

MICT-12-15
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UNITED
NATIONS



Mechanism for International Criminal Tribunals

Case No: MICT-12-15

Date: 3 November 2017

Original: English

THE OFFICE OF THE PRESIDENT

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

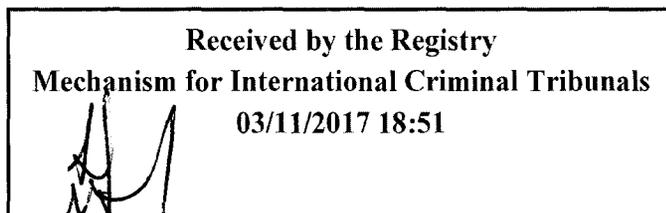
ALFRED MUSEMA

PUBLIC WITH PUBLIC ANNEX A

**MOTION SEEKING THE VARIATION OF PROTECTIVE MEASURES TO
OBTAIN DISCLOSURE OF THE PSEUDONYMS OF NINE WITNESSES IN CASES
IN WHICH THEY HAVE TESTIFIED BEFORE THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR RWANDA**

Office of the Prosecutor
Serge Brammertz

Counsel for Alfred Musema
Steven Kay QC
Gillian Higgins



IM

A. Introduction

1. On 27th January 2000, Alfred Musema was convicted of genocide, extermination and rape as crimes against humanity and was sentenced to life imprisonment. On 16th November 2001 before the Appeals Chamber, a not-guilty verdict was entered in respect of the count of rape and Mr. Musema's convictions for genocide and extermination were affirmed, as was his sentence of life imprisonment.
2. On 22nd November 2016, the Registry of the Mechanism for International Criminal Tribunals ("MICT") appointed Steven Kay QC and Gillian Higgins to act on behalf of Alfred Musema to assist him in seeking to file a review of his conviction for genocide and extermination before the International Criminal Tribunal for Rwanda ("ICTR"),¹ which was upheld on appeal.² Mr. Musema continues to maintain his innocence and now files this motion before the MICT to request access to confidential information to assist him in the identification of "new facts" for any potential review of his conviction.
3. This motion requests the variation of protective measures to seek disclosure of confidential information, namely the pseudonyms of nine key witnesses and the names of the cases in which they have testified before the ICTR. These nine witnesses from the trial of Alfred Musema are Witness M, R, F, D, T, N, H, S, and AC. These witnesses were relied upon by the Trial Chamber to convict Mr. Musema of genocide and extermination. The seven crime sites in respect of which Alfred Musema was convicted are set out in Annex A. In respect of two of the nine witnesses, at trial His Honour Judge Aspergren issued a Separate Opinion.³ In respect of four of the crime sites, the conviction of Alfred Musema rests on only one witness per site.⁴ Alfred Musema has always maintained his innocence.
4. Counsel seeks the variation of protective measures requested in order to be able to file requests to the Registry (for public material) and to the Court (for confidential material) for copies of witness statements, exhibits, hearing transcripts and unused material from other trials in which these nine witnesses have testified. In relation to those witnesses who are known to Counsel to have testified in other proceedings before the ICTR, separate applications to vary protective measures have been filed.

¹ Alfred Musema was convicted of genocide, extermination and rape as crimes against humanity and was sentenced to life imprisonment on 27th January 2000.

² On 16th November 2001, before the Appeals Chamber, a not guilty verdict was entered in respect of the count of rape and his convictions for genocide and extermination were affirmed, as was the sentence of life imprisonment.

³ This dissenting opinion relates to witnesses M and R.

⁴ Witness M, in respect of whom Judge Aspergren dissented; Witness R, in respect of whom Judge Aspergren dissented; Witness H and Witness S.

