecution submits that, under the Statute and the Rules, the Chamber is independent, competent to make its own rulings, and has equal authority to all other Trial Chambers. While a Defence application for reconsideration on the basis of an Appeal Chamber decision may be appropriate, the present Defence application on the basis of another Trial Chamber's ruling is not. If the Defence motion is granted as a result of another Trial Chamber's decision, there will be no finality to this Chamber's decisions.
10. Under Rule 68 (A), the Prosecution is obliged to disclose material “which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”<sup>3</sup> The Prosecution's obligations are ongoing.<sup>4</sup> Where the Defence believes that exculpatory material in the Prosecution's custody or control has not been disclosed, it may request that the Trial Chamber order disclosure. Before the Chamber will grant a request under Rule 68, the Defence must sufficiently identify the material sought and make a *prima facie*

<sup>2</sup> *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-T, Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 21 June 2006.

<sup>3</sup> Rule 68 (A) of the Rules of Procedure and Evidence.

<sup>4</sup> Rule 68 (E) of the Rules of Procedure and Evidence; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.



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showing that it is exculpatory.<sup>5</sup> Where the Defence specifically requests information or material covered by Rule 68 (A) that is not within the possession or control of the Prosecution and that the Defence has been unable to procure through its own efforts, the Prosecution should attempt to obtain and disclose the relevant information or material if it is in a better position than the Defence to do so.<sup>6</sup>

11. The Chamber recalls that its Oral Ruling of 16 June 2004 restricting questioning on the specifics of Witness D's witness protection programme reflected the Chamber's concern that the identity of the witness might be revealed. The specific question which led to the ruling concerned whether the witness had been given a new identity as part of that programme. The Prosecution represented that the Witness had specifically been instructed by the administrators of the witness protection programme not to answer that question or any other question which might make it easier to determine the Witness's location or identity.<sup>7</sup>
12. Despite the Prosecution's claim that the issue raised has already been decided by the Chamber, the Chamber finds that its Oral Ruling of 16 June 2004 did not determine whether information regarding the financial benefits received by Witness D is exculpatory for the purposes of disclosure under Rule 68. Moreover, the Chamber notes that the Prosecution does not argue that the information is not exculpatory for the purposes of Rule 68. Nor has the Prosecution requested relief from disclosure under Rule 68 (D), or Rule 66 (C), provisions which allow such relief where disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State." The Prosecution has not revealed a detailed statement of monies expended on behalf of Witness D to the Chamber.
13. The Chamber notes that not all payments made on behalf of witnesses are exculpatory for the purposes of Rule 68. Some expenses, such as transportation and accommodation costs connected with investigations and hearings, are reasonable and necessary and do not tend to undermine their credibility.<sup>8</sup> The Chamber is of the view that some expenses associated with a witness protection programme are also likely to be reasonable and necessary and therefore not exculpatory under Rule 68.<sup>9</sup> The Chamber is also mindful that the sum total of monies distributed under a witness protection programme would be deceptive without knowing the cost of living in the country administering the program, exchange rates, as well as other economic

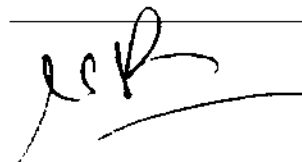
<sup>5</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicumumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.

<sup>6</sup> *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004, para. 10.

<sup>7</sup> *Bizimungu, et al.*, T. 16 June 2004, pages 13-15.

<sup>8</sup> Compare *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7.

<sup>9</sup> In *Karemera et al.*, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 9, the Chamber refused to order a State, pursuant to a Defence request under Article 28 of the Statute, to disclose the monetary value of the benefits received by a witness under a witness protection program, noting that such disclosure was not necessary to determine the credibility of the witness. In *Prosecutor v. Zigiranyirazo et al.*, Case No. ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 22, the Chamber, in ordering disclosure of the sum total of payments made directly by the Tribunal to the witness, specifically distinguished the *Karemera et al.* Decision cited directly above because it involved payments made through a witness protection programme.



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factors.<sup>10</sup> Such details might be difficult to disclose without compromising the safety of the Witness by potentially revealing his whereabouts. Nonetheless, the Chamber cannot determine the question before it, specifically, whether indirect and direct payments made to Witness D are exculpatory for the purposes of Rule 68, without seeing a detailed statement of payments, including details of all expenses connected with the witness protection programme. Therefore, the Chamber, pursuant to its authority to issue orders necessary for the conduct of trial under Rule 54, orders the Prosecution to provide such a detailed statement of expenses, which should be filed with the Chamber *ex parte* and strictly confidential. The Chamber reserves its decision on the central issue of whether these payments are exculpatory for the purposes of Rule 68 until it has had time to review the Prosecution's disclosure made pursuant to this order.

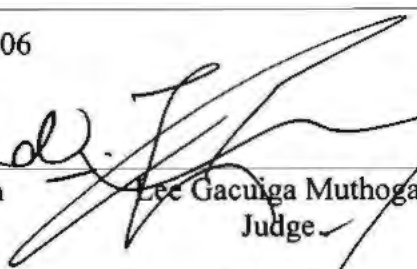
**FOR THE FOREGOING REASONS, THE CHAMBER**

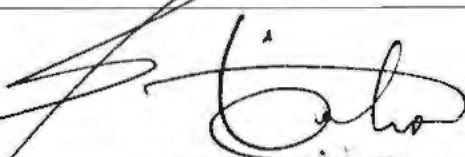
**ORDERS** the Prosecution to provide the Chamber with a detailed statement of all expenses incurred on Witness D's behalf and on behalf of members of his family, including the details of all expenses connected with the witness protection programme he is enrolled in, to be filed with the Chamber *ex parte* and strictly confidential;

**RESERVES** its final decision on the Defence motion until the Chamber has had a chance to review the Prosecution materials submitted pursuant to the above Order.

Arusha, 28 September 2006

  
Khalida Raehid Khan  
Presiding Judge

  
Lee Gacunga Muthoga  
Judge

  
Emile Francis Short  
Judge



<sup>10</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 9.