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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before: Judge Vagn Joensen
Sitting Pursuant to Rule 75 (A)

Registrar: Adama Dieng

Date: 28 May 2012

THE PROSECUTOR v.

Elizaphan and Gérard NTAKIRUTIMANA, Cases No. ICTR-96-10 and ICTR-96-17
Alfred MUSEMA, Case No. ICTR-96-13
Clément KAYISHEMA et al., Case No. ICTR-95-1
Yussuf MUNYAKAZI, Case No. ICTR-97-36A
Ignace BAGILISHEMA, Case No. ICTR-95-1A
Mikaeli MUHIMANA, Case No. ICTR-95-1B
Siméon NCHAMIHIGO, Case No. ICTR-01-63
Aloys NDIMBATI, Case No. ICTR-95-1
Emmanuel NDINDABAHIZI, Case. No. ICTR-01-71
Charles SIKUBWABO, Case No. ICTR-95-1D
Eliézer NIYITEGEKA, Case No. ICTR-96-14

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DECISION IN RELATION TO JACQUES MUNGWARERE'S MOTIONS FOR ACCESS TO MATERIALS and NOTICE UNDER RULE 67 (D)

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
William M. Mubiru
Lansana Dumbuya

Counsel for Jacques Mungwarere, accused before the jurisdictions of Canada:

Philippe Larochelle
Christian Deslauriers
Marc Nerenberg

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: CONSTANT K. HOMERONU
SIGNATURE: [Signature] DATE: 28-05-2012

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INTRODUCTION

1. Jacques Mungwarere, who is being prosecuted in Canada for crimes against humanity and genocide for events allegedly committed in Rwanda during the 1994 Genocide, filed three motions before this Tribunal for access to material in various cases and for notice pursuant to Rule 67 (D) of the Rules of Procedure and Evidence.¹
2. The Prosecution opposes the Motions.² Emmanuel Ndindabahizi, whose case is encompassed by the second motion, does not oppose the request.³
3. On 14 March 2012, I was designated to rule on the three Motions.⁴

DELIBERATIONS

Preliminary matters

The subject of this decision.

4. This decision only concerns:
 - (i) cases that are no longer pending before a chamber. *Mungwarere* has been advised by the President to direct requests concerning cases pending before the Appeals Chamber to the appropriate chambers.

¹ Mungwarere's Motion for Access to Material, filed on 17 August 2011 ("First Motion"); Mungwarere's Reply to Prosecutor's [*sic*] Response to Mungwarere's Motion for Access to Material, filed on 29 August 2011; Jacques Mungwarere's Urgent Motion for Access to Material, dated 29 February 2012 and filed on 1 March 2012 ("Second Motion"); Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice under Rule 67(D), filed on 5 March 2012 ("Third Motion").

² Prosecutor's (*sic*) Response to "Mungwarere's Motion for Access to Material" ("Response to First Motion"), filed on 25 August 2011 ; Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material, filed on 8 March 2012 ; Prosecutor's Response to Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice under Rule 67 (D), filed on 14 March 2012.

³ Réponse de M. Ndindabahizi Emmanuel sur la Jacques Mungwarere's Motion for Access to Material, 20 March 2012.

⁴ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17, *Alfred Musema*, Case No. ICTR-96-13, *Clément Kayishema et al.*, Case No. ICTR-95-1, *Yussuf Munyakazi*, Case No. ICTR-97-36A, *Ignace Bagilishema*, Case No. ICTR-95-1A, *Édouard Karemera et al.*, Case No. ICTR-98-44, *Mika Muhimana*, Case No. ICTR-95-1B, *Siméon Nchamihigo*, Case No. ICTR-01-63, *Aloys Ndimbati*, Case No. ICTR-95-1, *Emmanuel Ndindabahizi*, Case. No. ICTR-01-71, *Charles Sikubwabo*, Case No. ICTR-95-1D, *Pauline Nyiramasuhuko et al.* ("*Butare*"), Case No. ICTR-98-42, *Eliézer Niyitigeka*, Case No. ICTR-96-14, *Casimir Bizimungu et al.*, Case No. ICTR-99-50, *Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56, Designation of a Judge to Consider Jacques Mungwarere's Motions for Access to Material and Notice Under Rule 67 (D), 14 March 2012 ("Order of 14 March 2012"). This Order replaces the Designation of a Trial Chamber to Consider Mungwarere's Motion for Access to Material of 15 September 2011 for the First Motion.