B. Background

5. On 9 December 2016, Counsel wrote to the Office of the Prosecutor seeking *inter alia* the disclosure of pseudonyms used by twelve witnesses in the trial of Alfred Musema.⁵ On 2nd February 2017, the Prosecution responded in writing stating the following:

“information about other cases in which the twelve witnesses referred to in your request may have testified, including the pseudonyms under which they testified in those cases, is considered confidential information and cannot be provided without a court order (unless it is exculpatory), varying the protective measures, if any, of the witnesses concerned. In this regard, Rule 86(G) and (I) of the Rules of the Mechanism for International Criminal Tribunals (MICT) provides that a party to the second proceedings, seeking to rescind, vary or augment protective measures ordered in the first proceedings, must apply to the chamber, remaining seized of the first proceedings, or if no chamber remains seized of the first proceedings, the application for variation should be made to the chamber seized of the second proceedings. Please note that a party seeking access to confidential material from another case is required to establish that there is a legitimate forensic purpose for the access, in that there must be a nexus between your case and the case from which the confidential material is sought.”

6. A further written request for assistance was sent to the Office of the Prosecution on 21st June 2017. No reply to this request has been received from the Prosecution to date.⁶

C. Law

7. The relevant sections of Rule 86 of the MICT Rules provide as follows:
- (F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the ICTY, the ICTR, or the Mechanism (the “first proceedings”), such protective measures:
- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism (“second proceedings”) or another jurisdiction unless

⁵ Following further considered review of the Alfred Musema proceedings, the scope of the request for assistance has now been narrowed by Counsel to the 9 key witnesses whose testimony underpins the counts on which Alfred Musema was convicted.

⁶ This communication dealt specifically with the statement by the Office of the Prosecutor that a search of the OTP database has not revealed any additional material which it considers exculpatory pursuant to Rule 73. This issue is addressed in a separate motion.

and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but

- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
 - (G) 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 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. As no Chamber remains seised of the proceedings, this motion is filed in the case name of Alfred Musema.
9. In accordance with the settled case law of the ICTR and the ICTY, as accepted before the MICT,⁷ a party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.⁸ In the “*Decision on Defence Request for Access to Confidential Materials from Krstic Case*”,⁹ the Chamber gave the following guidance:

“The Tribunal’s jurisprudence concerning the identification requirement is not particularly onerous, and applicant requests for “all confidential material” are generally considered sufficiently specific to meet this standard.¹⁰ With respect to *inter partes* confidential material, the applicant party must demonstrate that such material “is likely to assist the [party’s] case materially, or at least there is a good chance that it would.”¹¹ The “good chance” standard may be met by the

⁷ MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the Nshogoza Case, 9 November 2015, para.4.

⁸ Prosecutor v Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Raadovan Karadžić’s Motion for Access to Confidential Material in Dragomir Milošević case, 19 May 2009, para.7 (D Milošević Decision); Prosecutor v Milan Martić, Case No. IT-95-11-A, Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i), 22 February 2008, para.9.

⁹ Prosecutor v Ratko Mladic, Case No IT-09-92-PT, Decision on Defence request for Access to Confidential Materials from Krstić Case, 21 March 2012, paras.5 and 8.

¹⁰ Prosecutor v Radovan Karadžić, Case No IT-95-5/18-PT, Decision on Momcilo Persić’s Motion for Access to Confidential Materials in the Radovan Karadžić case, 14 October 2008, para.8.

¹¹ D Milošević Decision, para.8.

establishment of a legitimate forensic purpose, demonstrated by the existence of a “geographical, temporal or otherwise material overlap” between the applicant’s case and the case from which the material is sought.”¹² The “good chance” standard, however, does not require that the applicant party “establish a specific reason that each individual item is likely to be useful.”¹³

“Once an applicant has been granted access to confidential exhibits and confidential closed and private session testimony transcripts from another case before the Tribunal, he or she should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential material.”¹⁴

