



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-2001-70-A
18 February 2010
{259/H – 252/H}

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Decision of: 18 February 2010

THE PROSECUTOR

v.

EMMANUEL RUKUNDO

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**

ICTR Appeals Chamber

The Applicant

Mr. Georges A. N. Rutaganda, *pro se*

Counsel for Mr. Emmanuel Rukundo

Ms. Aisha Condé
Mr. Benoît Henry

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Linda Bianchi
Mr. Ousman Jammeh
Ms. Madeleine Schwarz

Date: 18th February 2010

Action: R. Jammeh

Copied To: Concerned Judge,

Parties, Judicial Archives,

LOs, LSS

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: KICEL... KUMELID... A... AFANDE	
SIGNATURE:	DATE: 18 Feb. 2010

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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seised of "Rutaganda's Extremely Urgent Motion for Access to Confidential Material of Witness 'CSH' in *Rukundo* Case (ICTR-2001-70-T)" filed by Georges Anderson Nderubumwe Rutaganda ("Rutaganda") on 29 December 2009 ("Motion").

A. Procedural Background

2. On 13 March 2009, Trial Chamber II of the Tribunal ("Trial Chamber") rendered its Judgement in the *Rukundo* case and found Emmanuel Rukundo ("Rukundo") guilty of genocide and murder and extermination as crimes against humanity and sentenced him to 25 years' imprisonment.¹ Rukundo's and the Prosecution's appeals against the *Rukundo* Trial Judgement are pending.²

3. On 6 December 1999, Rutaganda was convicted by Trial Chamber I of the Tribunal of genocide and murder and extermination as crimes against humanity, and sentenced to life imprisonment.³ On 26 May 2003, the Appeals Chamber confirmed Rutaganda's convictions for genocide and extermination as a crime against humanity, overturned his conviction for murder as a crime against humanity, entered a conviction for murder as a violation of Article 3 common to the Geneva Conventions, and upheld the sentence of life imprisonment.⁴

4. On 29 December 2009, Rutaganda filed the Motion before the Trial Chamber, seeking an order for disclosure of confidential materials of Witness CSH in the *Rukundo* case.⁵ On 6 January 2010, the Prosecution filed its response before the Trial Chamber, seeking the dismissal of the Motion⁶ and arguing that the Motion should have been filed before the Appeals Chamber.⁷

¹ *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Judgement, delivered orally on 27 February 2009, filed on 13 March 2009 ("*Rukundo* Trial Judgement"), paras. 591, 608.

² See Prosecutor's Notice of Appeal, 14 April 2009; Prosecutor's Appellant's Brief, 14 May 2009; *Acte d'appel d'Emmanuel Rukundo du Jugement rendu le 27 février 2009*, 6 November 2009; *Mémoire d'appel de la Défense*, 19 January 2010.

³ *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement"), Disposition.

⁴ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), Disposition.

⁵ Motion, para. 15.

⁶ Prosecutor's Response to Rutaganda's Extremely [*sic*] Urgent Motion for Access to Confidential Material of Witness "CSH" in *Rukundo* Case (ICTR 2001-70-T), 6 January 2010 ("Response"), paras. 2, 9-23.

⁷ Response, paras. 2-8.

On 11 January 2010, Rutaganda filed his reply with the Appeals Chamber indicating *inter alia* that he had no objection to his Motion being transferred to the Appeals Chamber.⁸

5. On 21 January 2010, the Appeals Chamber clarified that pursuant to Rule 75(G)(i) of the Tribunal's Rules of Procedure and Evidence ("Rules") and as the Chamber currently seized of the *Rukundo* proceedings, it had jurisdiction over any request to rescind, vary, or augment the protective measures ordered in this case.⁹ Accordingly, it issued an order directing the Registry to re-file the Motion, Response, and Reply before the Appeals Chamber in the *Rukundo* case.¹⁰ These submissions were accordingly re-filed in the present case on 22 January 2010.