(ii) material that is protected pursuant to a court order for witness protection. *Mungwarere* has been advised by the President to access non-protected material on the Tribunal's webpage or request it from the Court Management Section. Furthermore, I note that requests for statements made to the Prosecution by witnesses, who are not protected pursuant to a court order must be directed to the Prosecution. If the Prosecution denies access *Mungwarere* may apply for a court order pursuant to Rule 54.

Mungwarere's legal standing to request the cooperation of the Tribunal

5. Rule 75 envisages that protected material from one set of proceedings before the Tribunal, under certain conditions, may be made available for use in other proceedings before the Tribunal. It is, however, well established that protected material from the Tribunal's proceedings under certain conditions may be made available for use in legal proceedings in a State.

6. The Prosecution objects that *Mungwarere's* requests, nevertheless, should be dismissed because the law and jurisprudence of this Tribunal does not envisage cooperation between the Tribunal and an accused person before another jurisdiction in an individual capacity.⁵

7. The Appeals Chamber has found that "[w]hile any judge or bench, as a judicial authority, may directly apply for variation of protective measures ordered pursuant to Rule 75 of the Rules, [it] considers that a party to proceedings before another jurisdiction should be authorized by an appropriate judicial authority to apply for such variation."⁶

8. As the competent Canadian judicial authority, subsequent to the Prosecutor's objection, has consented to the requests made by *Mungwarere*,⁷ I will consider *Mungwarere's* requests as made with the consent of a competent foreign authority. Consequently, the Prosecution's objection is moot.

The requirements for access to confidential material

Does the requested access require a variation of the protection orders?

9. The crux of any witness protection order is that the identity of the witness shall not be revealed to anyone but the court and the parties in the proceedings for which the protective measures

⁵ Prosecutor's (*sic*) Response to "Mungwarere's Motion for Access to Material" ("Response to First Motion"), filed on 25 August 2011, paras. 2, 4-6; Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material, filed on 8 March 2012 ("Response to Second Motion").

⁶ *The Prosecutor v. Pauline Nyiramasuhuko et al.* ("Butare"), Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 14.

⁷ Correspondence from Judge Michel Z. Charbonneau, Judge of the Superior Court of Justice, Court of Ontario, Canada to Mr. Adama Dieng, re: Motions filed by Jacques Mungwarere, dated 4 April 2012.

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were ordered. Sub-Rule 75 (F) (i) provides that protective measures ordered in Tribunal proceedings shall continue to have affect *mutatis mutandis* in other proceedings before the Tribunal.

10. Mungwarere submits that the sub-Rule should be interpreted to mean that protected material from Tribunal proceedings can be made available for subsequent legal proceedings without requiring a variation or rescission of the relevant witness protection orders since the protective measures from the first proceedings are extended to the subsequent proceedings.

11. I note that the purpose of the sub-Rule, however, is to provide that the witness will enjoy the same protection of his identity when testifying in the subsequent proceedings before the Tribunal as was ordered in the previous proceedings. Conversely, it is clear that the sub-Rule, when read in context with sub-Rules (E) and (F) (ii), does not purport to the protected material from the first proceedings. Consequently, where sub-Rules (E) and (F) (ii) are not applicable, access to protected material for parties in subsequent proceedings, be it before the Tribunal or in a State, requires a variation or rescission of the protective measures.⁸

Consultation of the protected witness.