D. Submissions

10. Counsel submits that it is in the interests of justice that the variation of protective measures and disclosure requested is made in those cases where there is a geographical and/or temporal link to the case of Alfred Musema. The geographical and temporal areas of relevance in the present case are set out in Annex A. Based on an initial review of the Trial Chamber and Appeals Chamber Judgments, a number of the trials before the ICTR concern geographical and/or temporal areas of overlap with Bisesero, Kibuye Prefecture, now known officially as Karongi District. These include the cases of *Edouard Karamera et al.*,¹⁵ *Clement Kayishema and Obed Ruzindana*,¹⁶ *Mikaeli Muhimana*,¹⁷ *Emmanuel Nindabahizi*,¹⁸ *Eliezer Niyitegeka*,¹⁹ *Elizaphan and Gerard Ntakirutimana*²⁰ and *Vincent Rutaganira*.²¹
11. Further, it is submitted that the refusal of this motion would render Counsel unable to make subsequent detailed requests for access to evidence, which may in turn be capable of providing vital information to assist Mr. Musema in the preparation of any review proceedings. Without vital knowledge as to the trials in which the same witnesses have testified before the ICTR, Counsel is unable to make requests for access to evidence. The Prosecution submits in correspondence with Counsel that a Court order is required in this regard.

¹² *Prosecutor v Mile Mrksić et al*, Case No IT-95-13/1-A, Decision on Veselin Sljivančanin’s Motion Seeking Access to Confidential Material in the Kordić and Cerkez Case, 22 April 2008, para.7.

¹³ *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Case No IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005, p.4.

¹⁴ D Milosevic Decision, para.11.

¹⁵ ICTR-98-44-T, ICTR-98-44-A.

¹⁶ ICTR-95-1-T, ICTR-95-A, MICT-12-10.

¹⁷ ICTR-95-1B-T, ICTR-95-1B-A, MICT-12-12.

¹⁸ ICTR-01-71-T, ICTR-01-71-A, MICT-12-08.

¹⁹ ICTR-96-14-T, ICTR-96-14-A, MICT-12-16.

²⁰ ICTR-91-10-T, ICTR-96-17-T, ICTR-96-10-A, MICT-12-17.

²¹ Guilty plea. ICTR-95-1C-T.

12. In essence, this motion is a request for assistance to allow Counsel to conduct due diligence work in assessing the credibility of the key witnesses who testified in the trial of Alfred Musema and most importantly, to enable Counsel to conduct its own review of the evidence and assess whether or not there are sufficient discrepancies to merit the raising of a “new fact” in Alfred Musema’s case.
13. In circumstances where both Counsel and Alfred Musema know the identity of the relevant witnesses from the Musema proceedings, it must be contrary to the interests of justice, in cases of geographical or temporal overlap, for Counsel *not* to be provided with disclosure of the case names and pseudonyms used by these individuals in other proceedings before the ICTR. Such evidence may represent a significant bank of material which Counsel should be entitled to review, particularly in circumstances where the credibility of each of these nine witnesses was in issue at trial, and remains in issue in any future review proceedings.
14. For the reasons set out above, Counsel submits that the “good chance” standard and a legitimate forensic purpose have been established to justify the request to vary the protective measures in this case.
15. Based on a review of the Trial Chamber and Appeals Chamber Judgments, in addition to being relevant to the Applicant’s case, the material sought is likely to assist the case materially by enabling Counsel to assess its pertinence in the context of potential review proceedings and “new facts” in the case of Alfred Musema.
16. Counsel submit that in the circumstances, the “good chance” standard and a legitimate forensic purpose have been established. It is recalled that the “good chance” standard does not require the applicant party to establish a specific reason that each individual item is likely to be useful.

E. Consent

17. Counsel submit that the variation of protective measures sought should be granted even if the witnesses do not consent, as there is a risk of a miscarriage of justice in the event that access to this confidential material is refused. The inability to access confidential material from these witnesses could deny Counsel the opportunity to conduct a comprehensive review of the evidence on behalf of Alfred Musema, who maintains that a miscarriage of justice occurred when he was convicted before the ICTR.

F. Security Risk to the Witness

18. Counsel submit that the variation of protective measures will not expose the witnesses to any security risk. Counsel undertake to maintain the confidentiality of the

information, to guarantee such confidentiality, and to use the confidential information solely for the present case.

G. Relief Sought

19. For the reasons outlined above, Counsel request that the Single Judge to be assigned by the President, issues an order granting the application and varying the protective measures in the following terms:

- The Court orders the release of the information to Review Counsel and Alfred Musema, namely the pseudonyms and case names of all the trials in which the nine witnesses referred to herein have testified before the ICTR.

