

UNITED NATIONS
NATIONS UNIES

**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

1925/H
IN THE APPEALS CHAMBER

ICTR-98-41-A

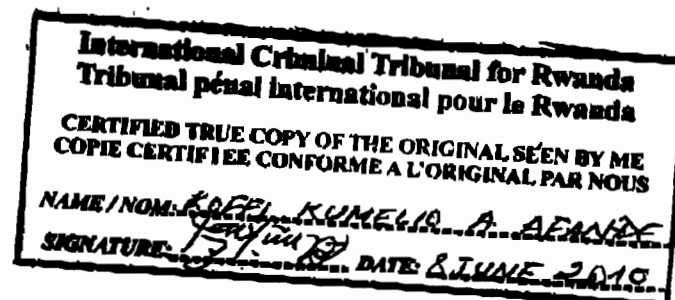
8th June 2010

{1925/H – 1919/H}

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 8 June 2010



ICTR Appeals Chamber

Date: 08th June 2010

Action: R. Jumea

Copied To: Concerned Judges, SLOs,
LOS, ALOS Parties, CMS

LGS.

**Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA**

v.

THE PROSECUTOR

Case No. ICTR-98-41-A

**DECISION ON AUGUSTIN NGIRABATWARE'S MOTION FOR
DISCLOSURE OF CONFIDENTIAL MATERIAL
RELATING TO WITNESS DBN**

Counsel for Théoneste BagosoraRaphaël Constant
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Alex Obote-Odora
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Aisha Kagabo

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seised of the "Extremely Urgent Motion of Dr. Augustin Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DBN in *Bagosora et al.* (case No. ICTR-98-41-T)", filed by Augustin Ngirabatware ("Ngirabatware") on 5 May 2010 ("Motion for Disclosure").

A. Procedural Background

2. On 18 December 2008, Trial Chamber I of the Tribunal rendered its Judgement in the *Bagosora et al.* case and found Théoneste Bagosora, Aloys Ntabakuze, and Anatole Nsengiyumva guilty of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.¹ Their appeals against the Trial Judgement are pending.

3. Ngirabatware is charged before the Tribunal with multiple counts of genocide and crimes against humanity.² His trial started before Trial Chamber II of the Tribunal ("Trial Chamber") on 23 September 2009. The proceedings were adjourned on 18 March 2010 until 21 June 2010 as a result of the unavailability of a Prosecution witness.³

4. On 29 April 2010, the Prosecution filed confidentially an urgent motion in the *Ngirabatware* proceedings to vary its list of witnesses, seeking, *inter alia*, the Trial Chamber's permission to add Witness DBN as a "potential prosecution witness".⁴

5. On 5 May 2010, Ngirabatware filed the present Motion for Disclosure before the Appeals Chamber, in which he requests disclosure of material related to Witness DBN's testimony in the *Bagosora et al.* case ("Requested Material").⁵

6. On 10 May 2010, the Prosecution filed confidentially an urgent motion in the *Ngirabatware* proceedings seeking leave, *inter alia*, to vacate the scheduled trial date and withdraw the

¹ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 ("Trial Judgement"), para. 2258.

² *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 14 April 2009. The Prosecution filed the initial indictment against Ngirabatware on 28 September 1999, and filed amendments thereto on 5 February and 14 April 2009.

³ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, T. 18 March 2010 pp. 81, 84.

⁴ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses to be Called and Extension of Witness Protection Orders, confidential, 29 April 2010 ("Prosecution Motion to Vary the Witness List"), paras. 1, 57.

⁵ Motion for Disclosure, paras. 27, 28.

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Prosecution Motion to Vary the Witness List.⁶ The Prosecution filed its response to Ngirabatware's Motion for Disclosure the following day,⁷ to which Ngirabatware replied on 14 May 2010.⁸

7. On 24 May 2010, the Trial Chamber, *inter alia*, (i) granted the Prosecution's request to withdraw its Motion to Vary the Witness List; (ii) vacated the scheduled trial date of 21 June 2010; (iii) ordered that the Prosecution's case-in-chief will be deemed closed if the Prosecution fails to vary its witness list to rebut the alibi by 24 June 2010; and (iv) ordered that the Defence case be scheduled to commence on 15 November 2010.⁹

B. Submissions

8. Ngirabatware requests that the Appeals Chamber order that the closed session transcripts of the testimony of Witness DBN in the *Bagosora et al.* case be disclosed to him, together with the exhibits admitted during the witness's testimony in this case.¹⁰ In support of his Motion for Disclosure, Ngirabatware recalls that he filed a notice of alibi stating that he was in Kigali town from 6 to 12 April 1994 and, *inter alia*, at the Presidential Guard Camp on 7 and 8 April 1994.¹¹ He points out that Witness DBN's testimony in the *Bagosora et al.* case contains "multiple references to [the witness's] schedule during the days following the crash of President Habyarimana's plane, in his capacity of soldier within the para-commando battalion of the FAR" and in particular to the witness's movements "from the Kanombe Camp to the Presidential Guard Camp."¹² Ngirabatware argues that since Witness DBN is expected to testify as a Prosecution witness in his case "on the period and the places covered by the notice of alibi",¹³ the witness's expected testimony has a "close factual, temporal and geographical link with his testimony" in the *Bagosora et al.* case.¹⁴ Ngirabatware submits that the Requested Material would materially assist him in the preparation of his defence and the cross-examination of Prosecution witnesses,¹⁵ and agrees to be bound by the witness protection order applicable to Witness DBN in the *Bagosora et al.* case.¹⁶

