



UNITED NATIONS  
NATIONS UNIES



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

2475/H

ICTR-98-41-A

23<sup>rd</sup> July 2010

{2475/H – 2469/H}

IN THE APPEALS CHAMBER

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

**Registrar:** Mr. Adama Dieng

**Decision of:** 23 July 2010

**Théoneste BAGOSORA  
Aloys NTABAKUZE  
Anatole NSENGIYUMVA**

v.

**THE PROSECUTOR**

*Case No. ICTR-98-41-A*

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

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**Counsel for Théoneste Bagosora**

Raphaël Constant  
Richard Perras

**Counsel for Aloys Ntabakuze**

Peter Erlinder  
André Tremblay

**Counsel for Anatole Nsengiyumva**

Kennedy Ogetto  
Gershom Otachi Bw'Omanwa

**Counsel for Augustin Ngirabatware**

Peter Herbert  
Mylène Dimitri

**Office of the Prosecutor**

Hassan Bubacar Jallow  
Deborah Wilkinson  
George W. Mugwanya  
Inneke Onsea  
Renifa Madenga  
Abubacarr Tambadou  
Evelyn Kamau  
William Mubiru  
Aisha Kagabo  
Ndeye Marie Ka

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: ALOUHOU DIALELO

SIGNATURE: [Signature] DATE: 26/07/2012

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 DAK in *Bagosora et al.* (case No. ICTR-98-41-T)”, filed by Augustin Ngirabatware (“Ngirabatware”) on 28 June 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.<sup>1</sup> The appeals of Théoneste Bagosora, Aloys Ntabakuze, and Anatole Nsengiyumva against the Trial Judgement are pending.

3. Ngirabatware is charged before the Tribunal with multiple counts of genocide and crimes against humanity.<sup>2</sup> His trial commenced before Trial Chamber II of the Tribunal (“Trial Chamber”) on 23 September 2009. The proceedings were adjourned on 18 March 2010 and are scheduled to resume on 23 August 2010, with the hearing of additional Prosecution witnesses, including Witness DAK, starting on 24 August 2010.<sup>3</sup>

4. On 28 June 2010, Ngirabatware filed the present Motion for Disclosure before the Appeals Chamber, in which he requests disclosure of material related to Witness DAK’s testimony in the *Bagosora et al.* case (“Requested Material”).<sup>4</sup> The Prosecution responded on 8 July 2010 that it does not object to the disclosure of the Requested Material, save for four exhibits.<sup>5</sup> Ngirabatware filed his reply on 12 July 2010, in which he submits that the Response should be disregarded as filed out of time and reiterates his request to be provided with the Requested Material.<sup>6</sup>

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<sup>1</sup> *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.

<sup>2</sup> *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.

<sup>3</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, T. 18 March 2010 pp. 81, 84; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion of 24 June 2010 for Leave to Vary its Witness List, 15 July 2010, pp. 10, 11.

<sup>4</sup> Motion for Disclosure, paras. 28, 29.

<sup>5</sup> Prosecutor’s Response to: “Extremely Urgent Motion of Dr. Augustin Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DAK in *Bagosora et al.* (Case No. ICTR-98-41-T)”, 8 July 2010 (“Response”).

<sup>6</sup> Defence Reply to the Prosecution Response to the Defence Extremely Urgent Motion of Dr. Augustin Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DAK in *Bagosora et al.* (case N° ICTR-98-41-T), 12 July 2010 (“Reply”).

### B. Preliminary Matter

5. Ngirabatware submits that the Prosecution's Response was filed after the five-day time limit prescribed under Rule 73(E) of the Rules of Procedure and Evidence of the Tribunal ("Rules") without any explanation and that it should therefore be disregarded.<sup>7</sup>

6. The Appeals Chamber notes that the Motion for Disclosure was filed in the *Bagosora et al.* case which is currently on appeal from judgement. The Appeals Chamber has already held that, under such circumstances, Section V: "Motions During Appeals from Judgement" of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal applies,<sup>8</sup> providing that a response shall be filed within ten days of the filing of the motion.<sup>9</sup> The Prosecution's Response was therefore filed within the relevant required time limit.