B. Submissions

6. Rutaganda requests access to confidential material related to Witness CSH's testimony in the *Rukundo* case.¹¹ He submits that Witness CSH testified about the 1994 events in Gitarama prefecture and particularly about the events at Kabgayi in the Major Seminary and that Witness CSH wrote a book about these events (admitted as Exhibit D6 in the *Rukundo* case) which discusses the death of Viater Kalinda.¹² He argues that he has reason to believe that this information is likely to materially assist his case, or that there is at least a good chance that it would, because Witness CSH's book identifies where Viater Kalinda was killed, how, and by whom.¹³ He submits that, because he was convicted of killing Viater Kalinda by launching mass killings in Cyahafi sector on 15 April 1994,¹⁴ there is a clear nexus between the two cases and that therefore he has a legitimate forensic purpose for accessing it.¹⁵ He undertakes to respect all protective measures imposed on Witness CSH by the Tribunal in the *Rukundo* case if the Motion is granted.¹⁶

7. The Prosecution responds that the Motion should be dismissed.¹⁷ It submits that Rutaganda has failed to demonstrate that the material requested is likely to assist his case materially and that

⁸ Rejoinder to the "Prosecutor's Response to Rutaganda's Extremely Urgent Motion for Access to Confidential Material of Witness 'CSH' in *Rukundo* Case (ICTR-2001-70-T)", 11 January 2010 ("Reply"), para. 6.

⁹ Order on Filing of Georges Rutaganda's Motion for Access to Confidential Material of Witness "CSH" Before the Appeals Chamber, 21 January 2010 ("21 January 2010 Order").

¹⁰ 21 January 2010 Order, p. 2.

¹¹ Motion, paras. 4, 15.

¹² Motion, para. 11. The *Rukundo* Trial Judgement spells the victim's name "Viateur Kalinda" whereas "Viater Kalinda" is used in the *Rutaganda* Trial Judgement. The Motion uses "Viateur Kalinda" when referring to the victims in both the *Rukundo* and the *Rutaganda* cases whereas the Response and Reply use "Viater Kalinda" when referring to the victims in both the *Rukundo* and the *Rutaganda* cases. Following the submissions which do not differentiate the spellings between the two cases, the Appeals Chamber adopts the spelling "Viater Kalinda" to refer to the victims in both cases without finding that one spelling is correct or that they are necessarily the same victim. Rutaganda also refers to the "*Grand Séminaire*" of Kabgayi; however, for the sake of consistency it is referred to throughout the present decision as the Kabgayi Major Seminary.

¹³ Motion, para. 12.

¹⁴ Motion, para. 10.

¹⁵ Motion, para. 13.

¹⁶ Motion, para. 14.

his access to it is warranted.¹⁸ It submits that Rutaganda was not convicted of the actual killing of Viater Kalinda, but rather on the basis of the distribution of weapons in Cyahafi sector which resulted in the killings of various individuals.¹⁹ It asserts that Witness CSH did not testify about events in Cyahafi sector or mention Rutaganda.²⁰ It further submits that the *Rukundo* Trial Judgement summarises Witness CSH's testimony in relation to Viater Kalinda's killing and that no further information was provided in closed session testimony or in Exhibit D6.²¹ It argues that no legitimate forensic purpose or close nexus between Rutaganda's case and the material sought has been demonstrated because there is no geographical or temporal overlap between these cases.²² It states that the only potential factual overlap that may exist is in relation to the killing of Viater Kalinda.²³ However, it submits that this does not constitute a significant factual overlap particularly given that evidence in the *Rutaganda* case indicated that Viater Kalinda was killed in Cyahafi in mid-April 1994, while Witness CSH testified that Viater Kalinda was abducted from Kabgayi Major Seminary and killed in May 1994.²⁴

8. Rutaganda replies that contrary to the Prosecution's submission, he was convicted of killing Viater Kalinda who was one of three people shot immediately after the distribution of weapons by men who had arrived with Rutaganda.²⁵ With respect to the Prosecution's submission that there is no factual nexus because there is no geographical or temporal overlap, Rutaganda submits that this is simply an example of the type of nexus which may exist.²⁶ In the present instance, he argues, the death of Viater Kalinda establishes a significant factual nexus.²⁷ Furthermore, he contends that the Prosecution's assertion that there are two possible victims named Viater Kalinda is simply speculation.²⁸ He submits that Witness CSH's evidence demonstrates that, contrary to Witness J's evidence upon which his conviction relies, Viater Kalinda was not killed in Cyahafi sector on 15 April 1994 but rather at Bukomero, near Byimana, Gitarama prefecture on 24 May 1994.²⁹ He argues that this establishes that Witness CSH's evidence is likely to materially assist his case.³⁰

¹⁷ Response, paras. 2, 23.

¹⁸ Response, paras. 2, 10, 22.

¹⁹ Response, para. 13.

²⁰ Response, para. 14.

²¹ Response, paras. 15, 16, 20.

²² Response, para. 18.

²³ Response, para. 19.

²⁴ Response, paras. 19, 21. The Prosecution refers to the "Kabgayi Minor Seminary", however, Witness CSH testified about the events at the Kabgayi Major Seminary (*The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, T. 28 November 2006 pp. 29, 30; T. 29 November 2006 p. 2).

