

0013

MICT-12-02
06/07/2012
(0212-0220)

220
Ju



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER III

Before: Judge Dennis C.M. Byron, Presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

ICTR-00-56A-71 bis
5th August 2011
(220 - 212)

Registrar: Mr. Adama Dieng

Date: 5 August 2011

JUDICIAL RECORDS ARCHIVES
UNICTR
2011 AUG - 5 P 12: 38
[Signature]

**THE PROSECUTOR
v.
Protais MPIRANYA**

Case No. ICTR-00-56A-71 bis

**PROSECUTOR'S OPPOSITION TO DEFENCE MOTION
FOR THE PRESERVATION OF EVIDENCE PURSUANT TO
RULE 71 bis (I) OF THE RULES OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor:
Mr. Hassan B. Jallow
Mr. Richard Karegyesa
Ms. Ifeoma Ojemeni Okali
Ms. Cecilia Tillada

Duty Counsel:
Mr. Francis K. Musei

1. Pursuant to Rule 71 *bis* (I) of the Rules of Procedure and Evidence, the Defence seeks to preserve evidence by way of special depositions. The only specific relief requested in the prayers for relief, however, is authorization for the Defence to “conduct its own investigation for the purpose of enabling it to cross-examine the prosecution witnesses or testing any other pieces of evidence the prosecution intends to adduce.”¹ As detailed below, the Defence is free to conduct any investigation it deems warranted so long as it does not transgress any witness protection orders issued by the Chamber. Accordingly, the Prosecutor does not oppose this limited aspect of the Defence motion.

2. The Prosecutor, however, opposes all remaining aspects of the Defence motion. As a matter of procedure, the Defence Motion is misdirected to the Chamber rather than to the President, as Rule 71 *bis* (I) requires. As a matter of substance, the Defence Motion runs the risk of transforming Rule 71 *bis*’s special deposition procedure into a trial *in absentia*. This is contrary to the letter and spirit of the Rule.

3. In all events, the Defence has failed to show — as Rule 71 *bis* (I) requires — how its open-ended request for preservation of unspecified evidence is in the interests of justice. To the contrary, as demonstrated below, the Defence’s request to lead any evidence it may discover at some later date would frustrate, not promote, the interests of justice. Perversely, it could allow the Defence to test out various Defence strategies while Mpiranya remains a fugitive, only to have Mpiranya reject those theories when he elects to surrender or, more likely, is apprehended. Rule 71 *bis* was not intended to allow fugitives to game the system in this manner.

Submissions

A. Duty Counsel may investigate any evidence relating to the charges contained in the Indictment with a view toward preservation for trial.

4. Rule 71 *bis* (K) (ii) states that “Duty Counsel shall have the same rights and duties as Defence Counsel.” Thus, just as any competent Defence Counsel

¹ *The Prosecutor v. Protais Mpiranya*, Case No. ICTR-00-56A-71 *bis*, Defence Motion for the Preservation of Evidence Pursuant to Rule 71 *bis* (I) of the Rules of Procedure and Evidence, 1 August 2011, Prayer for Relief, para. 2 and paras. 9-10, 13 (“Defence Motion”).

would investigate the allegations contained in an indictment against an accused, Duty Counsel is under the same obligation with regard to the preservation of evidence for a future trial.

5. Any investigation relating to the preservation of evidence, however, must comply with the terms of the Chamber's orders, including any witness protection measures the Chamber has imposed for witnesses. Here, the Chamber imposed comprehensive protective measures for all potential Prosecution witnesses.² Those protective measures provide, among other things, that "Duty Counsel and members of his team shall not make or attempt to make any contact with any protected witness unless the consent of the relevant witness has first been confirmed. Should the Duty Counsel or his team desire to contact a protected witness, he or they shall first contact the Prosecution and the Witness and Victims Support Section (WVSS) who shall determine whether such consent exists."³ The Defence Motion fails to establish that any of these conditions for Defence contact with Prosecution witnesses have been fulfilled.

6. Should the Defence seek to vary these conditions, it must first obtain authorization from the Chamber. Notably, the Defence's present motion does not request variation of the Witness Protection Order and fails to provide sufficient grounds upon which any such variation could be based. Accordingly, absent further order from the Chamber, no Defence investigation should include contact with any Prosecution witnesses unless and until the specific conditions of imposed by the Chamber's Witness Protection Order are satisfied.

² *The Prosecutor v. Protais Mpiranya*, Case No. ICTR-00-56A-71 bis, Order Scheduling Disclosure of Evidence and Granting Protective Measures to Prospective Prosecution Witnesses, 28 June 2011, pp. 4-5 ("Witness Protection Order").

³ *Id.* at p. 4, para. (vii).

