



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1028/H

ICTR-99-50-A
24th May 2012

{1028/H - 1024/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Registrar: Mr. Adama Dieng
Decision of: 24 May 2012

ICTR Appeals Chamber

Date: 24th May 2012
Action: R. Palmer
Copied To: all concerned

JUSTIN MUGENZI
PROSPER MUGIRANEZA

v.

THE PROSECUTOR

Case No. ICTR-99-50-A

**DECISION ON JACQUES MUNGWARERE'S MOTION FOR ACCESS TO
CONFIDENTIAL MATERIAL**

Counsel for Mr. Jacques Mungwarere:

Mr. Philippe Larochelle
Mr. Marc Nerenberg
Mr. Christian Deslauriers

Superior Court of Justice, Ontario,
Canada:

Justice Michel Z. Charbonneau

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Mr. George W. Mugwanya
Mr. William M. Mubiru
Mr. Lansana Dumbuya

Defence Counsel:

Ms. Kate Gibson and Mr. Christopher Gosnell
for Mr. Justin Mugenzi

Mr. Tom Moran and Ms. Cynthia J. Cline for
Mr. Prosper Mugiraneza

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: NOUHOLO DIALLO
SIGNATURE: [Signature] DATE: 24/05/2012

1. I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) and Presiding Judge in this case,¹ am seized of a motion filed on 22 March 2012 by Mr. Jacques Mungwarere for access to closed session and confidential material.² The Prosecution responded on 5 April 2012,³ and Mr. Mungwarere replied on 16 April 2012.⁴

2. Mr. Mungwarere is being prosecuted by the Public Prosecution Service of Canada for genocide and crimes against humanity allegedly committed in 1994 in Kibuye Prefecture, Rwanda.⁵ Mr. Mungwarere requests access, pursuant to Rule 75 of the Rules, to all material in this case relating to the recantation of Witness GFA’s testimony, including the *Amicus Curiae* Report, and all material pertaining to allegations of contempt resulting from Mr. Prosper Mugiraneza’s defence witnesses’ harassment, including the Confidential *Amicus Curiae* Report and the Confidential Decision on Request to Initiate Contempt Proceedings.⁶

3. Mr. Mungwarere submits that he has established a legitimate forensic purpose for his request because he intends to “raise the issues of false allegations and fabrication of evidence against people accused in connection with the Rwandan genocide of 1994 before this Tribunal, in Rwanda, and elsewhere” as part of his defence in the proceedings in Canada.⁷ According to Mr. Mungwarere, the material sought relates to allegations of systemic fabrication of evidence, witness intimidation, and collusion involving high-ranking officials in Rwanda and the Rwandan prison system.⁸ He further notes that almost all Prosecution witnesses in his case currently live in Rwanda and many are or have been incarcerated there.⁹

¹ Pursuant to Rule 75(I) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), an application to vary protective measures may be dealt with by a Chamber or a Judge of that Chamber.

² Jacques Mungwarere’s Urgent Motion for Access to Material in the Bizimungu et al. Case, 22 March 2012 (“Motion”).

³ Prosecutor’s Response to “Jacques Mungwarere’s Motion for Access to Material in the Bizimungu et al. Case”, 5 April 2012 (“Response”).

⁴ Reply to Prosecutor’s Response to Jacques Mungwarere’s Urgent Motion for Access to Material in the Bizimungu et al. Case, 16 April 2012 (“Reply”). I accept the Reply as validly filed in light of Mr. Mungwarere’s explanation for the late filing. See Reply, para. 2.

⁵ Motion, para. 1.

⁶ Motion, para. 31, pp. 8, 9, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Confidential Decision on Request to Initiate Contempt Proceedings, 19 August 2011 (confidential). See also Motion, para. 29. I understand Mr. Mungwarere’s request to relate only to confidential material.

⁷ Motion, paras. 26, 27, 30-32.

⁸ Motion, paras. 30, 31. See also Reply, para. 13.

⁹ Motion, para. 30.

4. The Prosecution responds that Mr. Mungwarere lacks standing to request a variation of protective measures and disclosure of confidential material under Rule 75 of the Rules and, in any event, fails to demonstrate that he has a legitimate forensic purpose for accessing the material sought.¹⁰

5. In his reply, Mr. Mungwarere annexed a letter from Justice Michel Z. Charbonneau, the judge presiding over his trial in Canada, requesting that Mr. Mungwarere be granted standing to proceed with his Motion and such access to the requested material as the Appeals Chamber may deem him to be entitled to receive.¹¹ In addition, Mr. Mungwarere also attached an order by Justice Charbonneau requiring the parties in the case of *R. v. Jacques Mungwarere* before the Ontario Superior Court of Justice to comply with all protective measures regarding this material.¹²

6. Witness GFA was granted protective measures pursuant to Rule 75 of the Rules, including the non-disclosure to the public of any information identifying the witness or likely to reveal his identity.¹³ Similarly, the *Amicus Curiae* Report and the Confidential Decision on Request to Initiate Contempt Proceedings were filed confidentially in conformity with the protective measures granted to Mr. Mugiraneza's defence witnesses.¹⁴ Consequently, the disclosure of the material which Mr. Mungwarere seeks requires a variation or rescission of the protective measures currently in effect.

