

UNITED  
NATIONS



Mechanism for International Criminal Tribunals

Case No: MICT-12-15

Date: 16 November 2017

Original: English

**THE SINGLE JUDGE**

Before: Judge Prisca Matimba Nyambe

Registrar: Mr. Olufemi Elias

The Prosecutor

v.

Alfred Musema

**PROSECUTION'S RESPONSE TO MOTION SEEKING VARIATION  
OF PROTECTIVE MEASURES TO OBTAIN DISCLOSURES OF  
THE PSEUDONYMS OF NINE WITNESSES IN CASES IN WHICH  
THEY HAVE TESTIFIED BEFORE THE ICTR**

**Office of the Prosecutor**  
Veronic Wright  
Thembile Segoete  
Sunkarie Ballah-Conteh

**Alfred Musema**  
Steven Kay QC – Counsel  
Gillian Higgins

Received by the Registry  
Mechanism for International Criminal Tribunals

16/11/2017 19:07

*Tuwai popo*

## I. INTRODUCTION

1. Alfred Musema's "Motion Seeking 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" is impermissibly vague, fails to establish a legitimate forensic purpose for the disclosure and should be dismissed in its entirety.<sup>1</sup>

2. By motion dated 3 November 2017, received by the Prosecution on 6 November 2017, Musema requests pursuant to Rule 86(G) of the MICT Rules of Procedure and Evidence ("Rules"), variation of the protective measures pertaining to witnesses M, R, F, D, T, N, H, S and AC from the Musema case.

3. He argues that the variation is required to enable him to know the other cases in which the listed witnesses have testified and the pseudonyms under which they testified in those cases.<sup>2</sup> He will then be in a position to request from the MICT Registry all public material pertaining to the nine witnesses and to request access to their confidential material from the Chamber, including all statements, exhibits, transcripts, both public and confidential and unused material from other ICTR cases.<sup>3</sup> Musema maintains that the material will assist him in identifying new facts for a potential application for a review of his conviction because there may be discrepancies between the witnesses' testimony in his case and their testimony in other ICTR cases sufficient enough to warrant a review application.<sup>4</sup>

4. Musema also submits that there is a geographical and/or temporal overlap between his cases and a number of ICTR cases, including *The Prosecutor v. Karemera et al.*; *The Prosecutor v. Clement Kayishema and Obed Ruzindana*; *The Prosecutor v. Mikaeli Muhimana*; *The Prosecutor v. Emmanuel Ndinabahizi*; *The Prosecutor v. Eliezer Niyitegeka*; *The Prosecutor v. Elizaphan and Gerard Ntakirutimana* and *The Prosecutor v. Vincent Rutaganira*; therefore the variation and disclosure is warranted in the interest of justice.<sup>5</sup>

5. The Prosecution hereby files his submissions.

---

<sup>1</sup> *The Prosecutor v. Alfred Musema*, Case No. MICT-12-15, 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, 3 November 2017.

<sup>2</sup> *Ibid.* para. 3.

<sup>3</sup> *Ibid.* para. 4

<sup>4</sup> *Ibid.* para.12

<sup>5</sup> *Ibid.* para.10

## II. SUBMISSIONS

6. Musema's request in its current form is impermissibly vague, overly broad and unjustified. His request amounts to a "fishing expedition", in that he seeks material which he may potentially use in a potential application for review without establishing the necessary nexus between his case and the cases from which material is sought, which is prohibited by the jurisprudence.<sup>6</sup>

7. Despite having access to a substantial amount of material from other cases that would enable Musema to identify with greater particularity points of overlap between his case and other ICTR cases and indeed the likelihood that the confidential material will assist his case, Musema has failed to do so with the result that his application must fail.

8. 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 the access must be demonstrated.<sup>7</sup> In determining whether this standard has been met a chamber must consider the relevance of the material sought, 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.<sup>8</sup> Such a factual nexus may be established 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 sufficient. A case specific analysis is required each time.<sup>9</sup> "The applicant must further establish that the material sought is likely to assist the case materially or at least that there is a good chance that it would."<sup>10</sup>

9. Given that the proceedings against Musema have been concluded, the only legitimate forensic purpose for obtaining access to the material requested is to

---

<sup>6</sup> See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29-1/A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009, para. 11.

<sup>7</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiliyimana v. Prosecutor*, Case No. ICTR-00-56-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

<sup>8</sup> *Ibid*

<sup>9</sup> *Rutaganda v The Prosecutor*, Case No. ICTR 96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the *Karemera et al.* Case, 10 July 2009, para.13.

<sup>10</sup> *Ibid*

establish a “new fact” capable of constituting a basis for a review of Musema’s convictions.<sup>11</sup>

10. Musema fails to demonstrate any legitimate forensic purpose for the variation or for accessing the broad scope of material requested. He merely states that there is a geographical, temporal and/or material relationship between his case and several ICTR cases. Additionally he makes broad and speculative assertions that there may be discrepancies in the testimony of these witnesses about the events for which he was convicted in the other trials.<sup>12</sup> His unsubstantiated assertions and speculations are insufficient to establish a legitimate forensic purpose for the disclosure or indeed that there is a likelihood that the material will assist his case.

