

ICTR-02-78-T  
26-08-2009  
(4020-4017)

4020  
Mwaly



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

**Before Judges:** Taghrid Hikmet, Presiding  
Seon Ki Park  
Joseph Masanche

**Registrar:** Adama Dieng

**Date:** 26 August 2009

THE PROSECUTOR  
v.

Gaspard KANYARUKIGA

*Case No. ICTR-2002-78-I*

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**DECISION ON THE EXTREMELY URGENT DEFENCE MOTION FOR  
DISCLOSURE OF ALL EXHIBITS FROM THE SEROMBA TRIAL**

*Rule 75(G) of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Holo Makwaia  
Althea Alexis-Windsor  
Mara Tidiane  
Lasana Dumbuya

**Defence Counsel:**  
David Jacobs  
Claver Sindayigaya  
Marc Nerenberg

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## INTRODUCTION

1. The trial in this case is scheduled to commence on 31 August 2009.<sup>1</sup>
2. On 30 April 2009, the Prosecution disclosed to the Defence all unredacted transcripts from the *Seromba*<sup>2</sup> trial.<sup>3</sup>
3. On 19 August 2009, the Defence filed a motion requesting disclosure of all exhibits from the *Seromba* trial.<sup>4</sup> The Defence submits that the exhibits are potentially exculpatory and therefore subject to the disclosure requirements of Rule 68(A) of the Rules of Procedure and Evidence ("the Rules").<sup>5</sup> In the alternative, the Defence argues that the exhibits should be disclosed in accordance with the Tribunal's jurisprudence on *inter partes* materials pursuant to Rule 75(G).<sup>6</sup>
4. On 24 August 2009, the Prosecution filed a Response, submitting that the Defence should apply to the Chamber for access to the exhibits in question.<sup>7</sup>

## DELIBERATIONS

### *Preliminary Matters*

5. Before considering the merits of the motion, the Chamber notes that the Defence request is untimely. While the Prosecution disclosed all transcripts from the *Seromba* trial on 30 April 2009, the Defence did not file its motion for the exhibits until 19 August 2009, less than two weeks prior to the commencement of the trial. The Chamber finds no excuse for this delay. However, in the interests of justice, the Chamber shall nevertheless consider the motion.
6. Rule 75 (G) of the Rules of Procedure and Evidence provides that:
 

A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

  - (i) to any Chamber, however constituted, remaining seised of the first proceedings;  
or
  - (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

<sup>1</sup> Scheduling Order Following the Status Conference (TC), 24 April 2009.

<sup>2</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T.

<sup>3</sup> See, e.g., Prosecutor's Response to the Defence Extremely Urgent Motion for Postponement of the Start of the Trial, filed on 25 May 2009, para. 4; Extremely Urgent Defence Motion for Disclosure of all Exhibits from the Case of *The Prosecutor v. Seromba*, filed on 19 August 2009, para. 19.

<sup>4</sup> Extremely Urgent Defence Motion for Disclosure of all Exhibits from the Case of *The Prosecutor v. Seromba*, filed on 19 August 2009.

<sup>5</sup> Extremely Urgent Defence Motion for Disclosure of all Exhibits from the Case of *The Prosecutor v. Seromba*, filed on 19 August 2009, para. 25.

<sup>6</sup> Extremely Urgent Defence Motion for Disclosure of all Exhibits from the Case of *The Prosecutor v. Seromba*, filed on 19 August 2009, para. 28.

<sup>7</sup> Réponse à la Requête en Extrême Urgence de la Défense pour communication de preuves documentaires du procès Seromba en Application des Articles 68(A), 75(F) et 75(G) de Règlement de Procédure et de Preuve, filed on 24 August 2009.

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7. During the pendency of an appeal, the Trial Chamber before which the trial was conducted remains seized of all matters not related to the appeal, including requests to modify witness protection orders.<sup>8</sup> The appeal in the *Seromba* case, however, was completed on 12 March 2008.<sup>9</sup> Thus, the Chamber finds that no Trial Chamber remains seized of the *Seromba* proceedings and that the present application is properly before this Chamber pursuant to Rule 75 (G)(ii) of the Rules.<sup>10</sup>

*On the Merits*

8. Confidential *inter partes* material from one case may be disclosed to a party in another case, where the applicant demonstrates that the material sought “is likely to assist that applicant’s case materially, or at least that there is a good chance that it would.”<sup>11</sup> This standard can be met by showing that there is a factual nexus between the two cases.<sup>12</sup>

9. The Chamber recalls that the charges against Gaspard Kanyarukiga relate to the destruction of the Nyange Parish Church, the same event for which Athanase Seromba was previously convicted.<sup>13</sup> The Chamber is therefore satisfied that at least some of the exhibits introduced in the *Seromba* case are material to the preparation of Kanyarukiga’s defence.

<sup>8</sup> *Prosecution v. Nahimana et al.*, Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, paras. 3-6.

<sup>9</sup> *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008.

<sup>10</sup> Compare *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Decision on Ngirabatware Defence Request for Disclosure of Exhibits Admitted During the Testimony of Prosecution Witness BKW in the Bikindi Case, 7 July 2009.

<sup>11</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Decision on Nsengiyumva Request for Access to Protected Material (TC), dated 14 July 2006, para. 4; *Prosecutor v. Galic*, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the Galic Case (AC), 16 February 2006, para. 3 (citations omitted); *Prosecutor v. Blagojevic and Jokic*, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 4.

<sup>12</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Decision on Nsengiyumva Request for Access to Protected Material (TC), 14 July 2006, para. 4; *Prosecutor v. Bagosora*, Decision on Nzirorera Request for Access to Protected Material (TC), 19 May 2006, para. 2; *Prosecutor v. Blagojević and Jokić*, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 4; *Prosecutor v. Galić*, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3 (with further references).

<sup>13</sup> See *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-T, Judgement (TC), 13 December 2006.

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**FOR THE FOREGOING REASONS**, the Chamber

**GRANTS** the Defence motion in part;

**ORDERS** the Prosecution, after having reviewed the exhibits together with the Defence, to disclose to the Defence those closed session exhibits from the *Seromba* trial that are deemed to be material to the applicant's case;

**DECIDES** that the Defence and any other party in receipt of the protected information, including the Accused, shall be bound *mutatis mutandis* by the witness protection measures ordered by the *Seromba* Trial Chamber;<sup>14</sup>

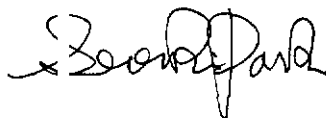
**REMANDS** the Prosecution of its ongoing obligation under Rule 68(A) to disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence;

**REMANDS** the Defence of its right, pursuant to Rule 66(B), to inspect books, documents, photographs and tangible objects in the custody or control of the Prosecutor, which are material to the preparation of the Defence;

**REMAINS** seized of the matter.

Arusha, 26 August 2009


[read and approved by]



Taghrid Hikmet  
Presiding Judge  
absent at the time  
of signature]



[read and approved by]



Joseph Masanche  
Judge  
[absent at the time  
of signature]

[Seal of the Tribunal]

<sup>14</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Décision Relative à la Requête aux fins de Prescription de Mesures de Protection des Témoins de la Défense, 28 January 2005; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003.