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Before: Judge Vagn Joensen, *President*

Registrar: Adama Dieng

Date Filed: 14 March 2012

PROSECUTOR v. NIYITEGEKA
Case No. ICTR-96-14

PROSECUTOR v. NTAKIRUTIMANA et al
Case No. ICTR-96-10/17

PROSECUTOR v. NYIRAMASUHUKO et al
Case No. ICTR-98-42

PROSECUTOR v. BIZIMUNGU et al
Case No. ICTR-99-50

PROSECUTOR v. NDINDILIYIMANA
Case No. ICTR-00-56

PROSECUTOR v. NDINDABAHIZI
Case No. ICTR-01-71

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Prosecutor's Response to Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice Under Rule 67 (D)

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A. Overview

1. Jacques Mungwarere ("The Applicant"), currently facing prosecution in Canada for genocide and other serious crimes committed in Rwanda in 1994, filed an omnibus motion (The Motion) on 5 March 2012[1] seeking 'access to all materials related to witness tampering, intimidation, bribing, collusion, recantation and fabrication of evidence before this Tribunal'[2] as well as a specifically listed materials from six ICTR case files.[3]

2. The Prosecutor respectfully submits that the entire Motion is inadmissible in its current form for combining, in a single pleading, matters before different jurisdictions of the Tribunal. Only part of the Motion is brought properly before the President[4] while the other part is in respect of three cases currently before the Appeals Chamber.[5] On this ground alone, the entire motion should be dismissed in its entirety.[6]

3. In the alternative and without prejudice to the foregoing, should the President be inclined to consider the merits of that part which is properly brought before him, the Prosecutor opposes the Motion on the grounds that:[7]

   (a) The law and jurisprudence of the Tribunal do not generally envisage cooperation between the Tribunal and an accused in another jurisdiction in an individual capacity;

   (b) The motion is fatally defective as it provides insufficient forensic justification; and,

   (c) The applicant has not demonstrated that the protected witnesses subject of his motion have consented to the variation of protective measures or disclosure of there statements and testimony.

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[1] *Prosecutor v. Niyitegeka (and 5 other cases)*, "Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice Under Rule 67(D)," 5 March 2012 (Motion).
[2] Motion, at para 41.
[3] Motion, at paras. 22-40.
[4] *Prosecutor v. Niyitegeka* (Case No. ICTR-96-14), *Prosecutor v. Ntakirutimana et al.* (Case No. ICTR-96-10/17 and *Prosecutor v. Ndindabahizi* (Case No. ICTR-01-71).
[5] *Prosecutor v. Nyiramasuhuko et al.* (Case No. ICTR-98-42), *Prosecutor v. Bizimungu et al.* (ICTR-99-50) and *Prosecutor v. Ndindiliyimana* (Case No. ICTR-00-56).
[6] *Prosecutor v. Niyitegeka* (Case No. ICTR-96-14), "Decision on Request for Disclosure (AC)," 11 July 2007 and again, "Decision on Motion for Disclosure," 10 May 2011.
[7] The Prosecutor reiterates the position he took in *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10/17, "Prosecutor's Response to Mungwarere's Motion for Access to Material," 25 August 2011 (hereinafter *Prosecutor v. Ntakirutimana et al.*).

B. Submissions

The law and jurisprudence of the Tribunal do not generally envisage cooperation between the Tribunal and an accused in another jurisdiction in an individual capacity.

4. The Prosecutor submits that while the Tribunal has broadly construed the provisions of Rule 75 (F) – (G) to apply, *mutatis mutandis*, to disclosure of confidential/protected material between the Tribunal and national jurisdictions[8], this is not without limitation. Indeed the Tribunal has previously dismissed,[9] or declined to entertain[10] applications brought by persons facing prosecution before domestic courts because they lack a standing to do so. As a general rule, confidential/protected material is disclosed, upon good cause being shown, to national prosecution or judicial authorities that assume the obligation and have the institutional capacity to ensure compliance with the Tribunal's orders with respect to witness protection.[11] The Prosecutor submits that this liberal construction of the Rules confers no automatic right of disclosure to parties not before the Tribunal,[12] the consideration being, on a case-by-case basis, whether such disclosure would, subject to overriding orders of the Tribunal, be in the "interests of justice".[13]