### C. Submissions

7. Ngirabatware requests that the Appeals Chamber order that the closed session transcripts of the testimony of Witness DAK in the *Bagosora et al.* case be disclosed to him, together with the names extracted and placed under seal and the exhibits admitted during the witness's testimony in this case.<sup>10</sup> In support of his Motion for Disclosure, Ngirabatware recalls that he filed a notice of alibi stating that he did not leave Kigali town between the evening of 6 April 1994 and the morning of 12 April 1994 and that he stayed at the Presidential Guard Camp and the French Embassy in Kigali on 7 and 8 April 1994.<sup>11</sup> He points out that Witness DAK's testimony in the *Bagosora et al.* case contains "multiple references to [the witness's] schedule during the day of April June [sic] 7<sup>th</sup>, 1994, in his capacity as a soldier within the [Rwandan Armed Forces]" and in particular to the witness's movements from the Kanombe Camp to the Presidential Residence.<sup>12</sup> Ngirabatware argues that since Witness DAK is expected to testify as a Prosecution witness in his case "on the period and the places covered by the notice of alibi",<sup>13</sup> the witness's expected testimony has a "close factual, temporal and geographical link with his testimony" in the *Bagosora et al.* case.<sup>14</sup> Ngirabatware submits that the Requested Material would materially assist him in the preparation of

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<sup>7</sup> *Ibid.*, paras. 3, 4.

<sup>8</sup> *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, para. 10.

<sup>9</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, Section V, para. 13.

<sup>10</sup> Motion for Disclosure, paras. 28, 29.

<sup>11</sup> *Ibid.*, paras. 14, 15.

<sup>12</sup> *Ibid.*, para. 13.

<sup>13</sup> *Ibid.*, para. 18.

<sup>14</sup> *Ibid.*, para. 19.

his defence and the cross-examination of Prosecution witnesses,<sup>15</sup> and agrees to be bound by the witness protection order applicable to Witness DAK in the *Bagosora et al.* case.<sup>16</sup>

8. The Prosecution responds that it does not object to the disclosure of the Requested Material, except in relation to four exhibits.<sup>17</sup> The Prosecution submits that Exhibits P120, P121, DB46A, and DB46B requested by Ngirabatware need not or should not be disclosed on the grounds that (i) Exhibit P120 relates to the testimony of another witness, Witness DAS, and has no connection to Witness DAK's testimony in the *Bagosora et al.* case or relevance for Ngirabatware's case; (ii) the un-redacted statement of Witness DAK in French and English, admitted as Exhibits DB46A and DB46B, is already in Ngirabatware's possession; and (iii) Exhibit P121 is the personal identification sheet of Witness DAK, containing the same information as Exhibits DB46A and DB46B.<sup>18</sup>

9. In reply, Ngirabatware submits that the relevant French Transcripts indicate that Exhibit P120 was admitted during Witness DAK's testimony and reiterates his request to obtain this exhibit if it is actually related to Witness DAK.<sup>19</sup> He acknowledges that he has received un-redacted statements of Witness DAK but argues that he is not in a position to compare whether these statements are the same as the statements admitted as Exhibits DB46A and DB46B.<sup>20</sup> He adds that even if Exhibit P121 contains the same information provided in Exhibits DB46A and DB46B, Exhibit P121 remains the "actual link between the identity of the witness and his pseudonym as being DAK" and should therefore be disclosed.<sup>21</sup>

#### D. Discussion

10. 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

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<sup>15</sup> *Ibid.*, paras. 24, 25. Ngirabatware further claims 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 transcripts. He also avers that "transcripts of prior testimonies of Prosecution witnesses directly fall under Rule 66 of the Rules disclosure". See *ibid.*, paras. 20, 21.

<sup>16</sup> *Ibid.*, para. 26.

<sup>17</sup> Response, paras. 2-5.

<sup>18</sup> *Ibid.*, para. 3. The Prosecution indicates that the un-redacted statement of Witness DAK in French and English, admitted as Exhibits DB46A and DB46B in the *Bagosora et al.* case, was provided as Annex F of *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, 24 June 2010.

