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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Adama Dieng

**Date:** 18 February 2009

JUDICIAL RECORDS/ARCHIVES  
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**The PROSECUTOR**  
v.  
**Augustin NDINDILYIMANA**  
**Augustin BIZIMUNGU**  
**François-Xavier NZUWONEMEYE**  
**Innocent SAGAHUTU**  
*Case No. ICTR-00-56-T*

**DECISION ON BIZIMUNGU'S MOTION FOR REPARATION FOLLOWING THE  
PROSECUTION'S FAILURE TO DISCLOSE DOCUMENTS AFFECTING THE  
CREDIBILITY OF PROSECUTION WITNESS AOE**

*Rule 68 of the Rules of Procedure and Evidence*

**Office of the Prosecution:**

Mr Alphonse Van  
Mr Moussa Sefon  
Mr Lloyd Strickland  
Mr Abubacarr Tambadou  
Ms Faria Rekkas

**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Benoît Henry for **Augustin Bizimungu**  
Mr Christopher Black and Mr Vincent Lurquin for **Augustin Ndindiliyimana**  
Mr Charles Taku and Ms Beth Lyons for **François-Xavier Nzuwonemeye**  
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

## INTRODUCTION

1. On 4 December 2008, the Defence for the Accused Bizimungu ("Defence") filed a Motion requesting the Chamber to order the Prosecution to disclose a Gacaca Court judgement relating to Witness AOE/SDA ("Gacaca Judgement") which was admitted as a sealed exhibit in *Prosecutor v. Ephrem Setako* and to admit into evidence the Gacaca Judgement and extracts of open session transcripts ("Transcripts") from Witness AOE/SDA's testimony in the *Setako* case ("Defence Motion").<sup>1</sup> The Prosecution filed a response opposing the Motion ("Prosecution Response")<sup>2</sup> to which the Defence filed a reply ("Defence Reply").<sup>3</sup> The Chamber notes that the Defence Reply was filed out of time by two days and that the Defence admitted to the late filing.<sup>4</sup> The Chamber reminds the Defence of the importance of timely filings in order to ensure the smooth continuation of the proceedings. The Chamber however finds that it is in the interest of justice to consider the Defence Reply notwithstanding its late filing.

2. Witness AOE testified as a Prosecution Witness on 8, 9, 13 and 14 June 2005. Witness AOE also testified as a Prosecution Witness in the case of *Prosecutor v. Setako* under pseudonym SDA ("Witness AOE/SDA") on 22 and 23 September 2008.

## DELIBERATIONS

### *Law on Disclosure*

3. Rule 68(A) of the Rules of Procedure and Evidence ("Rules") requires the Prosecution to disclose "any 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>5</sup> The Appeals Chamber has held that whether material "may suggest the innocence or mitigate the guilt of the accused" must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.<sup>6</sup>

### *Whether the Gacaca Judgement should have been disclosed under Rule 68(A)*

4. The Defence submits that the Gacaca Judgement sentences Witness AOE/SDA to three months' imprisonment for having lied in different cases before the Gacaca Court.<sup>7</sup> In the Transcripts of the *Setako* proceedings annexed to the Defence Motion, Witness AOE/SDA admits to having lied before the Gacaca Court but states that he was imprisoned

<sup>1</sup> Requête en vue d'obtenir réparation suite à la violation par le Procureur de son obligation de divulguer des éléments susceptibles de porter atteinte à la crédibilité d'un témoin à charge en vertu des articles 72A) (sic) et 68 RPP et 92D) RPP, filed on 4 December 2008 ("Defence Motion").

<sup>2</sup> Réponse du Procureur à la "Requête en vue d'obtenir réparation suite à la violation par le Procureur de son obligation de divulguer des éléments susceptibles de porter atteinte à la crédibilité d'un témoin à charge en vertu des articles 72A) (sic) et 68 RPP et 92D) RPP" filed on 10 December 2008 ("Prosecution Response").

<sup>3</sup> Réplique à la Réponse du Procureur à la Requête d'Augustin Bizimungu pour obtenir divulgation du dossier judiciaire du témoin AOE qui a déposé sous le pseudonyme SDA dans l'affaire *Setako* et pour autoriser le dépôt en preuve de certaines transcriptions d'audience, filed out of time on 17 December 2008 ("Defence Reply").

<sup>4</sup> Defence Reply, para. 4.

<sup>5</sup> See also Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008 ("Rule 68 Decision") para. 9, citations omitted.