11. Without particularized submissions, the mere fact that various cases may share common witnesses with Musema’s case is insufficient to establish a link between his case and the cases from which confidential material is sought. It is common for ICTR witnesses to testify in more than one ICTR case and possibly in cases outside of the ICTR. A witness’ subsequent testimony or other confidential material may be premised on different facts, which have no relevance to those in Musema’s case and which will not necessarily assist in establishing a “new fact” in the context of a review proceeding or assist in the preparation of a review application.<sup>13</sup>

12. Jurisprudence from the Appeals Chamber has established that where the requesting party seeks access to *all* confidential material in a case, but can show a nexus only for part of it, the request will be rejected.<sup>14</sup> Musema makes no attempt to specify the link or identify the witnesses from other cases whose closed session testimony, sealed exhibits and other material may be relevant to his own case.

---

<sup>11</sup> *Eliézer Niyitegeka v The Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka’s Urgent request for Orders Relating to Prosecution Witnesses, 29 January 2016, para. 9; see also *Georges Rutaganda v The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges R.N. Rutaganda’s Appeal against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 16; See also *Prosecutor v Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the *Nshogoza* Case, 9 November 2015, para. 5.

<sup>12</sup> *The Prosecutor v. Alfred Musema*, Case No. MICT-12-15, 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, 3 November 2017, paras. 10, 12.

<sup>13</sup> See *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016, para. 9.

<sup>14</sup> *Prosecutor v. Protais Zigiranyirazo*, case no. ICTR-01-73-A, Decision on Michel Bagaragaza’s Motion for Access to Confidential Material, 14 May 2009, para. 8.

13. Moreover, Musema is able to access all unclassified and open session material from all ICTR cases in the public domain without an application to the Chamber or a request to the MICT Registry. A review of the publicly available records would enable him to identify material that may be of material assistance to his case. His motion does not demonstrate that he has made any attempts to avail himself of the publicly available records.

14. Notwithstanding the foregoing, should the Single Judge find that Musema has established that a legitimate forensic purpose exists between Musema's case and the cases from which material is sought, the Prosecutor opposes the disclosure of the confidential material without the consent of the witnesses concerned. The Appeals Chamber has repeatedly underscored the importance of the protected witness's consent to the disclosure of confidential material.<sup>15</sup> Even where it is determined that confidential material from another case may materially assist the applicant, it is within the Chamber's discretionary power to strike a balance between the rights of the requesting party to have access to material to prepare its case, and guaranteeing the protection and integrity of confidential information.<sup>16</sup> In this regard, Musema has failed to identify any exigent circumstances that would warrant disclosure of the requested material without the witnesses' consent, or indeed that a miscarriage of justice would occur otherwise.

15. Having failed to establish a legitimate forensic purpose for access to the material requested, Musema is only entitled to material which may suggest his innocence or mitigate his guilt, or which affects the credibility of the Prosecution evidence adduced during his trial.<sup>17</sup> In this regard, the Prosecution notes that potentially exculpatory material has previously been disclosed to Musema.<sup>18</sup> In addition, the Prosecution conducted another search of its database following Musema's email request of 9 December 2016 and did not find any additional material which it considers exculpatory pursuant to Rule 73 of the Rules. Therefore, the Prosecution has fully complied with its disclosure obligations to date.

---

<sup>15</sup> *The Prosecutor v 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; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemara et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

<sup>16</sup> *Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemara et al. Case, 10 July 2009, para. 14.

<sup>17</sup> MICT Rule 73.

<sup>18</sup> Potentially exculpatory material was disclosed to Musema in 2001 and a further review for exculpatory material was conducted in 2015 and 2016.

16. Therefore, the Prosecutor objects to the variation and disclosure with or without the consent of the witnesses as Musema has failed to establish that there is a legitimate forensic purpose for the disclosure.<sup>19</sup>

Dated at Arusha this 16<sup>th</sup> day of November 2017

  
Veronic Wright  
Senior Legal Officer

  
Sunkarie Ballah-Conteh  
Legal Advisor

Word Count  
1,680

---

<sup>19</sup> *Bagosora v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Augustin Ngirabatware's Motion for Disclosure of Confidential Material Relating to Witness DBN, 8 June 2010, para. 13; *Rukundo v. Prosecutor*, Case No. ICTR-2001-70-A, Decision on Georges A.N. Rutaganda's Motion for Access to Confidential Material of Witness CSH from the Rukundo Case, 18 February 2010, para. 13.