<sup>19</sup> Reply, paras. 5, 9.

<sup>20</sup> *Ibid.*, para. 6.

<sup>21</sup> *Ibid.*, paras. 6, 8, 9.

case before the Tribunal, to assist in the preparation of its case.<sup>22</sup> 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.<sup>23</sup> Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.<sup>24</sup> 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, although this may not always be necessary or sufficient.<sup>25</sup> A case-specific analysis is required in each instance.<sup>26</sup>

11. 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.<sup>27</sup> 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.<sup>28</sup>

12. The Appeals Chamber is satisfied that Ngirabatware has identified the Requested Material with sufficient particularity in his Motion for Disclosure.<sup>29</sup> Further, it considers that there is a nexus between Ngirabatware's case and the *Bagosora et al.* case in that the events Witness DAK 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.<sup>30</sup>

13. 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 closed session transcripts of Witness DAK's testimony and the exhibits admitted in relation to his testimony<sup>31</sup> are likely to be of material assistance to Ngirabatware's defence. Accordingly, the Appeals Chamber holds that Ngirabatware has demonstrated a legitimate forensic purpose for access to said material.

<sup>22</sup> Decision on Augustin Ngirabatware's Motion for Disclosure of Confidential Material Relating to Witness DBN, 8 June 2010 ("Decision of 8 June 2010"), para. 11, and references cited therein.

<sup>23</sup> *Idem.*

<sup>24</sup> *Idem.*

<sup>25</sup> *Idem.*

<sup>26</sup> *Idem.*

<sup>27</sup> *Ibid.*, para. 12, and references cited therein.

<sup>28</sup> *Idem.*

<sup>29</sup> See Motion for Disclosure, paras. 28, 29.

<sup>30</sup> Witness DAK, T. 7 November 2003 pp. 31-44; T. 10 November 2003 pp. 1-46; T. 11 November 2003 pp. 3-15.

14. The Appeals Chamber acknowledges that most of the information contained in Exhibits P121, DB46A, and DB46B has already been disclosed to Ngirabatware through other means but considers that Ngirabatware is entitled to have access to the specific exhibits admitted in the course of Witness DAK's testimony in the *Bagosora et al.* case which relate to his evidence. With respect to Exhibit P120 requested by Ngirabatware, the Appeals Chamber notes that Exhibits P120A, B, C and D consist of photographs which were not admitted during Witness DAK's testimony but during Witness DAS's testimony and are unrelated to Witness DAK. As such, they are not within the proper scope of the present request.

15. For the foregoing reasons, the Appeals Chamber orders the disclosure of the closed session transcript of Witness DAK's testimony on 7, 10, and 11 November 2003 in the *Bagosora et al.* case, as well as Exhibits P121, DB46A, DB46B, DB47A, and DB47B with the proviso that the witness protection order governing Witness DAK in the *Bagosora et al.* case<sup>32</sup> applies *mutatis mutandis* to Ngirabatware and any party in receipt of this material.

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<sup>31</sup> The Appeals Chamber notes that no names were extracted from the public transcripts and put under seal during the course of Witness DAK's testimony in the *Bagosora et al.* case.

<sup>32</sup> *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").

**E. Disposition**

16. For the foregoing reasons, the Appeals Chamber

**GRANTS** the Motion for Disclosure in part;

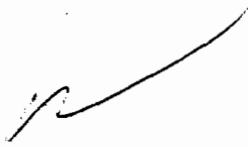
**DIRECTS** the Registry to transmit to Ngirabatware's Counsel the closed session transcripts of Witness DAK's testimony on 7, 10, and 11 November 2003, as well as Exhibits P121, DB46A, DB46B, DB47A, and DB47B pertaining to the testimony of Witness DAK in the *Bagosora et al.* case, together with the Protective Measures Decision governing the protective measures applicable to Witness DAK;

**ORDERS** that Ngirabatware, his Counsel, and any other party in receipt of the above-mentioned 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 twenty-third day of July 2010  
At The Hague,  
The Netherlands.

  
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Judge Patrick Robinson  
Presiding Judge

[Seal of the Tribunal]

