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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-99-50-T  
18-02-2008  
(25425-25422)

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OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr. Adama Dieng

**Date:** 18 February 2008

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

**Defence Counsel:**

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

INTRODUCTION

1. On 16 June 2004, the 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. On 23 June 2006, the Defence for Prosper Mugiraneza moved the Chamber to order the Prosecution to disclose all payments made to Witness D, arguing 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 may "affect the credibility of" his evidence pursuant to Rule 68.<sup>1</sup>

2. On 28 September 2006, the Chamber ordered 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. The Chamber ordered this material to be filed *ex parte* and assigned strictly confidential status. The Chamber reserved its decision on the central issue of whether these payments were exculpatory for the purposes of Rule 68 until it had had time to review the Prosecution's disclosure.<sup>2</sup>

3. The Prosecution filed a detailed statement of expenses incurred on Witness's D's behalf on 28 December 2006.<sup>3</sup> The Chamber reviewed the statement filed by the Prosecution, and, on 27 April 2007, requested further details regarding the payments.<sup>4</sup> In compliance with this request, the Prosecution filed a statement of expenses containing additional details on 26 June 2007.<sup>5</sup>

DISCUSSION

4. Pursuant to 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>6</sup> The Prosecution's disclosure obligations under this Rule are ongoing.<sup>7</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

<sup>1</sup> Prosper Mugiraneza's Motion Pursuant to Rule 66 (sic) for Records of All Payments Made Directly or Indirectly to Witness D", filed on 23 June 2006 ("Motion").

<sup>2</sup> Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006 ("First Witness D Disclosure Decision").

<sup>3</sup> Prosecutor's *Ex Parte* and Strictly Confidential Response to Trial Chamber's Decision of 28 September 2006, filed 28 December 2006.

<sup>4</sup> *Ex Parte* and Strictly Confidential Order for Further Disclosure Concerning Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 27 April 2007.

<sup>5</sup> Prosecutor's Compliance with the Decision in Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D (*Ex Parte* and Strictly Confidential), filed 26 June 2007.

<sup>6</sup> Rule 68 (A) of the Rules of Procedure and Evidence.

<sup>7</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.

25423

request under Rule 68, the Defence must sufficiently identify the material sought and make a *prima facie* showing that it is exculpatory.<sup>8</sup>

5. In reaching its conclusion in the First Witness D Disclosure Decision, the Chamber noted the following principles regarding disclosure of payments made to prosecution witnesses under Rule 68:

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. 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. 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 factors. Such details might be difficult to disclose without compromising the safety of the Witness by potentially revealing his whereabouts.<sup>9</sup>

6. The Chamber has reviewed the *ex parte* statements of payments to Witness D disclosed by the Prosecution in the light of these principles. In its disclosures, the Prosecution details payments to Witness D beginning in 2001 and continuing until July 2006 for, among other expenses, rent, medical, utilities, gas and oil, meals, clothing, school supplies, bus passes, computer classes, computer hardware and software, and cable television, as well as less transparent payments listed as maintenance and miscellaneous. It is unclear from the Prosecution's Disclosures whether the payments began in 2001 or before that date and whether they ended in July 2006 or are ongoing.

7. The Chamber acknowledges that the payments to Witness D have been made in connection with a witness protection programme, but does not consider this a sufficient basis for preventing the Defence from being made aware of any of the payments. Taking into account the Prosecution's Disclosures, the Chamber finds that the Prosecution should disclose the payments made to Witness D to the Defence teams. The Chamber reiterates that the disclosure of the sum total of payments made to Witness D in the absence of knowledge regarding the cost of living in the State administering the witness protection programme, as well as other economic factors, may be deceptive. To ameliorate the resulting distortions, the Chamber considers that the Prosecution should disclose the details of these payments, such as it did in its *ex parte* disclosures to the Chamber.

8. The Chamber is of the view that the Prosecution must certify when it began making payments to Witness D and whether it has ceased to do so or whether its payments are ongoing. If payments to Witness D, whether through the witness protection programme or independent thereof, commenced prior to 2001, the Prosecution should also disclose the sum total and details of these payments. The same is true of any payments made to Witness D since July 2006 to the present. Moreover, the Prosecution should disclose future payments to Witness D, if any, on an ongoing basis.

<sup>8</sup> Decision on Bicumbupaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.

<sup>9</sup> First Witness D Disclosure Decision, para. 13 (citations omitted).



9. In order to prevent the revelation of Witness D's whereabouts, the Chamber considers that the payments should be calculated and disclosed in US dollars. Any distortions that may result from the Defence being unaware of the cost of living in the State administering the witness protection programme can be taken into consideration by the Chamber when it considers the effect of the payments, if any, on the credibility of Witness D's evidence. The Chamber considers this compromise to strike the best balance between the principles of disclosure under Rule 68 and the need to ensure the continued protection of Witness D.

10. As the Defence acknowledges in its Motion, if details of the Prosecution's payments to witnesses were to be made public, future informants might use that information as a bargaining tool. Therefore, the Prosecution should file its disclosures confidentially.

**FOR THESE REASONS, THE CHAMBER**


**GRANTS** the Motion;


**ORDERS** the Prosecution to disclose to the Defence for all of the Co-Accused, as well as to the Chamber, detailed statements of all payments made to and expenses incurred on behalf of Witness D and his family, calculated in U.S. dollars, within thirty (30) days of this Decision;


**ORDERS** the Prosecution to disclose to the Defence and to the Trial Chamber future payments to Witness D, if any, on an ongoing basis, such disclosures to be made every three (3) months after the initial disclosure made in response to this Decision;

**ORDERS** that all disclosures made by the Prosecution in compliance with this Decision be filed confidentially.

Arusha 18 February 2008

  
 Khazida Rachid Khan  
 Presiding

  
 Lee Gacunga Muthoga  
 Judge

  
 Ernie Francis Shon  
 Judge