²⁵ Reply, paras. 8, 9.

²⁶ Reply, para. 12.

²⁷ Reply, paras. 12, 14, 16.

²⁸ Reply, paras. 13, 14.

²⁹ Reply, paras. 10, 11, 15.

³⁰ Reply, para. 15.

C. Preliminary Matter

9. The Prosecution indicated that it was filing its Response within 10 days of the filing of the Motion in accordance with paragraph 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ("Practice Direction") because the *Rukundo* case is before the Appeals Chamber.³¹ Rutaganda submits in his Reply that the Prosecution's Response was filed after the time limit because paragraph 13 of the Practice Direction applies to filings in appeals from judgement, not to motions filed directly before the Appeals Chamber, such as the present motion.³²

10. The Appeals Chamber notes that the Motion was filed in the *Rukundo* case which is currently on appeal from judgement. Therefore, Section V: "Motions During Appeals from Judgement" of the Practice Direction applies.³³ Accordingly, the Prosecution's Response was filed within the required time limit.³⁴

D. Discussion

11. Pursuant to Rule 75(F)(i) of the Rules, 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. 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 preparation of its case.³⁵ 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.³⁶

³¹ Response, fn. 3.

³² Reply, para. 7.

³³ See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 8 October 2009, para. 1 (in which the response was filed 8 days after the motion); *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 25 September 2009, para. 1 (in which the response was filed 10 days after the motion); *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. 1 (in which the response was filed 10 days after the motion).

³⁴ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, para. 13.

³⁵ See, e.g., *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemera et al.* Case, 10 July 2009 ("Rutaganda Decision of 10 July 2009"), para. 10; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009 ("Zigiranyirazo Decision"), para. 7; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009 ("Rutaganda Decision of 22 April 2009"), para. 7, citing *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential Materials in the *Muhimana and Karemera et al.* Cases, 23 October 2008 ("Niyitegeka Decision"), para. 21.

³⁶ See, e.g., *Rutaganda Decision of 10 July 2009*, para. 13; *Zigiranyirazo Decision*, para. 7; *Rutaganda Decision of 22 April 2009*, para. 10.

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.³⁷ Such a factual nexus may be established, for example, "if the cases stem from events alleged to have occurred in the same geographic area at the same time",³⁸ although this may not always be necessary or sufficient.³⁹ A case-specific analysis is required in each instance.⁴⁰

12. Further, 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.⁴¹ 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 necessary for the preparation of its case and guaranteeing the protection and integrity of confidential information.⁴²

13. The Appeals Chamber is satisfied that Rutaganda has identified the material sought with sufficient particularity in the Motion.⁴³ The Appeals Chamber observes that it is only possible for Rutaganda to make a *prima facie* demonstration of the existence of a legitimate forensic purpose for accessing Witness CSH's confidential material, since he does not have access to the materials and therefore, Rutaganda presumably lacks knowledge of its content.⁴⁴ The Appeals Chamber notes that Rutaganda submits that there is a nexus between his case and the *Rukundo* case, as both cases concern the death of Viater Kalinda.⁴⁵ The Appeals Chamber will examine the Motion in this context.

14. The Appeals Chamber notes that, contrary to the Prosecution's submission, the killing of Viater Kalinda did form part of the basis for Rutaganda's conviction for genocide and extermination as a crime against humanity. The Trial Chamber found, on the basis of Witness J's

³⁷ See, e.g., *Rutaganda* Decision of 10 July 2009, para. 13; *Zigiranyirazo* Decision, para. 7; *Rutaganda* Decision of 22 April 2009, para. 10.

³⁸ See, e.g., *Rutaganda* Decision of 10 July 2009, para. 13, citing *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 ("*Blagojević and Jokić* Decision"), para. 4 (internal quotations and citations omitted); *Rutaganda* Decision of 22 April 2009, para. 10.

³⁹ See, e.g., *Rutaganda* Decision of 10 July 2009, para. 13, citing *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Confidential Materials in the *Limaj* Case, 31 October 2006 ("*Limaj et al.* Decision"), para. 7; *Rutaganda* Decision of 22 April 2009, para. 10.

⁴⁰ See, e.g., *Rutaganda* Decision of 10 July 2009, para. 13; *Rutaganda* Decision of 22 April 2009, para. 10; *Limaj et al.* Decision, para. 7.

⁴¹ See, e.g., *Zigiranyirazo* Decision, para. 7; *Rutaganda* Decision of 22 April 2009, para. 10, citing *Niyitegeku* Decision, para. 21; *Blagojević and Jokić* Decision, para. 4.