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[8] *Prosecutor v. Simba,* ICTR-01-76-R75, 'Decision on Charles *Munyaneza*'s Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal, 9 April 2008,' at para.5 (hereinafter *Prosecutor v. Simba*). See also *Prosecutor v. Muhimana, Kayishema et al., Niyitegeka, Ntakirutimana et al., Musema*, Case Nos. ICTR-95-1B, ICTR-95-1, ICTR-96-10/17, ICTR-96-16, 'Decision on Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses,' 13 August 2008 (hereinafter *Prosecutor v. Muhimana* et al.). See also *Bagosora et al v. Prosecutor,* Case No. ICTR-98-41-A, 'Ex Parte and Confidential, Order in Relation to Prosecutor's Motion to Rescind Protective Measures for Witness XXY,' 25 February 2010, at para.3 (hereinafter *Bagosora et al v. Prosecutor*).

[9] *Prosecutor v. Casmir Bizimungu et al.*, 'Confidential Decision on Prosecutor's Urgent Confidential Motion to Vary Protective Measures for Witness GJQ and the Extremely Urgent Application for Variation of Protective Measures and Disclosure of Documents by Counsel for Onesphore Rwabukombe,' 27 July 2011, at para. 29 (hereinafter *Prosecutor v. Casmir Bizimungu et al*).

[10] *Prosecutor v. Jean-Baptiste Gatete*, Decision on Application for Variation of Protective Measures Relating to German Proceedings, 15 July 2011, at para. 11 (hereinafter *Prosecutor v. Jean-Baptiste Gatete*).

[11] *Prosecutor v. Jean-Baptiste Gatete AC*, at para. 8. See also *Prosecutor v. Casmir Bizimungu et al* at para. 29.

[12] *Prosecutor v. Blagojevic and Jokic, (AC),'* Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in th e Blagojevic and JokicCase,'18 January 2006, at para. 4: *"The Appeals Chamber has held that an accused in a case before the International Tribunal may be granted access to confidential material in another case if he shows a legitimate forensic purpose for such access." (Emphasis added)*

[13] *Prosecutor v. Simba,* at para. 5 where TC asserts the necessity for a broad interpretation of the Rule 75(F)(i) for variation of witness protection orders for cases from another jurisdiction as codified in the ICTY Rules; See also, Prosecutor v Bizimungu *et al* para 26.

5. Further support for this proposition can be found in Rule 75 (H) of the Rules of Procedure and Evidence of the ICTY, which specifically deals with applications submitted by or from foreign jurisdictions to rescind, vary or augment protective measures ordered in proceedings before the Tribunal. The Rule and Practice Directions for its application underscore the importance of specificity, proper jurisdiction and authorization by an appropriate judicial authority in the requesting country.[14]

6. In the extant motion the Applicant places undue reliance on the *Simba* Decision[15], without making any effort to either distinguish it or attempt to meet its criteria. First, the *Simba* Decision predates Prosecutor's Regulation No 1 of 2008 promulgated on 17 November 2008, which regulates requests for assistance by national authorities and is, to date, the only exception to the consistent practice of the Tribunal in handling foreign requests. Second, and more importantly, the applicant in that case (Charles *Munyaneza*) sought access to the sealed material in respect of four named witnesses in the *Simba* case, who had given public statements in the extradition proceedings in the UK implicating *Munyaneza*. The Chamber considered this clear and direct connection to *Munyaneza* critical in its granting the motion in part.[16]

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[14] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, "PRACTICE DIRECTION ON PROCEDURE FOR THE VARIATION OF PROTECTIVE MEASURES PURSUANT TO RULE 75 (H) OF THE RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL FOR ACCESS TO CONFIDENTIAL TRIBUNAL MATERIAL," IT/254, 4 February 2008, states at para.1:

An application submitted pursuant to Rule 75 (H) of the Rules by a Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority to rescind, vary or augment protective measures ordered in proceedings before the Tribunal shall be addressed to the President of the Tribunal, filed with the Registry of the Tribunal, and include:

(a) the fact that the application is made pursuant to Rule 75(H) on the cover page of the application;
(b) the name of the applicant and the competent authority conducting the investigation or court proceeding;
(c) the name of the Tribunal proceeding from which the material is sought and the case number whenever possible;
(d) the specific details related to the material that is being sought; for example, the date of the witness testimony, the witness name or the pseudonym used to identify the witness, and the exhibit number;
(e) separate applications must be submitted where the requested material is sought from more than one Tribunal proceeding;
(f) the relevance of the material sought to the investigation or court proceeding of the applicant;
(g) the precise purpose for which the material is sought;
(h) the specification of any time-limit to be complied with; and
(i) any other information necessary to the processing of the application.