12. It appears from *Mungwarere's* applications that the protected witnesses have not been consulted about request for access to the protected material. He submits that it is impracticable and not necessary because in the *Simba* case the request for access to protected material was granted without the consent of the concerned witnesses.⁹

13. I note that it is the practice of the Tribunal to consult the protected witnesses before varying or rescinding their protective orders and that protection orders are not varied or rescinded without the consent of the witness unless the witness's refusal to consent is considered unreasonable or substantial interests of justice requires it. The decision in *Simba* is in accordance with this practice.¹⁰ Thus, the protected witnesses in that case were indeed consulted, but their objections, in the special circumstances of the case, were overruled as unreasonable. Therefore, to the extent that the

⁸ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A (“*Bagosora et al.*”), Order in Relation to Prosecutor’s Motion to Vary Protective Measures for Witnesses DCB, XXC and AAA (ex parte), 23 July 2010, para. 3; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A (“*Ntawukulilyayo*”), Decision on Prosecutor’s Motion to Rescind Protective Measures for Witnesses, 17 May 2011 (ex parte), para. 3; *Jean-Baptiste Gatete v. the Prosecutor*, Case No. ICTR-00-61-A, Decision on Prosecution’s Motion for Variation of Protective Measures Relating to German Proceedings, 15 July 2011, para. 6; *Butare*, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 17 May 2012, paras. 13-14.

⁹ Second Motion, para. 18.

¹⁰ *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76, Decision on Charles Munyaneza’s Motion for Disclosure of Documents Related to Protect Witnesses Before the Tribunal, 9 April 2008, para. 8.

own case is not sufficient to establish that the entirety of the *Ntakirutimana et al.* case file will materially assist his case or that there is a good chance that it would. Accordingly, I consider that Mungwarere has not established a legitimate forensic purpose to access this confidential exhibit.

Second Motion

22. In his Second Motion, Mungwarere requests access to material from the *Kayishema et al.*, *Bagilishema*, *Muhimana*, *Ndimbati*, *Sikubwabo*, *Niyitegeka*, *Musema* and *Ndimbahizi* cases.²³

23. I find that there is a factual nexus between the Mungwarere case in Canada and the *Kayishema et al.*,²⁴ *Bagilishema*,²⁵ *Musema*,²⁶ *Muhimana*,²⁷ *Niyitegeka*,²⁸ *Ndimbati*,²⁹ and *Sikubwabo* cases³⁰, but not in relation to the *Nchamihigo* case which relates only broadly to events in the Bisesero area and does not refer specifically to allegations against Mungwarere.³¹ I am therefore not convinced that the tenuous nexus between the two cases is sufficiently substantial to conclude that the requested material is likely to assist Mungwarere's case materially or that there is a good chance that it would. As for the *Ndimbahizi* case,³² it appears that only materials relating to Witness CGV might have a factual nexus with Mungwarere's case as it appears from the *Ndimbahizi* Indictment and Judgement.³³

24. Mungwarere requests access to "relevant material" "in particular": (i) all witness statements supporting the charges against the accused regarding the events for which Mungwarere is also

²³ Second Motion, para. 44.

²⁴ See *The Prosecutor v. Clément Kayishema and Obed Ruzindada*, Case No. ICTR-95-1 ("Kayishema et al."), Judgement, 21 May 1999. The *Kayishema et al.* case relates *inter alia* to massacres committed in the area of Bisesero throughout April, May and June 1994 in areas including the Bisesero Hills, Muyira Hill, Gitwa.

²⁵ See *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A, Judgement, 7 June 2001. Part of the *Bagilishema* case relates to events in the Bisesero area and Gitwa from April to June 1994.

²⁶ See *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Judgement and Sentence, 27 January 2000. The *Musema* case related *inter alia* to massacres committed in the Bisesero region from April to June 1994 including Gitwa Hill, Muyira Hill.

²⁷ See *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B, Judgement and Sentence, 28 April 2005. The *Muhimana* case relates to events that include the attack against Tutsi refugees at the Mugonero Complex on 16 April 1994 and attacks at Muyira Hills in May 1994.

²⁸ See *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14, Judgement and Sentence, 16 May 2003, paras. 92-116, 131-205, 258-264. The *Niyitegeka* case related *inter alia* to attacks at Muyira Hill.

²⁹ See Indictment, 29 April 1996 which includes allegations of massacres in the Bisesero area including its hills.

³⁰ See Indictment, 20 October 2000 which relates to the attacks on Mugonero Complex, especially the one of 16 April 1994.

