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

Registrar: Adama Dieng

Date: 7 August 2009

The PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME- CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR- 99-50-T

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DECISION ON NGIRABATWARE' S CONFIDENTIAL MOTION FOR
DISCLOSURE OF EXHIBITS ADMITTED DURING THE TESTIMONY OF
PROSECUTION WITNESS GTC

Rule 75 F (i) and G (i) of the Rules of Procedure and Evidence

The Prosecution:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamalal Rajapaksa
Mr. William Mubiru

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms Andrea Valdivia for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme Bicamumpaka**
Mr. Tom Moran and Ms Cynthia Cline for **Prosper Mugiraneza**

Defence for Augustin Ngirabatware:

Mr Peter Hebert, Lead Counsel
Ms Mylene Dimitri- Co-Counsel

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INTRODUCTION

1. The Defence of Augustin Ngirabatware ("Defence"), whose trial before this Tribunal is scheduled to start on 23 September 2009, moves this Trial Chamber for access to exhibits admitted during the testimony of protected Prosecution Witness GTC, who testified in the *Casimir Bizimungu et al* trial on 1, 2, 3, 4, 8 and 9 March 2005.¹
2. Witness GTC is expected to testify in the case against Augustin Ngirabatware on behalf of the Prosecution under the pseudonym ANAA. The Prosecution disclosed to the Defence the transcripts of Witness GTC's testimonies on 15 May 2009 but did not disclose the exhibits filed during his testimony.²
3. On 3 July 2009, the Prosecution filed its Response to the Defence Motion. The Prosecution submits that it was not obliged to disclose the exhibits pursuant to Rule 66 (A) of the Rules of Procedure and Evidence ("Rules"); that the Defence has not specified which exhibits it wants disclosed; and that the Defence has failed to establish the nexus between those exhibits and the Defence case.³
4. On 6 July 2009, the Defence filed its Reply to the Prosecution Response providing the list of the requested exhibits, which was amended in an Addendum to the Defence Reply on 8 July 2009.⁴
5. The Defence agrees to comply with the relevant Prosecution witness protection measures already extended to Prosecution Witness GTC ordered in these proceedings.⁵

DISCUSSION*Preliminary Matters*

6. The Chamber first wishes to express its concern regarding the confidential filing of motions that deserve to be filed publicly. The transparency of the proceedings is served by the public filing of documents. The Defence Motion is filed "confidentially".

¹ Extremely urgent and confidential motion of Dr. Augustin Ngirabatware for disclosure of exhibits admitted during the testimony of prosecutor [*sic*] witness GTC in Bizimungu et al., filed on 26 June 2009 ("Motion"). Ngirabatware is the Accused in the case of *The Prosecutor v Augustin Ngirabatware*, Case No. ICTR-99-54-T.

² Motion, para. 4

³ Réponse du Procureur à la requête intitulée "Extremely urgent and confidential motion of Dr. Augustin Ngirabatware for disclosure of exhibits admitted during the testimony of prosecutor [*sic*] witness GTC in Bizimungu et al.", filed on 3 July 2009 ("Response"), paras. 6-7.

⁴ Defence Reply to the Prosecutor's Response to the "Extremely urgent and confidential motion of Dr. Augustin Ngirabatware for disclosure of exhibits admitted during the testimony of prosecutor [*sic*] witness GTC in Bizimungu et al.", filed on 6 July 2009 ("Reply"); Addendum to the Defence Reply to the Prosecutor's Response to the "Extremely urgent and confidential motion of Dr. Augustin Ngirabatware for disclosure of exhibits admitted during the testimony of prosecutor [*sic*] witness GTC in Bizimungu et al.", filed on 8 July 2009 ("Addendum").

⁵ Decision on the Prosecutor's Motion for Protective Measures (TC), 22 September 2000.

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Confidential filing should be reserved for exceptional circumstances – for instance, where the protection of a witness is at stake.⁶ In the present case, the Chamber considers that the Defence Motion contains no such confidential information and therefore, the confidentiality of the Defence Motion should be lifted.

