



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

228H

*Q*

ICTR-01-73-A  
14<sup>th</sup> May 2009  
{228/H – 224/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 14 May 2009

ICTR Appeals Chamber

Date: *14th May 2009*  
Action: *R. Juma*  
Copied To: *Concerned Judges, Parties, Judicial Officers, LOs, LSS, [Signature]*

**PROTAIS ZIGIRANYIRAZO**

v.

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**THE PROSECUTOR**

NAME / NOM: *CONSTANT HOMETOWN*

SIGNATURE: *[Signature]* DATE: *18-05-2009*

Case No. ICTR-01-73-A

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**DECISION ON MICHEL BAGARAGAZA'S MOTION FOR ACCESS TO  
CONFIDENTIAL MATERIAL**

**The Office of the Prosecutor**

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Ms. Christine Graham  
Ms. Linda Bianchi  
Mr. Alfred Orono Orono

**Counsel for the Defence**

Mr. John Philpot  
Mr. Peter Zaduk

**Counsel for the Applicant**

Mr. G.G.J. Alexander Knoops  
Mr. Wayne Jordash

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: *KRIFA KUMELIO A. AFANDÉ*

SIGNATURE: *[Signature]* DATE: *14 May 2009*

1. 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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion,<sup>1</sup> filed by Michel Bagaragaza on 17 March 2009, in the case of Protais Zigiranyirazo. Mr. Zigiranyirazo responded on 20 March 2009,<sup>2</sup> and the Prosecution filed its response on 26 March 2009.<sup>3</sup> Mr. Bagaragaza did not file a reply.

## BACKGROUND

2. On 18 December 2008, Trial Chamber III convicted Mr. Zigiranyirazo of two counts of genocide and extermination as a crime against humanity and sentenced him to 20 years of imprisonment.<sup>4</sup> His case is pending on appeal.<sup>5</sup> Mr. Bagaragaza is an accused before the Tribunal whose case is currently at the pre-trial stage of proceedings. He appeared as a witness during the *Zigiranyirazo* trial.<sup>6</sup>

3. Mr. Bagaragaza requests access to all closed session transcripts and exhibits which were placed under seal in the *Zigiranyirazo* case.<sup>7</sup> He submits that there is a clear nexus between his case and the *Zigiranyirazo* case, and that the materials are necessary for the preparation of his defence.<sup>8</sup> He further undertakes to comply with all protective orders issued by the Trial Chamber in relation to the requested material.<sup>9</sup>

4. Mr. Bagaragaza contends that he is not in a position to specify in detail the relevant material because he does not have any knowledge of the contents of material that is under seal.<sup>10</sup> Nevertheless, according to him, a comparison of the indictments in the two cases and a review of the *Zigiranyirazo* Trial Judgement reveals a significant overlap. In particular, Mr. Bagaragaza notes

<sup>1</sup> Defence for Michel Bagaragaza Motion for Access to Confidential Material in the Case of The Prosecutor v. Protais Zigiranyirazo Pursuant to Rules 54 (J) and 75 (G) (i), 17 March 2009 ("Motion").

<sup>2</sup> Response of Protais Zigiranyirazo to the Bagaragaza Motion for Access to Confidential Material in the Case of Prosecutor vs Protais Zigiranyirazo, 23 March 2009 ("Zigiranyirazo Response").

<sup>3</sup> Prosecutor's Response to "Defence for Michel Bagaragaza Motion for Access to Confidential Material in the Case of Prosecutor v. Protais Zigiranyirazo pursuant to Rules 54 (j) and 75 (G) (i)", 26 March 2009 ("Prosecution Response").

<sup>4</sup> *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement, 18 December 2008, paras. 447, 468-471 ("Trial Judgement"). Specifically, the Trial Chamber sentenced Mr. Zigiranyirazo to two terms of 20 years of imprisonment for genocide and extermination as a crime against humanity in relation to events at Kesho Hill and to a term of 15 years of imprisonment for genocide with respect to Kiyovu roadblock. The sentences are to run concurrently.