214

B. The Defence request for preservation of evidence is both procedurally misdirected and contrary to the letter and spirit of Rule 71 bis.

7. More broadly, the Defence Motion requests that, after hearing the Prosecution evidence, it be allowed to preserve unspecified evidence that it has not yet discovered.⁴ This open-ended request is both procedurally misdirected and contrary to the letter and spirit of Rule 71 bis.

i. The Defence Motion is procedurally misplaced.

8. Rule 71 bis (I) sets out the procedure governing Defence requests for preservation of evidence. As with any Prosecution request under Rule 71 bis (A), Rule 71 bis (I) requires that any Defence request be directed to the President: “Upon a decision from a Trial Chamber granting a request [of the Prosecutor] pursuant to Sub-Rules (A) and (E), Counsel representing the interests of the accused may *submit a request to the President* that evidence relevant to the case of the accused be preserved by way of special deposition.” (emphasis supplied).

9. Here, the Defence request was submitted directly to the Chamber, not to the President as Rule 71 bis (I)’s plain language requires. This procedural misstep is no minor matter. By requiring all Defence and Prosecution requests for the preservation of evidence first be filed with the President, the drafters of Rule 71 bis sought to ensure conformity and consistency in the initiation of the special deposition procedure. Presumably, the President could also perform a preliminary screening of the request. The Defence’s failure to comply with this clear procedural requirement, therefore, is alone ground for denying its request for the preservation of evidence.

ii. The Defence Motion is substantively misplaced.

10. Separate and apart from this procedural misstep, the Defence request for the preservation of evidence should be denied because it is contrary to the letter and spirit of Rule 71 bis. The “objective of Rule 71 bis is to ensure that evidence relating to the indictment can be preserved for future trial. The Rule seeks to

⁴ For instance, the Defence states that, “after the prosecution’s evidence and evaluation thereof, it intends to lead its own evidence in view to preserving such evidence for future trial.” Defence Motion, para. 10. Similarly, the Defence states that, after hearing the Prosecution’s evidence, it will “decide whether to lead its own evidence.” Defence Motion, para. 13. Additionally, in its Prayer for Relief, the Defence requests that it be authorized to “lead evidence if so warranted.” Defence Motion, Prayer for Relief, para. 3.

prevent fugitive accused from avoiding effective prosecution and obstructing the proper administration of justice.”⁵ Most fundamentally, “it needs to be clearly emphasized that the Rule 71 *bis* procedure does not amount to a trial in *absentia*.”⁶

a. *Rule 71 bis is not intended to permit a trial in absentia.*

11. The Defence Motion runs afoul of these basic principles. It contends that the special deposition procedure is essentially an adversarial process, whereby the Defence must be permitted to contest any and all evidence the Prosecutor seeks to preserve and present its own evidence as well.⁷ This is a misconception. As noted above, the purpose of the Rule 71 *bis* proceeding is to preserve evidence for a future trial. It is not a trial.

12. The single Judge presiding over these special proceedings “is not empowered to enter a verdict of guilt or innocence, and cannot make decisions regarding the admissibility or the weight of the deposition evidence.”⁸ The assessment of evidence, including the relevance and probative value of the preserved evidence, is assigned to a future Trial Chamber.⁹ In making its assessment of preserved evidence, the future Trial Chamber also will take into consideration the fact that “Duty Counsel cross-examining the witnesses during the special depositions was not Counsel of the Accused’s choice and did not receive instructions from him.”¹⁰

13. Properly viewed, therefore, Rule 71 *bis* is not designed or intended to be an adversarial process like a full-fledged trial. Converting it into one risks undermining the Rule’s principal goal: the preservation of evidence relating to the Indictment for use in a future trial against the fugitive accused.¹¹

⁵ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-R71 *bis*, Decision on the Prosecutor’s Request for Preservation of Evidence by Special Deposition for a Future Trial, 15 March 2011, para. 15 (“Kabuga Rule 71 *bis* Decision”); see also *The Prosecutor v. Augustine Bizimana*, Case No. ICTR-98-44F-R71 *bis*, Decision on the Prosecutor’s Request for Preservation of Evidence by Special Deposition for a Future Trial, 5 May 2011, para. 14 (“Bizimana Rule 71 *bis* Decision”).

⁶ Kabuga Rule 71 *bis* Decision, para. 15; Bizimana Rule 71 *bis* Decision, para. 14.

⁷ Defence Motion, para. 12.

⁸ Kabuga Rule 71 *bis* Decision, para. 15; Bizimana Rule 71 *bis* Decision, para. 14.

⁹ Rule 71 *bis* (N); Kabuga Rule 71 *bis* Decision, para. 15; Bizimana Rule 71 *bis* Decision, para. 14.

