



UNITED NATIONS
NATIONS UNIES

ICTR-01-72-T
7-7-2009
(1437-1435)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1437
2 July
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ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Florence Rita Arrey, Presiding
Judge Mparany Richard Rajohnson
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 07 July 2009

THE PROSECUTOR

v.

Simon BIKINDI

Case No. ICTR-01-72-T

JUDICIAL
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**DECISION ON NGIRABATWARE DEFENCE REQUEST
FOR DISCLOSURE OF EXHIBITS ADMITTED DURING THE TESTIMONY OF
PROSECUTION WITNESS BKW IN THE BIKINDI CASE
Rule 75 F and G (i)**

The Prosecution

William T. Egbe
Veronic Wright
Patrick Gabaake
Peter Tafah
Iain Morley
Sulaiman Khan
Amina Ibrahim
Disengi Mugeyo

The Defence (Simon Bikindi)

Andreas O'Shea
Jean de Dieu Momo

The Defence (Bizimungu)

Mylène Dimitri; Co-Counsel;
Deogratias Sebureze; Legal Assistant
Anne-Gaelle Denier; Legal Assistant
Sophie Maurice; Legal Assistant

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INTRODUCTION

1. On 16, 17, 18 and 19 October 2006, Witness BKW testified for the Prosecution in the *Bikindi* case before Trial Chamber III.
2. The Defence of Augustin Ngirabatware, an accused before this Tribunal whose trial is scheduled to start on 3 August 2009, requests disclosure of the exhibits of Witness BKW, following the disclosure of the concerned transcripts on 15 May 2009.¹ This Witness will also appear in that case on behalf of the Prosecution, under the pseudonym ANAA.
3. On 3 July 2009, in its response, the Prosecution submitted that it was not obliged to disclose the exhibits pursuant to Rule 66 (A) of the Rules of Procedure and Evidence (“Rules” hereinafter); and that the Defence has not specified which exhibits it requests disclosure for, while it also needs to establish the *nexus* between those exhibits and its case.² On 6 July 2009, the Defence replied to the Prosecutor’s response, providing the list of the requested exhibits.³
4. On 6 July 2009, The President of the Tribunal designated Trial Chamber III, comprising Judge Florence Rita Arrey, presiding, Judge Mparany Richard Rajohnson and Judge Aydin Sefa Akay to render a decision on that motion.⁴

DELIBERATIONS

5. Rule 75 F of the Rules provides that “Once 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 the Rule; but
 - (ii) (...)
6. According to sub-Rule G, “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) (...)

¹ Extremely Urgent and Confidential Motion of Dr. Augustin Ngirabatware for Disclosure of Exhibits admitted During the Testimony of Prosecution Witness BKW in *Bikindi*, filed on 26 June 2009.

² 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 Prosecution Witness BKW in *Bikindi* (case No. ICTR-01-72-T), filed on 3 July 2009.

³ Defence’s 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 Prosecution Witness BKW in *Bikindi* (case No. ICTR-01-72-T)”, filed on 6 July 2009.

⁴ Office of the President, Interoffice Memorandum, Notice of Designation- Extremely Urgent and Confidential Motion of Dr. Augustin Ngirabatware for Disclosure of Exhibits admitted During the Testimony of Prosecution Witness BKW in *Bikindi*, dated 6 July 2009.

7. Since issues of disclosure of testimony and exhibits have no link with the appeals proceedings,⁵ the Chamber, with its modified Bench, retains competence to adjudicate this case pursuant to Rule 75 G (i) of the Rules.

8. The Chamber notes that confidential *inter partes* material may be disclosed to a party in another case provided that the applicant demonstrates that it “is likely to assist that applicant’s case materially, [...] there is a good chance that it would that it would.” This standard can be met by showing that there is a factual *nexus* between the two cases.⁶

9. The Chamber notes that on 15 May 2009, the Prosecution in the case against Augustin Ngirabatware disclosed the transcripts of the testimony of Witness BKW in the Bikindi case, but not the exhibits admitted under seal during this testimony. It further notes that Witness BKW is expected to testify in the case against Augustin Ngirabatware, under the pseudonym ANAA. It would be of interest not only to the Defence for cross-examination and the preparation of its case, but also to the Trial Chamber in the Ngirabatware case to evaluate the testimony of the said witness in the context of other testimonies that he gave on related matters. The Chamber is thus satisfied that the issues raised by Augustin Ngirabatware are sufficient to establish the *nexus* between the two cases.

10. The Chamber therefore orders the disclosure of the requested exhibits, on the understanding that the applicable witness protection order will apply *mutatis mutandis* to any party in the present case in receipt of the protected information.⁷

11. The Chamber however notes that exhibits D 32/1 E and F (Written statement of Prosecution Witness BKW dated 7, 9, 26 February 2001 and 1, 2, 3 March 2001) as well as D32/2 E and F (Written statement of Prosecution Witness BKW dated 15 February 2005) should already have been disclosed to the Defence, while the information contained in exhibits P68 E and F (protected information sheet of Prosecution Witness BKW) will have to be disclosed as part of the pre-trial brief. The remaining exhibit therefore is Defence exhibit D 31 (sheet of paper containing four names, tendered through Prosecution Witness BKW).

⁵ The Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Decision on Nsengiyumva Request for Access to Protected Material (TC), dated 14 July 2006, para. 3.

⁶ *The Prosecutor v. Blagojevic and Jokic*, Case Number IT-02-60-A, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (TC), dated 18 January 2006, para. 4.

⁷ *The Prosecutor v. Simon Bikindi*, Case no. ICTR-2001-72-PT, Decision on the Prosecutor’s Motion For Protective Measures (TC), dated 7 June 2006.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Ngirabatware Defence motion;


DIRECTS the Registry to transmit to the Defence the sealed exhibit D31, and if necessary the exhibits D32/1 E and F, D32/2 E and F, admitted during the testimony of Prosecution witness BKW in the Bikindi case.

ORDERS that the Ngirabatware Defence and any other party in receipt of the protected information, including the Accused, are bound *mutatis mutandis* by the terms of the witness protection order governing the testimony of Witness BKW.

Arusha, 07 July 2009


Florence Rita Arrey
Presiding Judge


Mparany Mamy Richard Rajohnson
Judge


Aydin Sefa Akay
Judge

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[Seal of the Tribunal]





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
From:	<input checked="" type="checkbox"/> Chamber Marjorie MASSELOT (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Simon Bikindi.		Case Number: ICTR-01-72-T	
Dates:	Transmitted: 07/07/2009		Document's date: 07/07/2009	
No. of Pages:	4	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	DECISION ON NGIRABATWARE DEFENCE REQUEST FOR DISCLOSURE OF EXHIBITS ADMITTED DURING THE TESTIMONY OF PROSECUTION WITNESS BKW IN THE BIKINDI CASE Rule 75 G (i)			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input checked="" type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
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		<input type="checkbox"/> Submission from parties		
		<input type="checkbox"/> Accused particulars		

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Reference material is provided in annex to facilitate translation.

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CMS SHALL NOT take any action regarding translation.

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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