<sup>5</sup> Prosecutor's Notice of Appeal, 15 January 2009 (English version), 28 January 2009 (French version). Mr. Zigiranyirazo filed his Notice of Appeal on 19 January 2009. See Notice of Appeal (Rule 108 R.P.E.), 19 January 2009. The Appeals Chamber granted him leave to file an amended version on 18 March 2009. See Decision on Protais Zigiranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009, para. 6.

<sup>6</sup> Trial Judgement (Annex I), para. 26.

<sup>7</sup> Motion, paras. 1, 13.

<sup>8</sup> Motion, paras. 2, 7-12.

<sup>9</sup> Motion, para. 6.

that, like Mr. Zigiranyirazo, he is charged with playing a role in the formation of the *Interahamwe* in Gisenyi prefecture and participating in a number of meetings there at which the genocide was allegedly planned.<sup>11</sup> He further notes that he is also alleged to have conspired to commit genocide with Mr. Zigiranyirazo and others, including Arcade Sebatware and Bernard Munyagishari, who were named as co-conspirators in Mr. Zigiranyirazo's indictment.<sup>12</sup> In particular, Mr. Bagaragaza emphasizes that he is charged with providing fuel to the convoy of assailants which participated in the attack on Kesho Hill on 8 April 1994.<sup>13</sup> Trial Chamber III found that Mr. Zigiranyirazo was part of that convoy and held him responsible for participating in the attack on Kesho Hill as part of a joint criminal enterprise, which also included one of Mr. Bagaragaza's alleged subordinates.<sup>14</sup>

5. Mr. Zigiranyirazo opposes the Motion and argues that Mr. Bagaragaza has failed to substantiate his need for access to all confidential material in his case, in particular the material on issues or events unrelated to Mr. Bagaragaza's case, such as the alibi.<sup>15</sup> Mr. Zigiranyirazo acknowledges that some of the witnesses related to Kesho Hill may have a link to the *Bagaragaza* case, but argues that Mr. Bagaragaza has not demonstrated such a link with respect to any particular piece of evidence or witness.<sup>16</sup> Mr. Zigiranyirazo further notes that most evidence in his case was given in open session with very short closed sessions related to identifying information.<sup>17</sup>

6. The Prosecution also opposes the Motion because it fails to identify and justify why specific witnesses are relevant to Mr. Bagaragaza's case.<sup>18</sup> In this respect, it notes that Mr. Bagaragaza has access to open session transcripts to facilitate this task.<sup>19</sup> The Prosecution acknowledges some similarities between the two cases, but submits that the overlap alone is not sufficient to justify Mr. Bagaragaza's access to all material in the *Zigiranyirazo* case.<sup>20</sup>

## DISCUSSION

7. Where protective measures have been ordered in any proceedings before the Tribunal, they continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied, or augmented.<sup>21</sup> The Appeals Chamber recalls that a party is entitled to seek material from any source, including another case before the Tribunal, to assist in the

<sup>10</sup> Motion, para. 7, fn. 10.

<sup>11</sup> Motion, paras. 8, 10.

<sup>12</sup> Motion, para. 10.

<sup>13</sup> Motion, para. 9.

<sup>14</sup> Motion, paras. 9, 11.

<sup>15</sup> Zigiranyirazo Response, paras. 3-6, 18, 20.

<sup>16</sup> Zigiranyirazo Response, paras. 5, 19.

<sup>17</sup> Zigiranyirazo Response, para. 7.

<sup>18</sup> Prosecution Response, paras. 4, 7.

<sup>19</sup> Prosecution Response, para. 4.

<sup>20</sup> Prosecution Response, paras. 5, 6.