⁴² See, e.g., *Rutaganda* Decision of 10 July 2009, para. 14, citing *Niyitegeku* Decision, para. 21; *Zigiranyirazo* Decision, para. 7; *Rutaganda* Decision of 22 April 2009, para. 11.

⁴³ Motion, paras. 11, 15.

⁴⁴ *Rutaganda* Decision of 10 July 2009, para. 15; *Rutaganda* Decision of 22 April 2009, para. 12.

⁴⁵ Motion, para. 13.

evidence, that on 15 April 1994 Rutaganda arrived at a public standpipe in Cyahafi sector, Nyarugenge commune, and that the men with whom he arrived distributed guns to *Interahamwe* while Rutaganda stood by.⁴⁶ Immediately following the distribution of the guns, Muzehe, one of the *Interahamwe* to whom the guns were distributed, shot Rusagara, who died on the spot, and the shooting continued. Viater Kalinda and Musoni Emmanuel were also shot by Muzehe and Bizimungu and fell immediately.⁴⁷ Based on these factual findings, the Trial Chamber concluded that Rutaganda aided and abetted the killings by distributing weapons to the *Interahamwe* on 15 April 1994 and convicted him of genocide and extermination as a crime against humanity.⁴⁸ Therefore, Viater Kalinda was one of the victims whose killing Rutaganda aided and abetted by his distribution of weapons and thus his killing formed part of the basis for Rutaganda's conviction.

15. The accounts of Viater Kalinda's death provided by Witness J in the *Rutaganda* case and Witness CSH in the *Rukundo* case differ with respect to the time, location, and method of his killing. As set out above, Witness J testified that Viater Kalinda was killed on 15 April 1994 by gunshot at Cyahafi sector.⁴⁹ Meanwhile, Witness CSH testified that Viater Kalinda was abducted from Kabgayi Major Seminary on 24 April 1994 and killed with a machete.⁵⁰ It is because of this discrepancy in the two accounts and thus the possibility of casting doubt on Witness J's testimony about the circumstances of Viater Kalinda's death that Rutaganda seeks access to the confidential evidence of Witness CSH in the *Rukundo* case.⁵¹

16. The Appeals Chamber considers that the information presented is not determinative of whether the two victims named Viater Kalinda are the same person and thus whether Witness CSH's account of his death is relevant to Rutaganda's conviction. In this respect, it notes the different spellings of the first name,⁵² the description of Viater Kalinda in *Rutaganda* as a young person⁵³ and in *Rukundo* as a Radio Rwanda journalist.⁵⁴ Nonetheless, in light of the possibility that they are the same person, it considers that the killing of Viater Kalinda forms a factual nexus between the two cases.

17. In light of the foregoing, the Appeals Chamber finds that there is a sufficiently substantial factual overlap between the *Rutaganda* and *Rukundo* cases such that there is a good chance that the confidential material regarding Witness CSH's testimony in the *Rukundo* case as identified by

⁴⁶ *Rutaganda* Trial Judgement, paras. 177, 197.

⁴⁷ *Rutaganda* Trial Judgement, paras. 177, 197.

⁴⁸ *Rutaganda* Trial Judgement, paras. 385, 386, 402, 405, 416, 418.

⁴⁹ *Rutaganda* Trial Judgement, paras. 177, 197.

⁵⁰ *Rukundo* Trial Judgement, para. 497.

⁵¹ Reply, para. 15.

⁵² See *supra*, fn. 12.

⁵³ *Rutaganda* Trial Judgement, para. 177.

⁵⁴ *Rukundo* Trial Judgement, para. 457.

Rutaganda is likely to be of material assistance to Rutaganda in his own case if the two individuals referred to are in fact the same person. Accordingly, the Appeals Chamber holds that Rutaganda has demonstrated a legitimate forensic purpose for access to said confidential material.

E. Disposition

18. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion and **VARIES** the applicable protective measures for purposes of the disclosure specified below;

DIRECTS the Registry to transmit to Rutaganda the closed session transcripts of Prosecution Witness CSH's testimony before the *Rukundo* Trial Chamber and Exhibit D6 which is under seal in the *Rukundo* trial record together with the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed in the *Rukundo* case on 24 October 2002 which governs the protective measures applicable to Witness CSH ("Protective Measures Decision"); and


ORDERS that Rutaganda and any other party in receipt of the protected information are bound *mutatis mutandis* by the terms of the Protective Measures Decision.

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

Done this eighteenth day of February 2010,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Fausto Pocar
Presiding Judge