Word Count: 2,307

Steven Kay QC

Gillian Higgins

Counsel for Alfred Musema

**Dated this 3 November 2017
At London**

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THE OFFICE OF THE PRESIDENT

Before: Judge Theodor Meron, President

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THE PROSECUTOR

v.

ALFRED MUSEMA

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**MOTION SEEKING THE VARIATION OF PROTECTIVE MEASURES TO
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MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

PUBLIC ANNEX A

List of Crime Sites and Witnesses

Crime Sites and Witnesses

- Alfred Musema was convicted in relation to 7 crime sites.
- He was convicted by 9 witness in total (in respect of two of the witnesses there is a dissenting opinion from HHJ Asperren – Witnesses M and R).
- 4 of the crime sites each rests on only one witness – M (dissent), R (dissent), H and S (no corroboration)
- The other 2 crime sites rely on the testimony of these witnesses as set out below: F, T, N, AC, D
- 3 of the crime sites were not proved beyond a reasonable doubt according to HHJ Aspergren (Gitwa Hill, 26th April, Rwirambo Hill and Nyakavumu cave)

- | | | |
|-----|---|--|
| (1) | Gitwa Hill 26th April: | Witness M (dissenting opinion from HHJ Aspergren)
NOT PROVEN BRD: HHJ ASPERGREN |
| (2) | Rwirambo Hill
end Apr/beg May: | Witness R (dissenting opinion from HHJ Aspergren)
NOT PROVEN BRD: ASPERGREN |
| (3) | Muyira Hill
13th May: | Witnesses F, T, N (Not relied upon: P, R, Z, G) |
| (4) | Muyira Hill
14th May: | Witnesses AC, T, D, F (not eye witness) (Not relied upon: R, Z) |
| (5) | Muyira Hill
mid-May
betw 10-20 May | Witness H |
| (6) | Mumataba Hill
Mid May betw 10-20 May | Witness S |
| (7) | Nyakavumu Cave
Mid May | Witnesses H, S, D, AC
NOT PROVEN BRD: ASPERGREN |



**TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE
MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/
FICHE DE TRANSMISSION POUR LE DÉPÔT DE DOCUMENTS DEVANT LE
MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX**

I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

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From/ De :	<input type="checkbox"/> Chambers/ <i>Chambre</i>	<input checked="" type="checkbox"/> Defence/ <i>Défense</i>	<input type="checkbox"/> Prosecution/ <i>Bureau du Procureur</i> <input type="checkbox"/> Other/ <i>Autre :</i>
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Date Created/ Daté du :	3 November 2017	Date transmitted/ Transmis le :	3 November 2017
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Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclue</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
	<input type="checkbox"/> Confidential/ <i>Confidentiel</i>	<input type="checkbox"/> Ex Parte R86(H) applicant excluded/ <i>Art. 86 H) requérant exclu</i>	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ <i>Amicus curiae exclu</i>
	<input type="checkbox"/> Strictly Confidential/ <i>Strictement confidentiel</i>	<input type="checkbox"/> Ex Parte other exclusion/ <i>autre(s) partie(s) exclue(s)</i> (specify/préciser) :	
Document type/ Type de document :	<input checked="" type="checkbox"/> Motion/ <i>Requête</i>	<input type="checkbox"/> Submission from parties/ <i>Écritures déposées par des parties</i>	<input type="checkbox"/> Indictment/ <i>Acte d'accusation</i>
	<input type="checkbox"/> Decision/ <i>Décision</i>	<input type="checkbox"/> Submission from non-parties/ <i>Écritures déposées par des tiers</i>	<input type="checkbox"/> Warrant/ <i>Mandat</i>
	<input type="checkbox"/> Order/ <i>Ordonnance</i>	<input type="checkbox"/> Book of Authorities/ <i>Recueil de sources</i>	<input type="checkbox"/> Notice of Appeal/ <i>Acte d'appel</i>
	<input type="checkbox"/> Judgement/ <i>Jugement/Arrêt</i>	<input type="checkbox"/> Affidavit/ <i>Déclaration sous serment</i>	

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