7. The Chamber notes that several of the exhibits requested by the Defence were not admitted under seal, and the Defence should be able to obtain access to these public documents through a request to the Registry without involving the Chamber.⁷ These exhibits are as follows:

- (i) ID 49 (E), ID 50 (E), ID 51 (E) (statements of Prosecution Witness GTC dated 16.04.2003, 6.03.2001 and 19.04.2002 respectively);
- (ii) ID 52 (F) (“Jugement du Tribunal de 1ère instance de Gisenyi” dated 25.05.2001);
- (iii) ID 53 (K), ID 54 (E) (letter of Witness GTC to the Appeal Court of Ruhengeri dated 24.10.2001 and 29.08.2002 respectively);
- (iv) ID 55 (E), ID 56 (E) (transcripts of Witness GTC’s testimony in *The Prosecutor v Nahimana et. al* (“Media case”) dated 4.09.2001 and 6.09.2001 respectively);
- (v) ID 58 (F) (Witness statement dated 18.04.2003) and 2D39 (K, E) (Transcripts of Communiqué from Préfecture Security Council).

8. The Motion is brought pursuant to Rules 68 and 75 of the Rules, but the Defence does not make any submissions concerning Rule 68. The Chamber will therefore consider the Request as falling solely under Rule 75. The Prosecution’s Response, which concerns Rule 66, is inapposite.

The Law on Disclosure of Confidential Materials

9. Rule 75 of the Rules empowers a Chamber to order appropriate measures to safeguard the privacy and security of witnesses, provided that the measures are consistent with the rights of the Accused. Pursuant to these powers, the Chamber extended a number of protective measures to the witnesses in this case, including Prosecution Witness GTC.⁸

10. Rule 75 (F) of the Rules provides that “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; ...”

⁶ *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Order for Transfer of Detained Witnesses, 1 March 2007, para. 5; *Prosecutor v. Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

⁷ Reply, para.20, Addendum to Reply, para.7.

⁸ Decision on the Prosecutor’s Motion for Protective Measures (TC), 22 September 2000.

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11. Rule 75 (G) of the Rules sets out the methods by which a party may apply to rescind, vary or augment protective measures ordered in the first proceedings. Accordingly, pursuant to Rule 75 (G) (i), that party must apply “[t]o any Chamber, however constituted, remaining seized of the first proceedings.”

12. This Trial Chamber is seized with proceedings in this case, and therefore retains competence to adjudicate this Motion pursuant to Rule 75 (G) (i) of the Rules.

13. According to the established jurisprudence of the ad-hoc Tribunals, under Rule 75, a “party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.”⁹ The party seeking access to confidential material from another case must sufficiently identify the requested material¹⁰ and “show a legitimate forensic purpose for seeking access, he must show that such access would be likely to assist his case materially or that there is at least a good chance it will give that assistance.”¹¹ This standard can be met “by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time.”¹²

⁹ *Niyitegeka, The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-R75, Decision on Eliézer Niyitegeka’s Appeal Concerning Access to Confidential Materials in the Muhimana and Karemera et al. Cases, 23 October 2008 (“*Niyitegeka Appeals Chamber Decision*”), para.21, citing: *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d’éléments en possession du procureur et nécessaires a la défense de l’ appellant et aum fins d’assistance du greffe pour accomplir des investigations complémentaires en phase d’appel, 8 December 2006 (“*Nahimana et al. Decision*”), para.12.

¹⁰ *Niyitegeka Appeals Chamber Decision*, para. 21, citing: *Nahimana et al. Decision*, para. 12 (“...such material must be identified or described by its general nature...”); *The Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Cerkez for Access to Confidential Supporting Material, 10 October 2001 (“*Hadzihasanovic Decision*”), para. 11 (a party seeking access to confidential material from another case must “identify as clearly as possible the documents of the nature of the documents to which he seeks access.”).

¹¹ *Niyitegeka Appeals Chamber Decision*, para.21, citing: *Nahimana et al. Decision*, para. 12; Decision on General Augustin Bizimungu’s Motion for Disclosure of Closed Session Material of Defence Witness WZ4, 22 September 2008; *Hadzihasanovic Decision*, para.11; See also *The Prosecutor v. Bagosora et al.*, Case No. ICTR -98-41-T, Decision on Nzirorera Request for Access to Protected Material (TC), 19 May 2006. (“*Bagosora Decision*”), para.2.

¹² *Niyitegeka Appeals Chamber Decision*, para.21, citing: *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in *The Prosecutor v. Blaškić*, 16 May 2002, para. 15; *The Prosecutor v. Vidoje Blagovjević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 4; *The Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3.; *Bagosora et al.*, Decision on Bizimungu Defence request for Disclosure of Closed Session Testimony and Exhibits Placed under Seal (TC), 15 May 2007, paras. 7-8 (granting motion for access to specific confidential material from the Military I case, filed by an accused in another case. The Chamber found the cases closely related and that a “significant factual, geographical and temporal overlap exists between the cases”. para. 7).