⁶ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecutor's Extremely Urgent Motion for Leave to Vacate the Scheduled Trial Date and Extend the Date for Commencement of Third Phase of Prosecution Case, confidential, 10 May 2010 ("Prosecution Motion to Withdraw Motion to Vary the Witness List"), paras. 1, 2, 42, 49.

⁷ Prosecution's Response to "Extremely Urgent Motion of Dr. Augustin Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DBN in *Bagosora et al.* (Case No. ICTR-98-41-T), 11 May 2010 ("Response").

⁸ Defence Reply to the Prosecutor's Response to Extremely Urgent Motion of Dr. Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DBN in *Bagosora et al.* (case No. ICTR-98-41-T), 14 May 2010 ("Reply").

⁹ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion to Vacate the Trial Date, 24 May 2010, p. 9.

¹⁰ Motion for Disclosure, paras. 27, 28.

¹¹ *Ibid.*, paras. 14, 15.

¹² *Ibid.*, para. 13.

¹³ *Ibid.*, para. 18.

¹⁴ *Ibid.*, para. 19.

¹⁵ *Ibid.*, paras. 23, 24. Ngirabatware further purports that the fact that the witness is expected to testify under the same pseudonym in both trials provides a sufficient basis for the Tribunal to grant him access to the witness's closed session

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9. The Prosecution responds that it has applied to withdraw its request to call Witness DBN to testify in the *Ngirabatware* case, rendering the Motion for Disclosure moot as the Requested Material will not facilitate cross-examination.¹⁷ It also submits that *Ngirabatware* has not established the existence of a legitimate forensic purpose justifying the disclosure of the Requested Material.¹⁸ In addition, the Prosecution contends that since there is no exculpatory material contained in the Requested Material, it is under no obligation to disclose it pursuant to Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules").¹⁹

10. In reply, *Ngirabatware* submits that, as the Prosecution's request to withdraw Witness DBN from the witness list is still under deliberation by the Trial Chamber, the Motion for Disclosure is not moot.²⁰ Furthermore, he asserts that, in light of the Prosecution's admission that Witness DBN will corroborate the alibi defence, the witness's closed session transcripts must contain exculpatory material falling within the purview of Rule 68 of the Rules.²¹ He maintains that in any event, even if the material sought is not considered to be exculpatory, the Prosecution is still required to disclose it under Rule 66 of the Rules.²²

C. Discussion

11. Pursuant to Rule 75(F)(i) of the Rules, where protective measures have been ordered in any proceedings before the Tribunal, they continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied, or augmented. The Appeals Chamber recalls that a party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.²³ Where a party requests access to confidential material from another case, such material must be identified or described by its general nature, and a legitimate forensic purpose for accessing it must be demonstrated.²⁴ Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the

transcripts. He also avers that "transcripts of prior testimonies of Prosecution witnesses directly fall under Rule 66 of the Rules disclosure". See Motion for Disclosure, paras. 20, 21.

¹⁶ *Ibid.*, para. 25.

¹⁷ Response, paras. 2, 3, 5.

¹⁸ *Ibid.*, para. 4.

¹⁹ *Ibid.*, paras. 3, 5.

²⁰ Reply, paras. 8, 9.

²¹ *Ibid.*, paras. 11-13, citing Prosecution Motion to Withdraw Motion to Vary the Witness List, para. 42 ("The Prosecution has reason to believe that the anticipated testimony of witnesses ANAV, AHJ and DBN [...] may be capable of meeting the anticipated testimony of the fifteen Defence alibi witnesses disclosed on 04 May 2010.").

²² *Ibid.*, para. 14.

²³ *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-A, Decision on Georges A.N. Rutaganda's Motion for Access to Confidential Material of Witness CSH From the *Rukundo* Case, 18 February 2010 ("*Rukundo* Decision"), para. 11; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemura et al.* Case, 10 July 2009 ("*Rutaganda* Decision"), para. 10; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009 ("*Zigiranyirazo* Decision"), para. 7.

²⁴ *Rukundo* Decision, para. 11; *Rutaganda* Decision, para. 13; *Zigiranyirazo* Decision, para. 7.