7. Rule 75(F)(i) of the Rules provides that "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the 'first proceedings'), such protective measures [...] 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 this Rule". According to Rule 75(G) of the Rules, "[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

¹⁰ Response, paras. 2, 9, 10.

¹¹ Reply, Annex I, Letter by Justice Michel Z. Charbonneau, dated 4 April 2012 ("Justice Charbonneau Letter"), paras. 1, 3. The Justice Charbonneau Letter was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

¹² Reply, Annex I, *R. v. Jacques Mungwarere*, Court of Ontario, Superior Court of Justice, Court File No. 09-30466, Order Binding the Parties to Comply with All Witness Protection Measures in Place at the International Criminal Tribunal for Rwanda with Regard to Any Disclosure Which May Be Received from the International Criminal Tribunal for Rwanda as a Result of Any Disclosure Motions that Have Been Made or May Be Made by Jacques Mungwarere to the International Criminal Tribunal for Rwanda, dated 4 April 2012 ("Justice Charbonneau Order"), p. 611/A (Registry pagination). The Justice Charbonneau Order was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

¹³ See *The Prosecutor v. Jérôme-Clément Bicomumpaka*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000, p. 6.

¹⁴ See *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005, pp. 4-6.

seised of the first proceedings; or (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings”.

8. Mr. Mungwarere does not seek variation for a case before the Tribunal and he is not “a party to the second proceedings” within the meaning of Rule 75 of the Rules. Nonetheless, the Appeals Chamber has held that the interests of justice require that Rule 75(F)(i) of the Rules be interpreted to provide for the variation of protective measures even when the second proceedings are not before the Tribunal, but before another jurisdiction.¹⁵ In such cases, the procedure set out in Rule 75(G)(i) of the Rules may apply *mutatis mutandis* to variations requested by a judge, a court, or a party for proceedings before another jurisdiction.¹⁶ A party to proceedings before another jurisdiction should be authorized by an appropriate judicial authority to apply for the variation of protective measures pursuant to Rule 75 of the Rules,¹⁷ as is the case here.¹⁸

9. The Appeals Chamber has held that where access to confidential Tribunal material is sought for proceedings before another jurisdiction the applicant should specifically identify such material and demonstrate a legitimate forensic purpose for the request.¹⁹ In this regard, consideration must be given to the relevance of the material requested, which may be demonstrated by showing the existence of a nexus between the applicant’s case and the case from which the material is sought, and whether the material requested is likely to materially assist the applicant’s case.²⁰ The Appeals Chamber has also underscored the importance of the protected witness’s consent to the disclosure of the material in question.²¹

10. With respect to the material sought relating to Witness GFA, while Mr. Mungwarere could have further indicated the material requested by providing the dates of the closed session testimonies, the numbers of the exhibits requested, or other identifying information, I am satisfied that by supplying the pseudonym of the witness concerned and specifying the issue of interest relating to the witness, Mr. Mungwarere has identified the material sought with sufficient specificity.²² However, Mr. Mungwarere’s request for access to “[a]ll material pertaining to allegations of contempt resulting from Mugiraneza Defence witness harassment”²³ is not

¹⁵ See, e.g., *The 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 (“*Nyiramasuhuko et al.* Decision”), para. 13.

¹⁶ *Nyiramasuhuko et al.* Decision, para. 13.

¹⁷ *Nyiramasuhuko et al.* Decision, para. 14.

¹⁸ See *supra*, para. 5.

¹⁹ *Nyiramasuhuko et al.* Decision, para. 17.

²⁰ *Nyiramasuhuko et al.* Decision, para. 17.

²¹ See, e.g., *Nyiramasuhuko et al.* Decision, para. 18.

²² Motion, para. 31, p. 8. See also Motion, para. 29.

²³ Motion, para. 31, p. 8.


sufficiently specific, with the exception of his request for access to the *Amicus Curiae* Report and the Confidential Decision on Request to Initiate Contempt Proceedings.

11. In any event, Mr. Mungwarere's general assertions of fabrication of evidence, witness intimidation, and collusion demonstrate only a tenuous nexus between the *Mugenzi and Mugiraneza* case and the specific allegations and witnesses in his own trial. This is not a sufficiently substantial basis for a finding that the material sought is likely to assist his case *materially* or that there is at least a good chance that it would.²⁴ Mr. Mungwarere has therefore failed to demonstrate a legitimate forensic purpose for his request.²⁵

12. Accordingly, Mr. Mungwarere has not satisfied the criteria for access to the requested confidential material in this case, and the Motion is therefore **DENIED**.

Done in English and French, the English version being authoritative.

Done this 24th day of May 2012,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]



²⁴ Cf. *Nyiramasuhuko et al.* Decision, para. 20.

²⁵ Mr. Mungwarere also submits that the material sought is "of interest to the general public" and that public redacted versions should be filed. *See* Motion, para. 33. However, this assertion does not give standing to Mr. Mungwarere to request the Appeals Chamber to review material put under seal by a trial chamber and to decide whether parts of this confidential material could be disclosed in public redacted form. Cf. *Nyiramasuhuko et al.* Decision, para. 22.