14. The jurisprudence further establishes that, once it is determined that confidential material filed in another case may materially assist an applicant, a Chamber has the authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry.¹³ A valid reason for modifying an order governing the testimony of a protected witness is that the witness is to testify in another case before this Tribunal.¹⁴

Should the Sealed Materials be Disclosed to the Defence of Augustin Ngirabatware?

15. In its Motion, the Defence requested access to exhibits admitted during the testimony of Witness GTC.¹⁵ In its Reply and Addendum, the Defence provided a list of the requested exhibits. The Chamber considers that the Defence has sufficiently identified the materials to which it seeks access.

16. The Defence argues that access to the exhibits admitted during Witness GTC's testimony would materially assist the Accused, as it would enable him to prepare his defence, and particularly the cross-examination of Prosecution Witness ANAA.¹⁶

17. The Defence further submits that, pursuant to the jurisprudence of the Tribunal, the fact that Witness GTC is also scheduled to testify as a witness for the Prosecution in the *Ngirabatware* trial, is a sufficient basis for it to be granted access to the exhibits.¹⁷ The Chamber notes that the jurisprudence referred to by the Defence in support of this submission does not refer to the legitimate forensic purpose test applied to requests made pursuant to Rules 75 (F) and (G). The Chamber considers that the Defence should have provided further information demonstrating the nexus between the *Ngirabatware* case and these proceedings.

18. Nonetheless, the Chamber considers it to be in the interests of justice to grant access to the requested materials, and notes that there is a nexus between the two cases. Like the four co-Accused in this trial, Ngirabatware is a former minister in the Interim Government. Prosecution Witness GTC's testimony in this case concerned, *inter alia*, the influence of ministers of the Interim Government and of party officials on various events that took place throughout Gisenyi *Préfecture*.¹⁸ Exhibits tendered during the testimonies of Prosecution Witness GTC put his testimony into context. Prosecution allegations against Ngirabatware include that he was an influential member of the MRND in Gisenyi, as well as allegations transpiring from events which allegedly took place in Gisenyi

¹³ *Bagosora* Decision, para.3; *Prosecutor v. Niyitegeka*, Case No.: ICTR-96-14-T, Decision on Release of Closed Session Transcript of Witness KJ for use in the Trial of *Bagosora et al.*, 16 February 2004, para.2; Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits received under Seal for Witness GKB, 20 February 2004, para.7.

¹⁴ *Ibid: Nahimana et al.*, Decision on Joseph Nzirorera's motion for disclosure of closed session testimony and exhibit received under seal, 5 June 2003, para.5.

¹⁵ Motion, para. 12.

¹⁶ Motion, paras. 5, 8.

¹⁷ Motion, para. 6.

¹⁸ See e.g., T. 1 March 2005, p. 60.



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Préfecture.¹⁹ The Chamber finds that a close factual, temporal and geographical link exists between the two cases, with particular reference to the events that allegedly took place in Gisenyi *Préfecture* and the role of ministers of the Interim Government and of party officials in the relevant period. The Chamber is therefore satisfied that a legitimate forensic purpose for the exhibits requested exists and that access to the confidential material is in the interests of justice.

19. The Chamber finds that its order granting protective measures to Prosecution Witness GTC should be modified to permit the Defence access to the protected material on condition that its terms shall apply *mutatis mutandis* to the Defence.

FOR THESE REASONS, the Chamber

GRANTS the Motion; and hereby

ORDERS that the confidentiality of the Defence Motion be lifted by the Registrar; and

DIRECTS the Registry to make available to the Defence of Augustin Ngirabatware sealed exhibits No. P. 82, No. P. 83, No. P. 84 and ID 57, admitted during the testimony of Prosecution Witness GTC; and

REMINDS the Defence for Augustin Ngirabatware and any other party in receipt of the protected information, including the Accused, that the witness protection orders in place for Prosecution Witness GTC continue to have effect in Augustin Ngirabatware's case, as provided for by Rule 75 (F) of the Rules.

7 August 2009



Khalida Rachid Khan
Presiding Judge



With the consent
and on behalf of
Lee Gacuiga Muthoga
Judge



With the consent
and on behalf of
Emile Francis Short
Judge



¹⁹ See e.g., *Nigabatware*. Indictment, para. 4.2, 6.67.