



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 TO REQUEST AN ORDER COMPELLING THE PROSECUTION TO
CONDUCT A COMPREHENSIVE EXCULPATORY SEARCH FOR EVIDENCE
PURSUANT TO RULE 73 IN THE CASE OF ALFRED MUSEMA**

Office of the Prosecutor
Serge Brammertz

Counsel for Alfred Musema
Steven Kay QC
Gillian Higgins

**Received by the Registry
Mechanism for International Criminal Tribunals**

03/11/2017 21:51

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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 ICTR,¹ which was upheld on appeal.² Mr. Musema has always maintained his innocence.
3. Counsel seek a court order to compel the Prosecution to (i) conduct a comprehensive exculpatory search for evidence pursuant to Rule 73 of the Rules of Procedure and Evidence of the MICT in the case of Alfred Musema and (ii) provide written answers to the questions raised by Counsel on 21st June 2017 and those set out in paragraph 8 herein within 14 days. The President of the MICT is requested to designate a Single Judge to consider this motion.

B. Background

4. Alfred Musema was convicted in relation to seven crime sites,³ on the evidence of nine witnesses ("nine relevant witnesses").⁴ A crime site and witness schedule is provided in Annex A. In respect of two of the nine witnesses, at trial His Honour Judge Aspergren issued a Separate Opinion.⁵ In respect of four of the crime sites, the conviction of Alfred Musema rests on only one witness per site.⁶
5. On 9 December 2016, Counsel sent a written request by email to the Office of the Prosecution seeking "full and frank disclosure of all exculpatory evidence within the

¹ Alfred Musema was convicted of genocide, extermination and rape as crimes against humanity and was

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 Gitwa Hill, 26th April; Rwirambo Hill, end April/beginning of May; Muyira Hill, 13th May; Muyira Hill, 14th May; Muyira Hill mid May, between 10-20 May; Mumataba Hill, Mid May between 10-20 May; Nyakavumu Cave, Mid May.

⁴ Witnesses M, R, T, N, AC, D, F, H, S.

⁵ This Separate Opinion relates to witnesses M and R.

⁶ Witness M, in respect of whom Judge Aspergren dissented; Witness R, in respect of whom Judge Aspergren dissented; Witness H and Witness S.

possession of the now-MICT prosecutor in relation to the case of Mr. Musema pursuant to Rule 73.” As part of the request, Counsel sought the following:

- “4. A review of all potentially relevant evidence and information within the possession of the Prosecutor, to identify and disclose all exculpatory evidence and other relevant material in relation to the case of Alfred Musema, pursuant to Rule 73;”
6. In addition, Counsel also sought the following material in relation to Witnesses F, P, R, Z, N, G, T, AC, D, H, S and M:⁷
- “5a) Copies of all statements made by these witnesses and exhibits produced by them in the possession of the ICTR, in relation to any ICTR case, whether or not these witnesses testified in subsequent trial or appeal proceedings before the ICTR;
 - 5b) Provision of the pseudonyms used by any of the 12 witnesses in other ICTR cases, the names of those cases and the dates on which the witnesses testified;
 - 5c) Provision of any exculpatory documentary information or evidence provided by the 12 witnesses identified, or indeed any other witness or individual questioned by the ICTR;
 - 5d) Provision of any exculpatory information or evidence in the possession of the ICTR which supports the alibi Alfred Musema provided at trial, set out at paragraphs 317 – 339 of the Trial Judgment;
 - 5e) Provision of all information within the possession of the prosecution in respect of any other proceedings, criminal or civil, in which any of these 12 witnesses testified before courts or tribunals external to the ICTR e.g. in the UK, Canada, Belgium or elsewhere; and
 - 5f) Provision of all information within the possession of the prosecution in respect of any Gacaca proceedings in Rwanda in which any of the 12 witnesses testified or participated.”
7. On 2nd February 2017, the Prosecution sent the following written response by email:
- a) Your request for all public judicial records, such as transcripts and exhibits from Mr. Musema’s case, as requested in item 1 of your

⁷ Counsel had at that stage referred to 12 relevant witnesses. Further study of the case by Review Counsel revealed that there are in fact only 9 relevant witnesses.

correspondence, should be directed to the MICT Registry as the office of record. In this regard kindly contact Ms. Xheni Shehu at [redacted...], or Mr. Samuel Algozin at [redacted] for assistance.

- b) In addition, your request, in item 2 of your correspondence, for information regarding the declassification of confidential records of proceedings and evidence in the Musema case, which may have taken place since Mr. Musema's case closed, should also be directed to the MICT Registry, as the office of record.
- c) With regard to item 4, 5(c), 5(d), 5(e) and 5(f) of your correspondence, as Mr. Musema's case has closed, the Prosecutor's disclosure obligation extends only to material which may suggest Mr. Musema's innocence or mitigate his guilt, pursuant to Rule 73 of the MICT Rules. In this regard, a search of the OTP database has not revealed any additional material which it considers exculpatory pursuant to Rule 73. Please note that the Prosecution conducts routine searches of its database in order to satisfy its continuing disclosure obligations pursuant to the Rules. Should we identify any exculpatory material in the future, we shall disclose it to Mr. Musema without delay.
- d) With regard to items 5(a) and 5(b) of your correspondence, 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 seised of the first proceedings, or if no chamber remains seised of the first proceedings, the application for variation should be made to the chamber seised 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.