<sup>6</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution pursuant to Rule 68(A) (TC), 8 March 2006, para. 5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

<sup>7</sup> Defence Motion, paras. 8-9. The Gacaca Judgement was admitted under seal as exhibit no. P30 in *Prosecutor v. Setako* on 22 September 2008.

for failing to pay compensation for destroying Tutsi's property on 7 April 1994.<sup>8</sup> The Chamber notes that the Transcripts from the *Setako* proceedings do not specify the nature of the lies told by Witness AOE/SDA in the Gacaca proceedings, nor do they provide the context in which such lies were told. The Chamber notes that without first reviewing the Gacaca Judgement, it cannot assess whether the lies told by Witness AOE/SDA may affect the credibility of his previous testimony before this Chamber in 2005. The Chamber therefore cannot determine, at this stage, whether the Gacaca Judgement may affect Witness AOE/SDA's credibility pursuant to Rule 68(A).

5. Consequently the Chamber cannot consider whether to admit the Transcripts into evidence until it is provided with specific information on the lies told by Witness AOE/SDA.

6. The Chamber recalls that pursuant to Rule 75(G) of the Rules, the Defence could apply to the *Setako* Trial Chamber for access to the Gacaca Judgement.<sup>9</sup>

7. The Chamber strongly rejects the Prosecution's submission that the Gacaca Judgement is currently under seal and that its exact content is unknown.<sup>10</sup> The Chamber reminds the Prosecution that Rule 68(A) of the Rules imposes the disclosure obligation on the Prosecutor, which is not a divisible entity. The Chamber recalls the Appeals Chamber's decision in *Bagosora* where it held that "...the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations."<sup>11</sup> The Chamber notes that the Prosecutor is already in possession of the Gacaca Judgement which was admitted as exhibit P.30 (under seal) in the *Setako* proceedings.

8. The Chamber reminds the Prosecution that pursuant to Rule 68 of the Rules the Prosecutor is under an obligation to disclose to the Defence *inter alia* exhibits admitted under seal if such documents might affect the credibility of a Prosecution witness in another case.<sup>12</sup> Furthermore, Rule 75(F)(ii) of the Rules provides that once protective measures have been ordered in any proceedings, they "shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules." The Chamber recalls that, in accordance with well-established jurisprudence, this sub-rule is intended to create a mechanism for the routine disclosure of *inter alia* sealed exhibits which is in line with Rule 68 without requiring the Defence to make an individual application to the Trial Chamber who granted a protective order.<sup>13</sup>

<sup>8</sup> Annexes II and III of the Defence Motion.

<sup>9</sup> See for example Requête en extreme urgence de la Defense du Général Augustin Bizimungu en communication des audiences à huis clos et des pièces produites sous scellées témoin protégé du Procureur BTH/GFA, 16 May 2008.

<sup>10</sup> Prosecution Response, para. 8.

<sup>11</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43.

<sup>12</sup> *Prosecutor v. Karemera et al.*, Case Number ICTR-98-44-T, Decision On Joseph Nzirorera's Eleventh Notice Of Rule 68 Violation And Motion For Stay Of Proceedings (TC), 11 September 2008, para. 6. See Rule 68 (A) of the Rules, pursuant to which the Prosecution is required to disclose to the Defence any material which may affect the credibility of Prosecution evidence.

<sup>13</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. 4-5; *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; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Disclosure on the Prosecutor's Request for an Order for 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. 6.

9. The Chamber recalls that Rule 46(A) of the Rules provides that a Chamber may after a warning impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice. The Chamber recalls that it has issued several decisions emphasizing the importance of the disclosure of exculpatory material.<sup>14</sup> The Chamber recalls that the Office of the Prosecutor is an "undivided unit".<sup>15</sup> The Chamber notes that the Office of the Prosecutor is in possession of the Gacaca Judgement because it was admitted as a sealed exhibit in *Prosecutor v. Setako*. Therefore the Chamber finds that the Prosecution's failure to acknowledge possession of the Gacaca Judgement by submitting that its exact contents is unknown defies the purpose of Rule 68 and amounts to an obstruction of the proceedings. The Chamber therefore issues a warning to the Prosecution pursuant to Rule 46(A) of the Rules.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence Motion without prejudice to any subsequent filings by the Defence;

**DIRECTS** the Defence to make an application to the *Setako* Trial Chamber for access to the Gacaca Judgement pursuant to Rule 75(G) of the Rules;

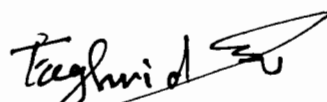
**DIRECTS** the Prosecution to review the Gacaca Judgement and, if necessary, discharge its disclosure obligation pursuant to Rule 68 of the Rules; and

**ISSUES** a warning to the Prosecution for obstructing the proceedings pursuant to 46(A) of the Rules.

Arusha, 18 February 2009, done in English.

  
Asoka de Silva

Presiding Judge

  
Taghrid Hikmet

Judge

  
Seon Ki Park

Judge

[Seal of the Tribunal]



<sup>14</sup> See also Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations pursuant to Rule 68 (TC), 22 September 2008, Decision on the Prosecution Motion to Vary the Chamber's Order concerning the Prosecutor's Rule 68 Disclosure Obligations (TC), 24 October 2008.

<sup>15</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43.