³¹ *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63, Judgement and Sentence, paras. 319-325.

³² See *The Prosecutor v. Emmanuel Ndimbahizi*, Case No. ICTR-2001-71-T, Judgement and Sentence, 15 July 2004.

³³ *The Prosecutor v. Emmanuel Ndimbahizi*, Case No. ICTR-2001-71-T, Judgement and Sentence, 15 July 2004, Section 4.

charged in Canada; (ii) the complete transcripts of the witnesses who testified about these events and (iii) any exhibits tendered during their testimonies or at other times of relevant to the pertinent events.³⁴

25. With regard to the *Sikubwabo* and *Ndimbati* cases I, further, note that the accused are still at large. Therefore, there are no protected transcripts or exhibits to disclose.

26. Furthermore, Mungwarere has not provided the required identification of the witnesses or exhibits concerned apart from Witness CGV who testified in the *Ndindabahizi* case.³⁵ However, it appears that Witness CGV testified in public session only. Therefore transcripts are readily available to him. During CGV testimony, three exhibits were admitted under seal, his personal information sheet (P. 17) and two written statements to the Office of the Prosecutor relating *inter alia* to attacks at Muyira (D. 12 A & B and D. 13 A & B). Mungwarere has demonstrated that a factual nexus exists between the material sought in relation to CGV testimony and his case and that it may materially assist his case. Therefore, the WVSS should consult with the witness to assert his consent to the disclosure of his confidential material to Mungwarere.

27. Moreover, Mungwarere specifically requests disclosure of witness statements which were submitted as supporting materials with the request for confirmation of the indictments in the aforementioned cases. Such material is provided *ex parte* by the Prosecution to the confirming Judge and subsequently disclosed to the concerned accused person under confidential cover. Therefore, it is not possible for Mungwarere to identify the material with more precision than he has.

28. From the summary of supporting documents that were filed on 22 July 1997 in the *Kayishema et al.* case and on 16 December 1999 in the *Muhimana* case, I have identified the following witnesses whose statements were used to support Paragraphs 45 to 50 of the Indictment which relate to allegations linked to Mungwarere's case in Canada: H, J, K, L, N, P, S, U, V, W, Y, BB, GG, HH, JJ, LL, NN, QQ, RR.

29. From the *Ndindabahizi* case, I have identified the witness statements cited in support of the 5 October 2001 Indictment but not the 1 September 2003 Indictment. However, some paragraphs are common to both indictments in relation to the Kibuye events relevant to the Mungwarere case in

³⁴ Second Motion, para. 44.

³⁵ Second Motion, para. 40.

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Canada and corresponding to paragraphs 3, 15-18 and 20-24 of the 1 September 2003 Indictment: CGV, CGR, CGT, CGP, CGY, CGO, CGN.³⁶

30. It was not possible to identify the statement used as supporting documents for the *Bagilishema, Musema, Niyitegeka, Ndimbati* and *Sikubwabo* cases.

31. Consequently, the WVSS should consult with the witnesses listed at paragraphs 28 and 29 to assert their consent to the disclosure of their confidential materials to Mungwarere.

Third Motion

32. In his Third Motion, Mungwarere first seeks access³⁷ to material from the *Niyitegeka*,³⁷ *Ntakirutimana et al.*³⁸ and *Ndindabahizi*³⁹ cases with respect to evidence relating to witness tampering, intimidation, collusion and recantation.⁴⁰ He submits that it is relevant to his defence to show that false allegations and fabrication of evidence against people accused in connection with the Rwandan Genocide of 1994 have taken place.⁴¹ He further submits that in the *Niyitegeka* and *Ntakirutimana et al.* cases allegations that Assiel Kabera exerted pressure on several witnesses to make false evidence were observed⁴² and that some witnesses scheduled to testify in his case are closely linked to Kabera.⁴³ He adds that some of them, although without identifying them or indicating under what circumstances, have made statements and testified in relation to the *Niyitegeka* and *Ntakirutimana et al.* cases.⁴⁴ To support his request regarding the *Ndindabahizi* case, Mungwarere refers to general allegations of fabrication of evidence and collusion in the Rwandan Prison System.⁴⁵

33. I find that Mungwarere has not established that because Assiel Kabera might have tried to influence evidence before the ICTR, people “closely linked” to him would do the same. I also consider that Mungwarere has not established how the material would materially assist his case or

³⁶ Explanatory Notes in support of [the Ndindabahizi] Indictment, filed on 26 June 2001.