8. On 21st June 2017, Counsel sent a further written request seeking clarification and information about the exculpatory search procedure in order to seek to “fully understand this process”. In particular, Counsel sought answers to the following questions:

- “(1) What the database searched contains (and what it does not contain, if applicable);
- (2) How the search of the OTP database is carried out - please explain how this works;
- (3) Who conducted the search in this case, and when?
- (4) Please identify the search criteria used to conduct the search;
- (5) Please explain whether or not any search for exculpatory has been carried out by an individual with knowledge of the case of Alfred Musema;
- (6) Please provide a copy of the search criteria used in conducting the search.

We are keen to understand better the context and detail of how such exculpatory searches are conducted.”

9. The Prosecution has not responded to this request for further information to date.

C. The Law

10. Section 73 of the MICT Rules provides as follows:

“Subject to the provision of Rule 76 [Matters Not Subject to Disclosure]

- (A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material that in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other Party any material referred to in paragraph (A) above.

11. The Prosecution has a positive and continuous obligation to disclose exculpatory material following the conclusion of any appeal.⁸
12. Rule 55 sets out the General Rule relating to the power of a Judge or Trial Chamber to “issue orders, summonses, subpoenas, warrants and transfer orders”. While this Rule applies expressly to an “investigation” or the “preparation or conduct of the trial”, the Court retains an inherent discretionary power to make any such orders as are deemed necessary, even after the conclusion of both trial and appeal.

D. Submissions

13. Counsel submit that the Prosecution’s response on 2nd February 2017 to the request for an exculpatory search is wholly inadequate. To inform Counsel merely, that “a search of the OTP database has not revealed any additional material which it considers exculpatory pursuant to Rule 73” raises more questions than it answers. From the wording of the Prosecutor’s response, it is unclear as to how, and pursuant to which search criteria this review was conducted. It is also unclear as to whether this review was automated or conducted by an individual with actual knowledge of the detail of the case of Alfred Musema and knowledge as to what might constitute exculpatory material. Counsel submit that all of these factors are highly relevant to the quality of the exculpatory review undertaken. The gravity of the obligation upon the Prosecution requires that it is discharged in a thorough manner with all due regard to the interests of justice. Counsel respectfully requests the Prosecution to inform the Defence as to the nature, frequency and scope of their exculpatory searches in Alfred Musema’s case, demonstrating clearly how they discharge their continuing duty under Rule 73 and explaining the review process, including the criteria by which the searches are conducted.
14. In the circumstances, it is within the proper remit of Counsel to seek to obtain further clarification, particularly given the central importance of exculpatory searches and the inability of Review Counsel to perform any check on the way in which the

⁸ *Prosecutor v Niyitegeka*, No. MICT-12-16-R, Decision on Appeals of Decision Rendered by a Single Judge (9 August 2017) at para.12; *Prosecutor v Niyitegeka*, No. MICT-12-16, Decision on Eliezer Niyitegeka’s Request for an Order for Disclosure of Exculpatory Evidence and other Relevant Evidence (28 August 2013) at para.11; *Prosecutor v Kamuhanda*, No. MICT-13-33, Decision on Motion to Compel Disclosure of Witness GEK Material (25 November 2015) at para.6; *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, Decision on the Prosecutor’s Motion to Move for Decision on Niyitegeka’s Requests for Review Pursuant to Rules 120 and 121 (28 September 2005) at p.8.

Prosecution seeks to carry out its obligation. The Prosecution's obligation to disclose exculpatory material is essential to the conduct of fair proceedings, and is an obligation that has always been interpreted broadly.⁹

15. As part of this request, Counsel also seeks clarification from the Prosecution as to the nature and extent of the evidence searched. For example, it is currently unclear whether any exculpatory search conducted to date has included scrutiny of (i) Gacaca testimony records made by any of the nine relevant witnesses in the possession of the Prosecution; and/or (ii) evidence from any trials external to the ICTR in the possession of the Prosecution in which any of the nine relevant witnesses testified or provided information or evidence that may not have been used at trial before the ICTR.
16. Counsel submit that the issuance of a short statement by the Prosecution that it has conducted an exculpatory search is insufficient in the circumstances of this case to discharge its fundamental duty. The interests of justice demand that exculpatory reviews are conducted in a thorough, transparent manner that is capable of examination upon request.

E. Relief Sought

17. For the reasons outlined above, Counsel request that the Single Judge to be assigned by the President, issues an order granting the application in the following terms:
 - (i) The Prosecution is ordered to conduct a comprehensive exculpatory review of evidence in the case of Alfred Musema within the next two months and report on its findings to Review Counsel and the Single Judge; and
 - (ii) The Prosecution is ordered to provide answers to the questions raised by Counsel in writing on 21st June 2017 set out in paragraph 8 herein within 28 days.

⁹ *Ngirabatware v Prosecutor*, No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order of Disclosure (15 April 2014) at para.12; *Prosecutor v Kamuhanda*, No. MICT-13-33, Decision on Motion to Compel Disclosure of Witness GEK Material (25 November 2015) at para. 9; *Prosecutor v Niyitegeka*, No. MICT-12-16-R, Decision on Appeals of Decision Rendered by a Single Judge (9 August 2017) at para.18.

Word Count: 2,314

Steven Kay QC

Gillian Higgins

Counsel for Alfred Musema

Dated this 3 November 2017

**UNITED
NATIONS**



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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 (Witnesses M and R) there is a dissenting opinion from His Honor Judge ('HHJ') Aspergren).
- 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 ('BRD') according to the dissenting opinion of 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: HHJ ASPERGREN |
| (3) | Muyira Hil
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: HHJ ASPERGREN |



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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>
Case Name/ Affaire :	Prosecutor v. Alfred Musema		Case Number/ Affaire n° : MICT-12-15
Date Created/ Daté du :	3 November 2017	Date transmitted/ Transmis le : 3 November 2017	No. of Pages/ Nombre de pages : 11
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
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	<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>
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