[15] *Prosecutor v. Simba*, ICTR-01-76-R75, 'Decision on Charles *Munyaneza*'s Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal,' 9 April 2008.
[16] *Prosecutor v. Simba*, at para. 9.

7. Additionally, the Chamber weighed the interests of the applicant against the security situation of the witnesses and found that, because the witnesses had given public statements, which had been disclosed to the applicant in the UK extradition proceedings,[17] it was reasonable to infer that the security of the witness would not be compromised by any further disclosure.[18] Finally, it is instructive to note that the Trial Chamber dismissed the rest of the application as being impermissibly vague.[19]

8. Similarly, the Applicant appears to have misconstrued the authority in *Prosecutor v. Ndindiliyimana et al* regarding its application to domestic proceedings.[20] In that case, witness consent was obtained and a joint application was filed by the relevant Canadian authorities and Defence Counsel. As a result, there was no prejudice to witness ANA and disclosure was deemed to be in the interest of justice.[21]

The requests for specific variation of witness protection orders and general access to confidential materials are fatally defective as they lack sufficient forensic justification.

9. As noted above, the Motion does not meet the *Simba* criteria as it fails to provide the requisite legitimate forensic justification.[22] A closer reading of *Simba* evinces three key elements that *Munyaneza* established in meeting this threshold:

   (a) He was able to establish a factual nexus based on common events and crime base between the his case and the ICTR case (i.e. *Munyaneza* and *Simba*);[23]

   (b) He established sufficient forensic justification in respect of four of twelve witnesses who

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[17] *Munyaneza* attached the public statements of these witnesses to his motion for access to their sealed material in the Simba case.
[18] *Prosecutor v. Simba*, at para. 10.
[19] *Prosecutor v. Simba*, at paras. 11and 12.
[20] Motion, at para. 8.
[21] *Prosecutor v. Ndindiliyimana et al*, Case No. ICTR-00-56-T, "Decision on the Prosecution Motion to Unseal and Disclose to the Canadian Auhorities the Closed Session Transcripts of ANA (TC), 23 March 2007, at para. 8.
[22] *Prosecutor v. Simba*, at para. 11. See also *Prosecutor v. Casmir Bizimungu et al*, at para. 16. See also *Bagosora et al v. Prosecutor*, at paras. 11and 12.
[23] *Prosecutor v. Simba*, at para. 10. Also see *Prosecutor v. Radoslav Brdanin* (Case No. IT-99-36-A), "Descision on Mico Stanisic's Motion for Access to All Confidential Materials in the Brdanin Case, 24 January 2007, para. 11 where the AC notes that this element is not particularly onerous.

had made public allegations implicating *Munyaneza* in the UK proceedings and had testified to the same events at the Tribunal therefore justifying disclosure of their statements. *Munyaneza* also attached to his application the public statements of the four witnesses rendered in the UK proceedings.[24]

(c) Finally, he established that the security situation of the witnesses would not be compromised by any further disclosure since they had made themselves known by making public statements in the UK proceedings.[25]

10. The Prosecutor submits that review of materials sought by the Applicant in the three cases before the President – in light of the three-tier cumulative test - shows that the extant motion does not meet the above test, as discussed below:-

(a) From *Niyitegeka*,

i. All transcripts of the oral testimony of DW **TEN-5** are public[26] and all exhibits placed under seal relate to personal identifying information.[27]

ii. All transcripts of the oral testimony of DW **TEN-6** are public[28] and all exhibits placed under seal relate to personal identifying information.[29] In addition, at least half of the exhibits were tendered publicly.[30]

(b) From *Ntakirutimana et al.*,

i. All transcripts of the oral testimony of DW **9** are public;[31]

ii. All transcripts of the oral testimony of DW **31** are sealed;[32]

iii. All transcripts of the oral testimony of PW **GG** are public;[33]

iv. All transcripts of the oral testimony of PW **FF** are public hearings.[34]

