



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 23 March 2007

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

**DECISION ON THE PROSECUTION MOTION TO UNSEAL AND DISCLOSE TO
THE CANADIAN AUTHORITIES THE CLOSED SESSION TRANSCRIPTS OF
WITNESS ANA**

Office of the Prosecutor:

Mr Ciré Aly Bâ
Mr Moussa Sefon
Mr Segun Jegede
Mr. Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Anne Pauline Bodley

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie MacDonald **for Augustin Bizimungu**
Mr Christopher Black and Mr Patrick De Wolf **for Augustin Ndindiliyimana**
Mr Charles Taku **for François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia **for Innocent Sagahutu**

INTRODUCTION

1. The trial in this case commenced on 24 September 2004. Prosecution Witness ANA testified on 22, 23 and 24 March 2005. On 7 December 2006 the Prosecution closed its case.
2. On 6 March 2007, the Prosecution filed a motion requesting the Chamber to issue an order varying its Decision on Protective Measures for Prosecution Witnesses dated 12 July 2001 and to unseal and disclose to the Canadian authorities the closed session transcripts of Witness ANA of 22 March 2005 and sealed Exhibit P-28 (Witness ANA's Protected Information Sheet).¹ On 9 March 2007, The Defence for Nzuwonemeye filed a Response opposing the Motion.²

SUBMISSIONS

The Prosecution

3. The Prosecution submits that the sharing of information between the Tribunal and national authorities is consistent with Articles 15 and 28 of the ICTR Statute and Security Council resolutions 1503 and 1534. The Prosecution avers that it is critical that it be able to transfer evidence to national authorities so that they can prosecute cases arising from the crimes committed in Rwanda.³
4. The Prosecution submits that the written consent of Witness ANA shows his confidence that the disclosure of his testimony will not adversely affect his safety.⁴
5. Finally, the Prosecution submits that the request from Canada is a "Joint request" in that both the Prosecution and the Defence in the proceedings in Canada seek this disclosure and thus, no party will be prejudiced if it is granted.⁵

The Defence

6. In its Response, the Defence for Nzuwonemeye avers that neither the Canadian authorities nor the Prosecutor gave any explanation as to the relevance of the testimony of Witness ANA to the proceedings in Canada. The Defence further submits that such an explanation is necessary so that the Parties in proceedings before the Chamber will be able to ascertain whether in the cause of the Canadian proceedings, evidence may emerge through the use of those transcripts that would be of interest to them.⁶
7. Alternatively, the Defence requests that the evidence that will emerge from the use of the disclosed transcripts in the Canadian proceedings be disclosed to the Defence. The Defence underscores its right to confront the evidence to be adduced with the testimony already given before the Chamber in this case.⁷

¹ *The Prosecutor v. Ndindiliyimana et al.*, "Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness ANA", 6 March, 2007.

² "Nzuwonemeye's Response to the Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness ANA, 9 March 2007.

³ Motion, para 10

⁴ Motion, para 11

⁵ Motion, para 13

⁶ Nzuwonemeye's Response, paras. 3, 4.

⁷ Nzuwonemeye's Response, para 5.

DELIBERATIONS

8. The Chamber notes that the request for disclosure of the closed session transcripts for Witness ANA is a joint request in that both the national level Prosecution and Defence seek this disclosure. The Chamber also notes that Witness ANA has consented in writing to the disclosure of his prior statements and testimony to the Canadian authorities.

9. This Tribunal has previously held that the guiding principles of State cooperation under Article 28(1) of the Statute, also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law.⁸ The Chamber notes that the request from the Canadian authorities for the disclosure of closed session transcripts of Witness ANA, falls within the ambit of the principles of state cooperation under Article 28(1).

10. The Chamber further notes that confidential *inter partes* material may be disclosed to a party in another case before the Tribunal provided the applicant demonstrates that it “is likely to assist that applicant’s case materially, or [...] there is a good chance that it would.” This standard can be met by showing that there is a factual nexus between the two cases.⁹ In the Chamber’s view this reasoning is also applicable to a request for disclosure to a party in domestic proceedings. The Chamber concludes that a sufficient factual nexus exists in this case because the proceedings in Canada relate to the 1994 events in Rwanda, which were also the subject matter of Tribunal’s proceedings.

11. Accordingly, having considered that there is no prejudice to Witness ANA given his written consent and the joint nature of the request from Canada, the Chamber deems that it is in the overall interest of justice to vary its protective order for Witness ANA, so as to enable the Registry to unseal and provide copies of the closed session transcripts of Witness ANA’s testimony and of Exhibit P-28 for the purpose of disclosure to the Canadian authorities.

12. The Chamber further orders that the protective measures accorded to Witness ANA shall continue to have effect *mutatis mutandis* in any proceedings in Canada unless and until they are rescinded, varied or augmented in accordance with the procedure delineated in Rule 75(F) of the Rules.

13. The Chamber notes that a Defence response to a Prosecution motion is not the appropriate procedure for requesting transcripts or other documents from a State.

⁸ *Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR -98-42-T, “Decision on the Prosecution’s Motion to Unseal the Transcripts of Witness WDUSA”, 1 November 2006.

⁹ *The Prosecutor v. Ndindiliyimana et al.*, “Decision on Nsengiyumva’s Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and the Witness’ Unredacted Statements and Exhibits”, 23 August 2006, para. 3; *The Prosecutor v. Bagosora et al.*, “Decision on Nzirobera Request for Access to Protected Material”, 19 May 2006, para. 2.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion;

REQUESTS the Registry to provide the Prosecution with the closed session transcripts of Witness ANA's testimony of 22 March 2005, together with sealed Exhibit P-28 (Witness ANA's Personal Information Sheet), for the purpose of disclosure to the Canadian authorities;

ORDERS that the protective measures granted to Witness ANA shall continue to have effect *mutatis mutandis* in any proceedings in Canada.

Arusha, 23 March 2007

Asoka de Silva
Presiding Judge

Taghrid Hikmet
Judge

Seon Ki Park
Judge

[Seal of the Tribunal]