<sup>21</sup> Rule 75(F)(i) of the Tribunal's Rules of Procedure and Evidence.

preparation of its case.<sup>22</sup> 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 accessing it must be demonstrated.<sup>23</sup> Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.<sup>24</sup> A Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially, or that there is at least a good chance that it would.<sup>25</sup> Once it is determined that confidential material filed in another case may materially assist an applicant, the Chamber shall determine which protective measures shall apply to the material, as it is within the Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information.<sup>26</sup>

8. Mr. Bagaragaza has identified the confidential material that he seeks, namely the closed session transcripts of all witnesses as well as all exhibits placed under seal in the *Zigiranyirazo* case.<sup>27</sup> He has made detailed submissions comparing the indictment in his case to the indictment and Trial Judgement in the *Zigiranyirazo* case. Based on these submissions, the Appeals Chamber is satisfied that Mr. Bagaragaza has shown a nexus between certain aspects of his case and parts of the *Zigiranyirazo* case. In particular, there is a clear overlap with respect to the massacre at Kesho Hill as well as a number of more general allegations related to conspiracy to commit genocide, planning, and the creation of the *Interahamwe* in Gisenyi prefecture.

9. Nevertheless, there is a large portion of Mr. Zigiranyirazo's case which does not appear to have any relevance to Mr. Bagaragaza's case, including events at roadblocks in Kigali and Gisenyi

<sup>22</sup> *George Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-R-3, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 7 ("*Rutaganda Appeal Decision*"); *Éliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Éliezer Niyitegeka's Appeal Concerning Access to Confidential Materials in the *Muhimana* and *Karemura et al.* Cases, 23 October 2009, para. 21 ("*Niyitegeka Appeal Decision*"); *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du procureur et nécessaires à la défense de l'appellant et aux fins d'assistance du greffe pour accomplir des investigations complémentaires en phase d'appel*, 8 December 2006, para. 12 ("*Nahimana et al. Appeal Decision*").

<sup>23</sup> *Rutaganda Appeal Decision*, para. 10; *Niyitegeka Appeal Decision*, para. 21; *Nahimana et al. Appeal Decision*, para. 12.

<sup>24</sup> *Rutaganda Appeal Decision*, para. 10; *Niyitegeka Appeal Decision*, para. 21; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 15.

<sup>25</sup> *Rutaganda Appeal Decision*, para. 10; *Niyitegeka Appeal Decision*, para. 21; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Blagojević and Jokić* Case, 18 January 2006, para. 4 ("*Blagojević and Jokić Appeal Decision*").

<sup>26</sup> *Rutaganda Appeal Decision*, para. 11; *Niyitegeka Appeal Decision*, para. 21; *Prosecutor v. Mladen Naletilić et al.*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 7; *Blagojević and Jokić Appeal Decision*, para. 7.

<sup>27</sup> See, e.g., *Prosecutor v. Radoslav Brdanin*, Case No. IT 99-36-A, Decision on Motion by Jovica Stanišić for Access to All Confidential Materials in the *Brdanin* Case, 24 January 2007, para. 11 ("The first element of gaining access to

prefecture. Accordingly, Mr. Bagaragaza has not demonstrated a legitimate forensic purpose for access to *all* closed session transcripts and confidential exhibits in the *Zigiranyirazo* case. With respect to the areas, noted above, where a nexus exists, the Appeals Chamber considers that, in making any future requests, Mr. Bagaragaza should identify with greater particularity the witnesses and exhibits related to these points of overlap in order to facilitate his access to the specific material relevant to his case. He is in a position to do so on the basis of public materials, such as the Trial Judgement, public session transcripts, and the case minutes, which give a brief description of each exhibit.

### DISPOSITION

10. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion.

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

Done this 14th day of May 2009,  
At The Hague,  
The Netherlands.



*Theodor Meron*  
Judge Theodor Meron  
Presiding

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confidential material is not considered particularly onerous and numerous Appeals Chamber decisions have accepted requests for access to 'all confidential material' as sufficiently specific.").