**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**

|   |   |  |   |
|---|---|--|---|
| <b>To/ À :</b>  | MICT Registry/ Greffe du MTPI   | <input checked="" type="checkbox"/> Arusha/ Arusha   | <input type="checkbox"/> The Hague/ La Haye   |
| <b>From/ De :</b>   | <input type="checkbox"/> Chambers/ Chambre  | <input type="checkbox"/> Defence/ Défense  | <input checked="" type="checkbox"/> Prosecution/ Bureau du Procureur<br>Veronic Wright  |
| <b>Case Name/ Affaire :</b>                                 | The Prosecutor v. Alfred Musema   |  | <b>Case Number/ Affaire n° :</b> MICT-12-15   |
| <b>Date Created/ Daté du :</b>                              | 16 November 2017  | <b>Date transmitted/ Transmis le :</b>   | 16 November 2017  |
|   |   | <b>No. of Pages/ Nombre de pages :</b>   | 6   |
| <b>Original Language / Langue de l'original :</b>           | <input checked="" type="checkbox"/> English/ Anglais  | <input type="checkbox"/> French/ Français  | <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/Autre (specify/préciser) : |
| <b>Title of Document/ Titre du document :</b>               | Prosecution's Response to Motion Seeking Variation of Protective Measures to Obtain Disclosures of the Pseudonyms of Nine Witnesses in Cases in which they have testified before the ICTR |  |   |
| <b>Classification Level/ Catégories de classification :</b> | <input checked="" type="checkbox"/> Unclassified/ Non classifié   | <input type="checkbox"/> Ex Parte Defence excluded/ Défense exclue                                   |   |
|   | <input type="checkbox"/> Confidential/ Confidentiel   | <input type="checkbox"/> Ex Parte Prosecution excluded/ Bureau du Procureur exclu                    |   |
|   | <input type="checkbox"/> Strictly Confidential/ Strictement confidentiel  | <input type="checkbox"/> Ex Parte R86(H) applicant excluded/ Art. 86 H) requérant exclu              |   |
|   |   | <input type="checkbox"/> Ex Parte Amicus Curiae excluded/ Amicus curiae exclu                        |   |
|   |   | <input type="checkbox"/> Ex Parte other exclusion/ autre(s) partie(s) exclue(s) (specify/préciser) : |   |
| <b>Document type/ Type de document :</b>                    | <input checked="" type="checkbox"/> Motion/ Requête   | <input type="checkbox"/> Submission from parties/ Écritures déposées par des parties                 | <input type="checkbox"/> Indictment/ Acte d'accusation  |
|   | <input type="checkbox"/> Decision/ Décision   | <input type="checkbox"/> Submission from non-parties/ Écritures déposées par des tiers               | <input type="checkbox"/> Warrant/ Mandat  |
|   | <input type="checkbox"/> Order/ Ordonnance  | <input type="checkbox"/> Book of Authorities/ Recueil de sources                                     | <input type="checkbox"/> Notice of Appeal/ Acte d'appel   |
|   | <input type="checkbox"/> Judgement/ Jugement/Arrêt  | <input type="checkbox"/> Affidavit/ Déclaration sous serment   |   |

**II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT**

|  |  |   |                                      |   |   |
|--|--|---|--------------------------------------|---|---|
| <input type="checkbox"/> Translation not required/ La traduction n'est pas requise   |  |   |                                      |   |   |
| <input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/<br>La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :<br>(Word version of the document is attached/ La version Word est jointe) |  |   |                                      |   |   |
| <input type="checkbox"/> English/ Anglais  | <input checked="" type="checkbox"/> French/ Français | <input type="checkbox"/> Kinyarwanda      | <input type="checkbox"/> B/C/S       | <input type="checkbox"/> Other/Autre (specify/préciser) : |   |
| <input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/<br>La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :  |  |   |                                      |   |   |
| <b>Original/ Original en</b>   | <input type="checkbox"/> English/ Anglais            | <input type="checkbox"/> French/ Français | <input type="checkbox"/> Kinyarwanda | <input type="checkbox"/> B/C/S                            | <input type="checkbox"/> Other/Autre (specify/préciser) : |
| <b>Translation/ Traduction en</b>  | <input type="checkbox"/> English/ Anglais            | <input type="checkbox"/> French/ Français | <input type="checkbox"/> Kinyarwanda | <input type="checkbox"/> B/C/S                            | <input type="checkbox"/> Other/Autre (specify/préciser) : |
| <input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/<br>La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :  |  |   |                                      |   |   |
| <input type="checkbox"/> English/ Anglais  | <input type="checkbox"/> French/ Français            | <input type="checkbox"/> Kinyarwanda      | <input type="checkbox"/> B/C/S       | <input type="checkbox"/> Other/Autre (specify/préciser) : |   |

Send completed transmission sheet to/ Veuillez soumettre cette fiche dûment remplie à :  
[JudicialFilingsArusha@un.org](mailto:JudicialFilingsArusha@un.org) OR/OU [JudicialFilingsHague@un.org](mailto:JudicialFilingsHague@un.org)

Rev: April 2014/Rév. : Avril 2014