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[24] *Prosecutor v. Simba*, at para. 9.
[25] *Prosecutor v. Simba*, at para. 10.
[26] *Niyitegeka*, TT. 23 and 24 October 2002.
[27] *Niyitegeka*, Exhibit Nos. D 23, 24, 25, 26 (A, B), 27 (A, B) and 28.
[28] *Niyitegeka*, TT. 21 and 22 October 2002.
[29] *Niyitegeka*, Exhibit Nos. P 28 (A,B), 29, 30 (A, B), 31 (A, B), 32 (A, B, C), D 13, 19 (A, B), 20 (A, B, C).
[30] *Niyitegeka*, Exhibit Nos. D 14, 16, 17, 18 and C1.
[31] *Ntakirutimana et al.*, TT. 29 and 30 April 2002.
[32] *Ntakirutimana et al.*, TT. 15 April 2002.
[33] *Ntakirutimana et al.*, TT. 20, 24 and 25 September 2001.

(c) From *Ndindabahizi*,

i. All transcripts of the oral testimony of DW **DF** are public, save one closed session hearing in order to provide personal identifying information;[35]

ii. All transcripts of the oral testimony of DW **DC** are public.[36]

11. On review of the transcripts, it is clear that the Applicant has failed to demonstrate a legitimate forensic purpose for accessing the closed session materials and sealed exhibits and that the information sought is likely to assist his case materially, or that there is at least a good chance that it would.[37] If, as the Applicant suggests at para 15 of his motion, he does not seek to contact the witnesses then no sufficient justification exists for disclosing their identities to him.

12. All transcripts for the above eight witnesses are public save for a short closed session for Defence DF[38] which on review contains personal data analogous to that found in a witness personal information sheet (P.I.S.) and the closed session testimony Witnesses 31[39] which is well summarized in the Judgment.[40] Likewise, the Prosecutor has reviewed sealed exhibits requested by the Applicant and found no legitimate forensic purpose as described in the Motion. Given that the transcripts are almost exclusively public the Applicant can read the entire context in which the sealed exhibits were entered into evidence.

The general request in the motion is abusive as it clearly amounts to a fishing expedition.

13. The Appeals Chamber has stressed that it is the responsibility of the Applicant to avoid engaging in "fishing expeditions."[41] The Applicant clearly has not respected this principle in its request to *'access to all materials related to witness tampering, intimidation, bribing, collusion, recantation and*

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[34] *Ntakirutimana et al.*, TT. 28 September and 1 October 2002.
[35] *Ndindabahizi*, TT. 5 and 6 November 2003.
[36] TT. 23 and 24 October 2002.
[37] *Prosecutor v. Georges A. N. Rutaganda*, Case No. ICTR-96-3-R, "Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the Karemera et al Case," 10 July 2009 (hereinafter *Prosecutor v. Georges A. N. Rutaganda*, at para. 28.
[38] *Ndindabahizi*, TT. 5 November 2003.
[39] *Prosecutor v. Ntakirutimana*, TT. 15 April 2002.
[40] *Prosecutor v. Ntakirutimana*, Judgment at paras. 769-771.
[41] See *Prosecutor v. Enver Hadzihasanovic et al.*, Case No. IT-01-47-AR73, 'Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, at para. 3. See also objection from Defence Counsel for Joseph Kanyabashi, Le Procureur c. Joseph Kanyabashi, "Reponse de Joseph Kanyabashi a la Procedure Intitulee Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice Under Rule 67 (D), 6 mars 2012, at para. 5.

fabrication of evidence before this Tribunal"[42] and the Prosecutor finds it a clear abuse of process. It again points to a lack of diligence and failure in making a forensic justification for disclosure based on a review of publicly available materials from the three ICTR cases.

The applicant has not demonstrated that the protected witnesses subject of his motion have consented to the variation of protective measures or disclosure of there statements and testimony.

14. With regard to the variation of protective measures pursuant to Rule 75(G), it is the practice of the Tribunal is to require the party seeking variation to demonstrate that the witnesses in issue have consented to the variation and to the disclosure of their confidential material to third parties or, that the circumstances that justified the protective measures have since changed.[43] The Applicant states: "seeking the consent of the witnesses concerned to a variation of their protective measures in order to enable him to review their statements is impracticable."[44] The Prosecutor reiterates that the Appeals Chamber has not hesitated to deny an application if such consent is withheld by the witness(es).[45] Similarly, where it apprehends a breach of protective measures, the Appeals Chamber has not hesitated in denying an application.[46]

15. In the *Simba* case, upon which the Applicant again relies for the proposition that no witness consent is required prior to variation of protective measures, the Chamber dispensed with consent as the applicant was able to prove that the named witnesses had made public statements

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[42] Motion, at para. 41.