¹⁰ Bizimana Rule 71 *bis* Decision, para. 14; Kabuga Rule 71 *bis* Decision, para. 16.

¹¹ Kabuga Rule 71 *bis* Decision, para. 15.

b. *Rule 71 bis permits preservation of evidence only when the Defence shows that it is in the interests of justice to do so.*

14. To further this goal, Rule 71 *bis* imposes specific conditions on when and how evidence may be preserved for future trial. It does not permit the sort of open-ended request contained in the Defence Motion. To the contrary, where, as here, the Defence requests preservation of evidence, Sub-Rule (I) provides that the relevant provisions of Sub-Rule (E) shall apply.¹² Sub-Rule (E), in turn, requires that a demonstration that “[i]t is in the interests of justice” to allow the Defence request.¹³

15. The Rule does not define the “interests of justice,” but its parameters can be determined with reference to the underlying purpose of the Rule, prior judicial decisions applying the Rule, and similar provisions in comparable Rules.

16. With regard to the Rule’s purpose, the Chamber should recall the justification provided at the Tribunal’s 21st Plenary Session, held on 8 May 2009, when the amendment was adopted: “This Rule provides, among other things, an effective way of combating impunity. Fugitives should not be permitted to wait out the mandate of the Tribunal. Rule 71 *bis* addresses this impunity gap by providing effective preservation of evidence thereby ensuring that persons most responsible for crimes committed in Rwanda are prosecuted even after the Tribunal is closed.”¹⁴

17. Any restrictions or limitations the Rule places on Mpiranya’s ability to preserve evidence Duty Counsel may discover in the course of his anticipated investigation are “in service of [these] sufficiently important objective[s] and impair his rights no more than necessary to accomplish the objective.”¹⁵ Indeed, Mpiranya can invoke all of the rights and protections ordinarily afforded to persons standing trial before the Tribunal by surrendering. Despite reasonable notice of these proceedings transmitted pursuant to Sub-Rule (H), Mpiranya has elected to persevere in his fugitive status. It must be presumed, therefore, that he has strategically absented himself from these proceedings.

¹² Rule 71 *bis* (I).

¹³ Rule 71 *bis* (E) (iii).

¹⁴ Proposed New Rule 71 *bis* Justification as presented at the Tribunal’s 21st Plenary Session held on 8 May 2009.

¹⁵ Kabuga Rule 71 *bis* Decision, para. 16; Bizimana Rule 71 *bis* Decision, para. 14.

18. Mpiranya should not be rewarded by allowing these special deposition proceedings to be used as a dry run for any future trial. Because Mpiranya remains a fugitive, it must be assumed that he is unable to direct or instruct Duty Counsel in the conduct of his defence. Allowing Duty Counsel the unbridled opportunity to preserve any and all evidence he may discover could, therefore, have a perverse effect on the interests of justice. It would allow Mpiranya, following his arrest and selection of counsel of his choice, to disavow any adverse evidence and theories that Duty Counsel presented on his behalf in favor of newly-tailored evidence and theories. No fugitive accused should be permitted to game the system in this manner.

19. To avoid this perversion of Rule 71 *bis*, each Chamber to consider prior requests has required specific information demonstrating how the interests of justice would be served by preserving particular witness testimony through special depositions. In allowing the Prosecutor's requests for preservation of evidence in *Kabuga* and *Bizimana*, for instance, the Chambers both noted the Prosecutor's submissions relating the potential loss of crucial evidence, resulting from death, incapacity, or passage of time.¹⁶ They further noted the Prosecutor's submissions regarding the "precarious health conditions" of specific witnesses and, thus, the real threat posed to the interests of justice were their evidence not preserved while the accused continued to evade arrest and trial. Moreover, in connection with each of these prior requests (including the request in this case), the Prosecutor identified the particular witnesses whose testimony he sought to preserve.¹⁷

20. The approach followed in connection with these prior requests is consistent with Rule 71's analogous provisions, relating to the taking of depositions for use at trial. Like Rule 71 *bis* (E), Rule 71 (A) adopts an "interests of justice" standard. Rule 71 (B) elaborates on this standard by stating that a "motion for the taking of a deposition . . . shall indicate the name and whereabouts of the witness whose deposition is sought. . . a statement of the

¹⁶ Kabuga Rule 71 *bis* Decision, para. 13; Bizimana Rule 71 *bis* Decision, para. 12.

¹⁷ See, e.g., *The Prosecutor v. Protais Mpiranya*, Case No. ICTR-00-56A-71 *bis*, Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial, 15 February 2011, Annex A.

matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.”¹⁸ Although not controlling here, Rule 71 (B)’s language is nevertheless instructive in interpreting Rule 71 *bis*’s substantively similar language.

