

MICT-12-14
24/07/2012
(0065-0059)

ICIR-95-1-7
08-03-2012
(1874-1868)

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Tribunal Pénal International pour le Rwanda**

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Before: Judge Vagn Joensen, *President*
Registrar: Adama Dieng
Date Filed: 8 March 2012

PROSECUTOR v. KAYISHEMA et al
Case No. ICTR-95-1
PROSECUTOR v. BAGILISHEMA
Case No. ICTR-95-1A
PROSECUTOR v. MUHIMANA
Case No. ICTR-95-1B
PROSECUTOR v. NDIMBATI
Case No. ICTR-95-1
PROSECUTOR v. SIKUBWABO
Case No. ICTR-95-1D
PROSECUTOR v. NIYITEGEKA
Case No. ICTR-96-14
PROSECUTOR v. MUSEMA
Case No. ICTR-96-13
PROSECUTOR v. MUNYAKAZI
Case No. ICTR-97-36A
PROSECUTOR v. KAREMERA et al
Case No. ICTR-98-44
PROSECUTOR v. NCHAMHIGO
Case No. ICTR-01-63
PROSECUTOR v. NDINDABAHIZI
Case No. ICTR-01-71

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**Prosecutor's Response to Jacques Mungwarere's Urgent
Motion for Access to Material**

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Received by the Registry
Mechanism for International Criminal Tribunals
24/07/2012 10:19

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 1 March 2012¹ seeking a blanket order for access to "relevant material" from eleven (11) ICTR case files.²
2. The Motion, which is presumably filed pursuant to Rule 75 (F) and (G) of the ICTR Rules of Procedure and Evidence, is based on an alleged "legitimate forensic purpose" because of the nexus between the Applicants case in Canada and each of the eleven ICTR cases.³
3. The Prosecutor opposes the Motion on the grounds that:⁴
 - (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; and,
 - (b) the motion is fatally defective as it lacks specificity and/or sufficient forensic justification.
 - (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

¹ *Prosecutor v. Kayishema et al (and 10 other cases)*, "Jacques Mungwarere's Urgent Motion for Access to Material," 29 February 2012 (Motion).

² Motion, para. 44.

³ Motion, para. 13 citing *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*). The Appeals Chamber recalls that 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.³ 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. 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.

⁴ 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 jurisdictions⁵, this is not without limitation. Indeed the Tribunal has previously dismissed,⁶ or declined to entertain⁷ 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 who assume the obligation and have the institutional capacity to ensure compliance with the Tribunal's orders with respect to witness protection.⁸ The Prosecutor submits that this liberal construction of the Rules confers no automatic right of disclosure to parties not before the Tribunal,⁹ 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".¹⁰
5. The Applicant places undue reliance on the *Simba* Decision¹¹, without making any effort to

⁵ *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*).

⁶ *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.*).

⁷ *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*).

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

⁹ *Prosecutor v. Blagojevic and Jokic, (AC)*, 'Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case,' 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)

¹⁰ *Prosecutor v. Simba*, at para. 5; *Prosecutor v Bizimungu et al* para 26

¹¹ *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.

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.¹²

6. 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 extradition proceedings,¹³ it was reasonable to infer that the security of the witness would not be compromised by any further disclosure.¹⁴ Finally, it is instructive to note that the Trial Chamber dismissed the rest of the application as being impermissibly vague.¹⁵

The motion is fatally defective as it lacks specificity and/or sufficient forensic justification

7. As noted above, the Motion does not meet the *Simba* criteria as it fails to provide the requisite specificity to accurately identify the "relevant materials" he seeks.¹⁶ With the exception of witness CGV in the Ndindabahizi case,¹⁷ the Applicant makes no attempt to specifically identify witnesses in the other ten ICTR cases who may possess relevant evidence as would materially assist his case. The Prosecutor submits that it is insufficient to merely allege an overlap or nexus between Applicant's case and the eleven ICTR cases and

¹² *Prosecutor v. Simba*, at para. 9.

¹³ Munyaneza attached the public statements of these witnesses to his motion for access to their sealed material in the *Simba* case.

¹⁴ *Prosecutor v. Simba*, at para. 10.

¹⁵ *Simba*, paras. 11 and 12.