³⁷ Third Motion, para. 24.

³⁸ Third Motion, para. 27.

³⁹ Third Motion, para. 40.

⁴⁰ Third Motion, para. 41.

⁴¹ Third Motion, para. 18.

⁴² Third Motion, paras. 22 and 25.

⁴³ Third Motion, paras. 23 and 26.

⁴⁴ Third Motion, paras. 23 and 26.

⁴⁵ Third Motion, para. 38.

that there is a good chance that it would. Therefore, I consider that Mungwarere has not established a legitimate forensic purpose to access such material.

34. Second, Mungwarere requests access to all material related to witness tampering, intimidation, bribing, collusion, recantation and fabrication of evidence before the Tribunal.⁴⁶ I consider that Mungwarere has not established a legitimate forensic purpose to have access to such material. Furthermore, he has not identified the materials sought with sufficient specificity.

35. Finally, Mungwarere requests that Rule 67 (D) be applied to his case and inquires whether there is an agreement between the Canadian Prosecution and the OTP for OTP to provide the Canadian Prosecution on a continuous basis with material relevant to the Canadian Prosecution.

36. Rule 67(D) provides that a party shall notify the other party and the Trial Chamber if the party discovers additional evidence it should have produced earlier pursuant to the Rules. I consider that the Rule in question should not apply *mutatis mutandis* to parties outside the Tribunal. I, further, note that should the OTP provide materials to its counterparts in foreign jurisdictions the law on disclosure in those jurisdictions will apply.

FOR THESE REASONS, I

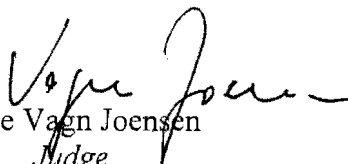
- I. **DENY** Jacques Mungwarere's request relating to the *Munyakazi* and *Nchamihigo* cases.
- II. **ORDER** the Prosecution to communicate *ex parte* to the Chamber and the WVSS the name and pseudonym of the protected witnesses in the *Ntakirutimana et al.* case who are mentioned in Exhibit P. 29 within three (3) days of this decision;
- III. **DIRECT** the WVSS to contact Witnesses FF, OO, PP, EE, GG and CC in the *Ntakirutimana et al.* case, Witnesses H, J, K, L, N, P, S, U, V, W, Y, BB, GG, HH, JJ, LL, NN, QQ, RR in *Kayishema et al.* and the *Muhimana* cases, Witnesses CGV, CGR, CGT, CGP, CGY, CGO, CGN in the *Ndindabahizi* case and the protected witnesses mentioned in Exhibit P. 29 in the *Ntakirutimana et al.* case in order to ascertain whether each of them consents to the variation of protective measures granted to them in order to disclose their testimony and/or documents under seal for their protection for disclosure to Jacques Mungwarere, and to file a confidential report indicating whether, and to what

⁴⁶ Third Motion, para. 41.

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- extent, these witnesses agree to the variation of their protective measures with their affidavit in annex, by 25 June 2012;
- IV. ORDER** the WVSS to explain to the Protected witnesses the implication of their consent to the variation of the protective measures they enjoy so far;
- V. INSTRUCT** the WVSS to inform the Chamber of any difficulties in fulfilling the present Order;
- VI. ORDER** the Prosecution to communicate *ex parte* to the Chamber within three (3) days of this decision the witness statements of the witnesses listed at (III) and used to support the concerned Indictments;
- VII. RESERVE** my decision regarding the witnesses listed at (III) above; and
- VIII. REJECT** Jacques Mungwarere's request in all other aspects.

Arusha, 28 May 2012, done in English.


Judge Vagn Joensen
Judge

[Seal of the Tribunal]

