



Mechanism for International Criminal Tribunals

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MICT-12-19 ✓
MICT-12-14
MICT-12-08
MICT-12-13
MICT-12-16

Date: 18 January 2013

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

In Re.

Elizaphan and Gérard NTAKIRUTIMANA

Alfred MUSEMA

Clément KAYISHEMA *et al.*

Yussuf MUNYAKAZI

Ignace BAGILISHEMA

Mikaeli MUHIMANA

Siméon NCHAMIHIGO

Aloys NDIMBATI

Emmanuel NDINDABAHIZI

Charles SIKUBWABO

Eliézer NIYITEGEKA

DECISION IN RESPECT TO JACQUES MUNGWARERE'S MOTIONS TO ACCESS
MATERIALS

The Office of the Prosecutor:

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Counsel for Jacques Mungwarere,
accused before the jurisdiction of Canada:

Phillippe Larochelle

M.

INTRODUCTION

1. Jacques Mungwarere, who is being prosecuted in Canada for crimes against humanity and genocide in relation to events allegedly committed in Rwanda during the 1994 Genocide, filed three motions before the ICTR for, *inter alia*, access to material in various completed cases.¹ Judge Michel Z. Charbonneau of the Superior Court of Justice, Court of Ontario, Canada subsequently authorised the requests.²

2. On 4 March 2012, I was designated as an ICTR Single Judge to rule on the three Motions.³ In a decision dated 28 May 2012 I denied Mungwarere's requests with respect to confidential material from a number of cases, ruled that the requests with respect to the remaining cases could be granted if the concerned witnesses consented to variation of their protective measures, and directed the Witnesses and Victims Support Section ("WVSS") of the ICTR to consult the concerned witnesses on their positions with respect to the requests.⁴

3. On 1 July 2012 all judicial functions related to the protection of witnesses and victims in completed ICTR cases passed to the Mechanism for International Tribunals ("MICT"). On 23 August 2012, I was assigned as MICT Single Judge to dispose of Jacques Mungwarere's motions.⁵

¹ Mungwarere's Motion for Access to Material, filed on 17 August 2011 ("First Motion"); Mungwarere's Reply to Prosecutor's [*sic*] Response to Mungwarere's Motion for Access to Material, filed on 29 August 2011; Jacques Mungwarere's Urgent Motion for Access to Material, dated 29 February 2012 and filed on 1 March 2012 ("Second Motion"); Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice under Rule 67(D), filed on 5 March 2012 ("Third Motion").

² Correspondence from Judge Michel Z. Charbonneau, Judge of the Superior Court of Justice, Court of Ontario, Canada to Mr. Adama Dieng, re: Motions filed by Jacques Mungwarere, dated 4 April 2012.

³ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Édouard Karemera et al.*, Case No. ICTR-98-44, *Mika Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbaty*, Case No. ICTR-95-1, *Emmanuel Ndinabahizi*, Case No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42, *Eliézer Niyitigeka*, Case No. ICTR-96-14, *Casimir Bizimungu et al.*, Case No. ICTR-99-50, *Augustin Ndiniliyimana et al.*, Case No. ICTR-00-56, Designation of a Judge to Consider Jacques Mungwarere's Motions for Access to Material and Notice under Rule 67 (D), 14 March 2012 ("Order of 14 March 2012"). This Order replaces the Designation of a Trial Chamber to Consider Mungwarere's Motion for Access to Material of 15 September 2011 for the First Motion.

⁴ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Édouard Karemera et al.*, Case No. ICTR-98-44, *Mika Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbaty*, Case No. ICTR-95-1, *Emmanuel Ndinabahizi*, Case No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Eliézer Niyitigeka*, Case No. ICTR-96-14, Decision in Relation to Jacques Mungwarere's Motion for Access to Materials and Notice under Rule 67 (D), 28 May 2012.

⁵ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17 *Alfred Musema*, Case No. MICT-12-15, *Clément Kayishema et al.*, Case No. MICT-12-10, *Yussuf Munyakazi*, Case No. MICT-12-18, *Ignace Bagilishema*, Case No. MICT-12-11, *Mika Muhimana*, Case No. MICT-12-12, *Siméon Nchamihigo*, Case No. MICT-12-19, *Aloys Ndimbaty*, Case No. MICT-12-14, *Emmanuel Ndinabahizi*, Case No. MICT-12-08, *Charles Sikubwabo*, Case No.