[43] *Prosecutor v. Casmir Bizimungu et al,* at para. 16.

[44] Motion, at para. 12.

[45] *Prosecutor v. Jean-Baptiste Gatete* AC para 10-11

[46] *Prosecutor v. Niyitegeka* (AC), 'Decision on Eliezer Niyitegeka's Appeal Concerning Access to Confidential Materials in the Muhimana and Karemera et al Cases, 23 October 2008, at paras. 21-23. The OTP is reliably informed that the applicant herein has challenged the application of protective measures for prosecution witnesses in the Canadian criminal proceedings and is doubtful whether he would abide the orders of this Tribunal, unless ordered to do so by the Canadian Courts. Additionally, Counsel for the Applicant, who is also Counsel for an Accused at the Tribunal appears to have placed himself in an irreconcilable conflict of interest between the duty to his client and a conflicting duty of confidentiality to the Tribunal. For example, his use of a Tribunal amicus curiae as a witness and the use of a **Strictly Confidential** Amicus Curiae Report (on matter *sub judice* at the Tribunal) in the Canadian Proceedings against Mungwarere points to a deliberate compromise of Tribunal Confidentiality in favour of Mungwarere. See *Prosecutor v Nzabonimana*, Motion by the PPSC for the Disclosure of the Amicus Curiae Report, 21 October 2011 and *Prosecutor v Nzabonimana*, Decision on PPSC Motion for Disclosure of the Amicus Curiae Report, 28 October 2011 where the TC never adverted to the potential breach of confidentiality nor the conflict of interest. It remains doubtful therefore whether Counsel for the Applicant, in light of this conflict of interest, would not breach Tribunal confidentiality.

in the UK extradition proceedings[47] It is nonetheless instructive to note that the Chamber first sought the respective witnesses consent through WVSS before reaching a decision after the witnesses had declined to consent. Similarly, the *Nizeyimana* case is distinguishable because the variation of protective measures was an *inter partes* decision, within an on-going trial, and was intended to permit disclosure of witness details to a state authority in order to facilitate further inquiry within that trial.[48]

16. The Applicant cites *Prosecutor v. Karemera et al.* for the proposition that it is in the interest of the Accused as well as in the general public interest to ensure access to evidence of witness tampering, intimidation, collusion and recantation.[49] In the cited case it is important to note that: first, the Applicant met the "factual nexus" and "legitimate forensic purpose" requirements;[50] second, the proposal was supported by the Prosecutor; third, the Chamber denied the Defence motion in part regarding 'unlimited access' to the witness and materials sought by maintaining making the material public in redacted form and maintaining witness protective measures.[51] The Prosecutor subscribes to the shared view that it is crucial to *balance* right of access with witness protection and the integrity of confidential information.

17. Finally, the Prosecutor finds the Applicant's submission regarding Rule 67(D) misplaced and totally without merit. The ICTR disclosure regime as governed by Rules 66, 67 and 68 is predicated upon "possession" of disclosable material and does not impose an obligation to embark on a pointless fishing expedition.

18. For these reasons, the Prosecutor submits that the Motion is without merit in form or substance and should be dismissed. It remains open however to the Applicant to renew his application through the Canadian Court seized with his case to seek clearly identifiable relevant ICTR material on his behalf, in conformity with the law and practice of the Tribunal.[52]

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[47] *Prosecutor v. Simba*, at para. 10.
[48] See *Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-56C-T, 'Decision on Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada,' 22 June 2011, at paras. 19-21.
[49] Motion, at para. 20 citing *Prosecutor v. Karemera et al.*, "Decision on Callixte Nzabonimana's Motion for Access to Exhibit DNZ-461, 23 August 2010, at para. 4.
[50] *Prosecutor v. Karemera et al.*, at para. 7.
[51] *Prosecutor v. Karemera et al.*, at para. 8.
[52] See *Prosecutor v. Jean-Baptiste Gatete*, at para. 8. See also *Prosecutor v. Casmir Bizimungu et al*, at para. 29.

C. - RELIEF SOUGHT

14. The Prosecutor, therefore, respectfully requests the Chamber to dismiss the motion in its entirety.

Dated at Arusha 14 March 2012

For Richard Karegyesa
Chief of Prosecutions

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