21. At bottom, therefore, Rule 71 *bis* (E) (iii)’s interests of justice standard is not intended to be an empty formalism. It anticipates, at a minimum, that the party seeking to preserve evidence for future use at trial will (a) identify the particular source of the evidence in question and (b) show why preservation of that evidence through a special deposition is likely to advance the interests of justice.

22. The Defence Motion falls woefully short of this standard or anything close. It does not identify the evidence that it seeks to preserve. Indeed, it appears from the Defence submissions that the proposed evidence has not yet been discovered.¹⁹

23. Further, the Defence Motion offers no reasons to support the bald assertion that its open-ended and unlimited request to preserve any evidence it may find would somehow promote the interests of justice. As already noted, there is a tangible threat that such a boundless use of Rule 71 *bis* could be detrimental to the interests of justice because it would allow fugitives like Mpiranya to game the system. Rather than closing the “impunity gap” this could broaden the gap by encouraging fugitives to tailor their evidence to the Prosecutor’s evidence or wait out the Tribunal’s mandate.²⁰

¹⁸ ICTY Rule 71 is to the same effect but, following an amendment in 1998, omits the “exceptional circumstances” language.

¹⁹ See Defence Motion, paras. 9, 10, and 13.

²⁰ Proposed New Rule 71 *bis* Justification as presented at the Tribunal’s 21st Plenary Session held on 8 May 2009.

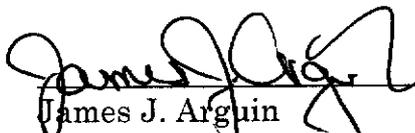
Conclusion

24. Accordingly, the Chamber should deny the Defence's motion for the preservation of evidence because it is procedurally misdirected and contrary to the letter and spirit of Rule 71 *bis*. In all events, the Defence fails to establish that its open-ended request for the preservation of unspecified evidence satisfies the interest of justice requirement imposed by Sub-Rules (I) and (E)(iii).

25. Lastly, to the extent Duty Counsel seeks to conduct an investigation to preserve evidence relating to the Indictment, the Prosecution does not object so long as the proposed investigation complies with the witness protection measures imposed by the Chamber's Witness Protection Order, dated 28 June 2011.

Respectfully submitted,

5 August 2011, Arusha, Tanzania



James J. Arguin
Chief, Appeals and Legal Advisory Division



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 type="checkbox"/> Trial Chamber I N. M. Diallo | | <input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo | | <input type="checkbox"/> Trial Chamber III C. K. Hometown | |
| | <input type="checkbox"/> OIC, JLSD P. Besnier | | <input type="checkbox"/> OIC, JPU C. K. Hometown | | <input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison | |
| From: | <input type="checkbox"/> Chamber (names) | | <input type="checkbox"/> Defence (names) | | <input checked="" type="checkbox"/> Prosecutor's Office Sharifah Adong (names) <i>Sharifah</i> | |
| Case Name: | The Prosecutor vs. Protais Mpiranya | | | | Case Number: ICTR-2000-56A- Rule 71bis | |
| Dates: | Transmitted: 05/08/2011 | | | Document's date: 05/08/2011 | | |
| No. of Pages: | 8 | | Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda | | | |
| Title of Document: | THE PROSECUTOR'S OPPOSITION TO DEFENCE MOTION FOR THE PRESERVATION OF EVIDENCE PURSUANT TO RULE 71 bis (1) OF THE RULES OF PROCEDURE AND EVIDENCE | | | | | |
| Classification Level: | | | TRIM Document Type: | | | |
| <input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public | | | <input type="checkbox"/> Indictment <input type="checkbox"/> Decision <input type="checkbox"/> Disclosure <input type="checkbox"/> Judgement <input type="checkbox"/> Warrant <input type="checkbox"/> Affidavit <input type="checkbox"/> Order <input checked="" type="checkbox"/> Motion <input type="checkbox"/> Correspondence <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Appeal Book <input type="checkbox"/> Book of Authorities <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Submission from parties <input type="checkbox"/> Accused particulars | | | |

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):
 English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

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

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):
 English French Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

| | |
|---|--|
| <input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax: | <input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax: |
|---|--|

JUDICIAL RECORDS ARCHIVES
 2011 AUG 5 15:58
 UNICTR

III - TRANSLATION PRIORITISATION (For Official use ONLY)

| | | |
|---------------------------------------|-----------------|---|
| <input type="checkbox"/> Top priority | COMMENTS | <input type="checkbox"/> Required date: |
| <input type="checkbox"/> Urgent | | <input type="checkbox"/> Hearing date: |
| <input type="checkbox"/> Normal | | <input type="checkbox"/> Other deadlines: |