4. In response to the 28 May 2012 decision, ICTR WVSS filed submissions on 3 July 2012 and 5 September 2012 and MICT Witness Support and Protection (“WISP”) filed submissions on 11 January 2013.⁶

DELIBERATIONS

Preliminary matter

5. Because it does not contain information that reveals the identity of protected witnesses, I consider that this decision should be filed publicly.

The *Musema, Munyakazi, Bagilishema, Ndimbati, Sikubwabo, Niyitegeka* and *Nchamihigo* cases.

6. Jacques Mungwarere’s requests in respect to the above cases were denied by the ICTR Decision of 28 May 2012 and are therefore moot.

The *Ntakirutimana, Kayishema, Muhimana* and *Ndindabazi* cases.

7. The preliminary ruling in the ICTR Decision of 28 May 2012 that Mungwarere’s requests with respect to these four cases may be granted if the concerned witnesses consented to the required variation of their protection measures was made pursuant to Rule 75 of the ICTR Rules of Procedure and Evidence as developed in the jurisprudence of ICTR Trial Chambers and the ICTR and ICTY Appeals Chamber.⁷ Bearing in mind that the MICT Rules are based on the Rules of the ICTY and

MICT-12-13, *Eliézer Niyitegeka*, Case No. MICT-12-16, Order Assigning a Single Judge to Consider Jacques Mungwarere’s Motions to Access Materials, 23 August 2012.

⁶ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Mikaeli Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbati*, Case No. ICTR-95-1, *Emmanuel Ndindabahizi*, Case No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Eliézer Niyitegeka*, Case No. ICTR-96-14, Registrar’s Submissions in Respect of the “Decision in Relation to Jacques Mungwarere’s Motions for Access to Materials and Notice under Rule 67 (D)”, 3 July 2012; *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Mikaeli Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbati*, Case No. ICTR-95-1, *Emmanuel Ndindabahizi*, Case No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Eliézer Niyitegeka*, Case No. ICTR-96-14, Registrar’s Second Submissions in Respect of the “Decision in Relation to Jacques Mungwarere’s Motions for Access to Materials and Notice under Rule 67 (D)”, 5 September 2012; *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, *Alfred Musema*, Case No. MICT-12-15, *Clément Kayishema et al.*, Case No. MICT-12-10, *Yussuf Munyakazi*, Case No. MICT-12-18, *Ignace Bagilishema*, Case No. MICT-12-11, *Mikaeli Muhimana*, Case No. MICT-12-12, *Siméon Nchamihigo*, Case No. MICT-12-19, *Aloys Ndimbati*, Case No. MICT-12-14, *Emmanuel Ndindabahizi*, Case No. MICT-12-08, *Charles Sikubwabo*, Case No. MICT-12-13, *Eliézer Niyitegeka*, Case No. MICT-12-16, Registrar’s Submission in Respect of the “Decision in Relation to Jacques Mungwarere’s Motions for Access to Materials and Notice under Rule 67 (D)”, 11 January 2013.

⁷ *The Prosecutor v. Ntanzigwa and Ntanzigwa*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere’s Motion for Access to Materials and Notice, 21 May 2012, *The Prosecutor v. Bagilishema et al.*, Case No. ICTR-97-36A,

ICTR, I consider that the standards developed in the ICTR and ICTY jurisprudence for allowing access to confidential information for use in proceedings in other jurisdictions also apply to Rule 86 of the MICT Rules. There is, therefore, no need to review the preliminary ruling in the ICTR Decision.

8. Contrary to the ICTR Rules, however, the MICT Rules specifically regulate the requirement of consent by the concerned protected witness to a variation of protective measures. MICT Rule 86(I) provides that it shall be ensured “through the Victims and Witness Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.” I consider that the contact to the witnesses performed by the ICTR WVSS in relation to MICT Rule 86(I) is equivalent to contact performed by MICT WISP.

9. WVSS/WISP has reported the following on the position of the concerned witnesses to Mungwarere’s requests:⁸

10. In the *Ntakirutimana* case Witnesses FF, OO, EE, GG and CC have signed affidavits that they, for security reasons, oppose that their identity be disclosed to Mungwarere. Despite repeated

Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 24 May 2012, para 9; *Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-9-50-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 24 May 2012, para 9; *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 17 May 2012, para. 18; *Prosecutor v. Popović et al.*, Cases No. IT-05-88-A and IT-95-5/18-T, Order Relating to Radovan Karadžić’s Motion to Rescind Protective Measures: Witness KDZ122, 2 March 2012, p. 2; *Prosecutor v. Popović et al.*, Cases No. IT-05-88-A and IT-95-5/18-T, Order Relating to Prosecution’s Urgent Motion to Rescind Protective Measures for Witness, 3 February 2012, p. 2.