¹⁶ *Prosecutor v. Casmir Bizimungu et al*, at para. 16. See also *Bagosora et al v. Prosecutor*, at paras. 11 and 12.

¹⁷ Motion, at para 40.

request a blanket disclosure of the entire court record in those cases.¹⁸ Not only is such an open ended request unduly oppressive, it also 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 eleven ICTR cases.

8. The Prosecutor submits that the public judicial records database managed by the ICTR Registry, for example, provides a searchable on-line repository of all public transcripts, exhibits, pleadings, decisions, judgments and other case documents.¹⁹ This would be a logical starting point for Applicant's Counsel to identify specific witnesses, transcript dates and exhibits required to prepare his defence. A general request alleging that "many witnesses" testified to broad events at commonly cited places (i.e. events in the Bisesero area, events in Kibuye prefecture, attacks at Muyira Hill etc...) is impermissibly vague.²⁰

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

9. 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.²¹ The extant motion fails to establish the consent of as yet unidentified witnesses nor does it establish that the circumstances giving rise to the protective measures have changed. If only to underscore the importance which the Appeals Chamber attaches to prior consent of witnesses to variation of protective measures, it has consistently required the

¹⁸ *Prosecutor v. Georges A. N. Rutaganda*, at para 10 citing that the finding of a nexus may not be sufficient. The Appeals Chamber denied access/disclosure despite having found a nexus between the accused's case and the sealed testimony of witness AWE in the *Renzaho* trial.

¹⁹ At footnotes 30 to 55 of the motion the applicant extensively cites Trial Judgments and Indictments but fails in like measure to specify the witness whose statements and sealed testimony he seeks.

²⁰ It is important to note that all foreign requests for access to sealed material cited herein have always clearly identified witnesses by pseudonym. In *Simba op cit* para 11-12, the Chamber dismissed as vague and unreasonable a request that the Tribunal search its records for relevant material.

²¹ *Prosecutor v. Casmir Bizimungu et al*, at para. 16.

WVSS to first seek such consent²² before reaching a decision, and has not hesitated to deny an application if such consent is withheld by the witness(es).²³ Similarly, where it apprehends a breach of protective measures, the Appeals Chamber has not hesitated in denying an application.²⁴

10. In the *Simba* case, upon which the Applicant 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 in the UK extradition proceedings.²⁵ 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 facilitate further inquiry within that trial.²⁶

An Alternative Remedy

11. The Applicant at paragraph 47 of the motion, as an alternative, seeks the "...guidance of the Chamber and the cooperation of the Prosecutor..." in securing access to the requested material so he can prepare his defence, should the extant motion be dismissed.

12. The Prosecutor submits in this regard that, on the basis of a letter from the Public Prosecution Service of Canada to the Foreign Requests Unit of the OTP, dated 6 February 2012,²⁷ it remains open 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

²² See *Prosecutor v. Jean-Baptiste Gatete*, AC 'Order in Relation to Rwabukombe's Application for Variation of Protective Measures and Disclosure of Documents,' 1 June 2011; *Prosecutor v. Karemera et al.*, AC 'Order in Relation to Prosecution Motion to Vary Protective Measures for Witnesses HF and CEA (Ex-Parte and Confidential),' 8 February 2012, at para. 6. *Prosecutor v. Bagosora et al.*, AC 'Order in Relation to Prosecutor's Motion to vary Protective Measures for Witnesses DCB, XXC and AAA, 23 July 2010,' at para. 6.

²³ *Prosecutor v. Jean-Baptiste Gatete* AC para 10-11

²⁴ *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.

²⁵ *Prosecutor v. Simba*, at para. 10.

²⁶ 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.

²⁷ Motion, Annex III, at Registry page 1826.


with the law and jurisprudence of the Tribunal.²⁸

13. The Prosecutor reiterates the importance of maintaining sound principles of mutual legal assistance to ensure the integrity of international cooperation in criminal proceedings while maintaining the safety and security of witnesses as well as promoting the responsible handling of confidential material.

C. - RELIEF SOUGHT

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

Dated at Arusha 8 March 2012


for **Richard Karegyesa**
Chief of Prosecutions

²⁸ See *Prosecutor v. Jean-Baptiste Gatete*, at para. 8. See also *Prosecutor v. Casmir Bizimungu et al.*, at para. 29.



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