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existence of a nexus between the requesting party's case and the case from which such material is sought.²⁵ Such a factual nexus may be established, for example, if the cases stem from events alleged to have occurred in the same geographic area at the same time,²⁶ although this may not always be necessary or sufficient.²⁷ A case-specific analysis is required in each instance.²⁸

12. Further, a Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially, or that there is at least a good chance that it would.²⁹ Once it is determined that confidential material filed in another case may materially assist an applicant, the Chamber shall determine which protective measures shall apply to the material, as it is within the Chamber's discretionary power to strike a balance between the rights of a party to have access to material necessary for the preparation of its case and guaranteeing the protection and integrity of confidential information.³⁰

13. The Appeals Chamber is satisfied that Ngirabatware has identified the Requested Material with sufficient particularity in his Motion for Disclosure.³¹ Further, it considers that there is a nexus between Ngirabatware's case and the *Bagosora et al.* case in that the events Witness DBN addressed in his testimony in the *Bagosora et al.* case are closely related to the time period and locations relevant to Ngirabatware's purported alibi that he was in Kigali town from 6 to 12 April 1994 and, specifically, at the Presidential Guard Camp on 7 and 8 April 1994. In particular, Witness DBN's testimony in the *Bagosora et al.* case contains multiple references to the movements of individuals at the Presidential Guard Camp and to the feasibility of travel between Kigali and Gisenyi during the relevant period.³² Regarding the required specificity in pleading a nexus between the *Bagosora et al.* case from which the material is sought and the applicant's case, the Appeals Chamber observes that it is only possible for Ngirabatware to make a *prima facie* demonstration of the existence of a legitimate forensic purpose for accessing Witness DBN's confidential material, since he does not have access to the material and therefore lacks knowledge of its content.

14. For the foregoing reasons, the Appeals Chamber finds that there is a sufficiently substantial factual, temporal, and geographical overlap between the *Ngirabatware* and *Bagosora et al.* cases such that the Requested Material is likely to be of material assistance to Ngirabatware's defence. Accordingly, the Appeals Chamber holds that Ngirabatware has demonstrated a legitimate forensic

²⁵ *Idem.*

²⁶ *Rukundo* Decision, para. 11; *Rutaganda* Decision, para. 13 and references cited therein.

²⁷ *Idem.*

²⁸ *Idem.*

²⁹ *Rukundo* Decision, para. 12; *Zigiranyirazo* Decision, para. 7 and references cited therein.

³⁰ *Rukundo* Decision, para. 12; *Rutaganda* Decision, para. 14; *Zigiranyirazo* Decision, para. 7.

³¹ Motion for Disclosure, paras. 27, 28.

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purpose for access to said material. The fact that Witness DBN is no longer expected to testify in Ngirabatware's trial as a Prosecution witness does not negate the fact that the documents pertaining to his testimony in the *Bagosora et al.* case are likely to be of material assistance to Ngirabatware's defence.

15. The Appeals Chamber notes, however, that of the Requested Material, Exhibits P114, DNT53, DNT54, DNT55, DNT57, and DB89 are unclassified and publicly available from the Tribunal's public database. The Appeals Chamber therefore only orders the disclosure of the remaining requested protected material, comprising the closed session transcript of Witness DBN's testimony on 31 March 2004 in the *Bagosora et al.* case,³³ as well as Exhibits P198, P199, DNT49A, DNT49B, DNT50A, DNT50B, DNT51, DNT52, and DNT56 admitted in connection with such testimony ("Protected Material"), with the proviso that the witness protection order governing Witness DBN in the *Bagosora et al.* case³⁴ applies *mutatis mutandis* to Ngirabatware and any party in receipt of the Protected Material.

³² T. 31 March 2004 pp. 68, 76-78; T. 1 April 2004 pp. 40, 41, 48, 49, 51, 52, 54, 55, 57-59, 64-66, 68, 69, 83-85; T. 5 April 2004 pp. 21, 34, 35, 39, 41-45, 48, 50-52, 54, 57-59, 61, 65, 66, 75, 76, 86, 87, 89, 90, 92-98, 101, 110, 114, 115, 120, 121; T. 6 April 2004 pp. 4, 15.

³³ T. 31 March 2004 pp. 61-63 (closed session).

³⁴ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 ("Protective Measures Decision").

1919/H**D. Disposition**

16. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion for Disclosure in part;

DIRECTS the Registry to transmit to Ngirabatware's Counsel the Protected Material pertaining to the testimony of Witness DBN in the *Bagosora et al.* case, together with the Protective Measures Decision governing the protective measures applicable to Witness DBN;

ORDERS that Ngirabatware, his Counsel, and any other party in receipt of the Protected Material are bound *mutatis mutandis* by the terms of the Protective Measures Decision; and

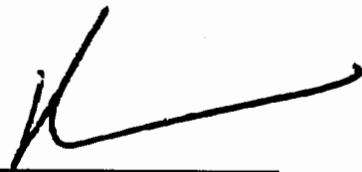
DISMISSES the remainder of the Motion for Disclosure.

Done in English and French, the English text being authoritative.

Done this 8th day of June 2010
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding Judge