⁸ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Mikaeli Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbati*, Case No. ICTR-95-1, *Emmanuel Ndindabahizi*, Case No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Eliézer Niyitegeka*, Case No. ICTR-96-14, Registrar’s Submissions in Respect of the “Decision in Relation to Jacques Mungwarere’s Motions for Access to Materials and Notice under Rule 67 (D)”, 3 July 2012; *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, *Alfred Musema*, Case No. MICT-12-15, *Clément Kayishema et al.*, Case No. MICT-12-10, *Yussuf Munyakazi*, Case No. MICT-12-18, *Ignace Bagilishema*, Case No. MICT-12-11, *Mikaeli Muhimana*, Case No. MICT-12-12, *Siméon Nchamihigo*, Case No. MICT-12-19, *Aloys Ndimbati*, Case No. MICT-12-14, *Emmanuel Ndindabahizi*, Case No. MICT-12-08, *Charles Sikubwabo*, Case No. MICT-12-13, *Eliézer Niyitegeka*, Case No. MICT-12-16, Registrar’s Submission in Respect of the “Decision in Relation to Jacques Mungwarere’s Motions for Access to Materials and Notice under Rule 67 (D)”, 11 January 2013.

attempts to contact Witness PP, the witness is not available to grant or refuse consent to protective measures.⁹

11. In the *Kayishema* and *Muhimana* case Witnesses K, L, U, V, BB, HH, JJ, NN and QQ have signed affidavits that they, for security reasons, oppose that their identity be disclosed to Mungwarere. No record exists for Witnesses H, J, N, P, Y and LL. Witness S testified under her own name at trial and therefore does not have protected status as a witness. Witnesses W and GG are deceased.

12. Witness RR, whose statements to the Prosecution were used as supporting material for the indictments against Kayishema and Muhimana and filed *ex parte* has signed an affidavit that he consents to disclosure of these statements to Mungwarere.

13. In the *Ndindabahizi* case Witnesses CGV, CGP, CGY and CGN have signed affidavits that they, for security reasons, oppose the disclosure of their identity to Mungwarere. No record exists for Witnesses CGR, CGT and CGO.

14. In accordance with the affidavit of Witness RR I vary his protective measures to allow disclosure of closed session transcripts and exhibits under seal from the *Ndindabahizi* case which reveal the witness' identity.

15. With respect to the other protected witnesses for whom there is no consent I find that Mungwarere has made no compelling showing of exigent circumstances that could justify a variation of the protective measures for the concerned witnesses without consent or that a miscarriage of justice would result if the identity of the witnesses were not revealed to Mungwarere.

16. I note that Mungwarere has access to the public session testimony, if any, of the concerned witnesses and may request a review of the decision based on a specific showing of the possible importance of the confidential material for his case in accordance with MICT Rule 86(I).

⁹ The WVSS submissions also refer to the protected witnesses mentioned in Exhibit P.29 in the *Ntakirutimana et al.* case. In a decision dated 28 May 2012, I ruled that Mungwarere had not shown a nexus between his case and the exhibit. However, WVSS was requested to reveal the identity of the witnesses on the exhibit in case any of them belonged to the witnesses that were otherwise deemed relevant to Mungwarere's case. WVSS was not directed to consult the witnesses on the exhibit on disclosure, but nevertheless did so. Some of the witnesses on the exhibit proved to be among the relevant witnesses, but all of the relevant witnesses on the exhibit declined consent to disclosure. The two witnesses on the exhibit who refused to consent are:

FOR THE ABOVE REASONS, I

- I. **GRANT** the Jacques Mungwarere's requests in part;
- II. **REQUEST** the Registry to provide the statements of Witness RR used to support paragraphs 45 to 50 of the Indictments in the *Kayishema et al.* and *Muhimana* cases to Judge Michel Z. Charbonneau, Judge of the Superior Court of Justice, Court of Ontario, Canada for disclosure to the parties in the case against Jacques Mungwarere before that jurisdiction;
- III. **ALLOW** the disclosure of the transmitted material to Judge Michel Z. Charbonneau, on the condition that the information that Witness RR gave statements to the ICTR Prosecution and that the material originates from proceedings before the ICTR shall be treated confidentially and only revealed to the Parties in the proceedings against Jacques Mungwarere before that jurisdiction.
- IV. **REJECT** Jacques Mungwarere's Motions in all other aspects.

Arusha, 18 January 2013, done in English.

Vagn Joensen

Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]





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