

ICTR-99-54-T
01-02-2012
(106712 — 106708)

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Mwamba



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 1 February 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON THE MOTION OF BERNARD MUNYAGISHARI
FOR DISCLOSURE OF
CONFIDENTIAL DOCUMENTS IN THE NGIRABATWARE CASE**

Office of the Prosecutor

Mr. Richard Karegyesa
Mr. Wallace Kapaya
Mr. Didace Nyirinkwaya
Mr. Kioko Kamula

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

Counsel for Munyagishari

Mr. Philippe Moriceau
Ms. Natacha Fauveau Ivanovic
Ms. Majda Dautovic

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

BEING SEIZED of the "*Requête de la Défense de Bernard Munyagishari visant la Communication des Informations Confidentielles dans l'Affaire Ngirabatware*", filed on 21 December 2011 (the "Munyagishari Defence Motion");

CONSIDERING:

- (a) The "Prosecutor's Response to 'Requête de la Défense de Bernard Munyagishari visant la Communication des Informations Confidentielles dans l'Affaire *Ngirabatware*'", filed on 23 December 2011 (the "Prosecution Response"); and
- (b) The "*Réplique de la Défense de Bernard Munyagishari à la Réponse du Procureur à la Requête de la Défense visant la Communication des Informations Confidentielles dans l'Affaire Ngirabatware*", filed on 27 December 2011 (the "Munyagishari Defence Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 75 of the Rules.

INTRODUCTION

1. Bernard Munyagishari is accused before this Tribunal of conspiracy to commit genocide, genocide, complicity in genocide, and murder and rape as crimes against humanity. His indictment makes numerous allegations concerning events in Gisenyi, and makes explicit reference to Augustin Ngirabatware.¹
2. Munyagishari was arrested on 25 May 2011 in the Democratic Republic of the Congo. On 14 June 2011, he was transferred to the United Nations Detention Facility.²
3. On 9 November 2011, the Prosecution filed a motion under Rule 11*bis* asking that Munyagishari's case be referred to Rwanda for trial.³ The Defence responded to this motion on 1 February 2012.⁴

¹ *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I ("*Munyagishari*"), T. 20 June 2011, pp. 2-9 (Initial Appearance).

² See *id.*, p. 2.

³ *Munyagishari*, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 9 November 2011.



SUBMISSIONS OF THE PARTIES

Munyagishari Defence Motion

4. The Defence of Bernard Munyagishari seeks to obtain access to all confidential and closed session transcripts, all exhibits thereto, and any confidential decision and order rendered in the *Ngirabatware* case, concerning the events that took place in Gisenyi prefecture.⁵

5. The Munyagishari Defence submits that the *Munyagishari* and *Ngirabatware* cases are closely related, as certain allegations of the respective indictments involve the same people, events, geographical area and time period. Accordingly, information from the *Ngirabatware* case will be essential in the preparation of Munyagishari's defence.⁶

6. The Munyagishari Defence commits to maintaining the confidentiality of any relevant documents, and to complying with any protective measures ordered by the Chamber.⁷

Prosecution Response

7. The Prosecution opposes the Munyagishari Defence Motion, arguing that it is premature. There is a pending application for referral of Munyagishari's case and no date has been set for trial. Granting the Motion would thus allow access to identifying information of protected witnesses long before the Munyagishari Defence is entitled to it under Rule 66(A)(ii).⁸

8. The Prosecution urges the Chamber to follow other decisions, including one concerning Munyagishari, where a similar request for disclosure of confidential material was considered as premature and therefore denied.⁹

9. The Prosecution also observes that "given the nexus between the events at issue in both cases", some of the confidential materials in the *Ngirabatware* case may qualify for inspection or disclosure to the Munyagishari Defence. The Prosecution is mindful of

⁴ *Munyagishari, Réponse de la Défense de Bernard Munyagishari à la Requête du Procureur aux Fins de Renvoi de l'Affaire Munyagishari au Rwanda en Application de l'Article 11bis du Règlement de Procédure et de Preuve*, 1 February 2012.

⁵ Defence Motion, paras. 1, 11.

⁶ *Id.*, paras. 4-9.

⁷ *Id.*, para. 10.

⁸ Prosecution Response, paras. 3, 7-8, 12, 14.

⁹ *Id.*, paras. 10-11, citing *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision sur la Requête de Bernard Munyagishari visant à la Communication des Informations Confidentielles dans l'Affaire Karemera et Consort* (TC), 21 December 2011 ("Karemera et al. Decision of 21 December 2011"); *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003.



these obligations, and will continue to review the trial materials with a view toward making them available to the Munyagishari Defence where required by the Rules.¹⁰

Munyagishari Defence Reply

10. The Munyagishari Defence reiterates that the issues presented by its Motion fulfill the necessary criteria, and repeats its request for disclosure.¹¹

11. The Munyagishari Defence notes that the Prosecution neither contests the link between the *Ngirabatware* and *Munyagishari* cases, nor objects to the disclosure of confidential exhibits, decisions and orders if they are redacted.¹²

12. Lastly, the Munyagishari Defence submits that Munyagishari has a right to prepare his defence, and he should not be prevented from doing so before the trial date is set or the Prosecution chooses its witnesses. Moreover, the Munyagishari Defence submits that it should have access to information regardless of where he will be judged, and that other Trial Chambers have granted access to confidential information to an Accused whose case was subsequently sent to a national jurisdiction.¹³

DELIBERATIONS

13. 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. A party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case. 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. 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. 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, although this may not always be necessary or sufficient. A case-specific analysis is required in each instance.¹⁴

¹⁰ Prosecution Response, para. 13.

¹¹ Munyagishari Defence Reply, paras. 8-10.

¹² *Id.*, paras. 3, 9.

¹³ *Id.*, paras 4-8, citing *Prosecutor v. Mitar Rašević & Savo Todović*, Case No. IT-97-25/1-PT, Decision on Savo Todović's Defence Motion for Access to All Confidential and Under Seal Materials in the Kronjelać Case (TC), 30 June 2005; *Prosecutor v. Tihomir Blaškić*, Case No. IT-94-14-A, Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits (AC), 4 December 2002; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT ("*Ljubičić*"), Decision on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in *Prosecutor v. Anto Furindžija* (TC), 27 November 2002; *Ljubičić*, Decision on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in *Prosecutor v. Zlatko Aleksovski* (TC), 27 November 2002.

¹⁴ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A ("*Bagosora et al.*"), Decision on Augustin Ndirabatware's Motion for Disclosure of Confidential Material Relating to Witness DAK (AC),

14. Further, the 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. 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.¹⁵

15. The Chamber notes that the Munyagishari Defence appears to have filed a similar motion for disclosure in the *Karemera et al.* case. That Trial Chamber concluded that the request was premature, and therefore denied it.¹⁶

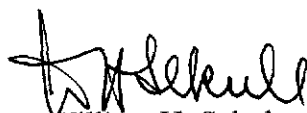
16. The Chamber considers that Munyagishari's case is at an early point in the pre-trial phase, and that the Prosecution's request for the case to be referred to Rwanda could have a significant impact on the case. Indeed, any such referral could lead to alterations in the indictment.¹⁷

17. Under these circumstances, the Chamber considers that any disclosure of confidential information would be premature. The Chamber also notes that the Munyagishari Defence request does not appear to be sufficiently specific in the circumstances of this case.

FOR THE ABOVE REASONS, THE CHAMBER

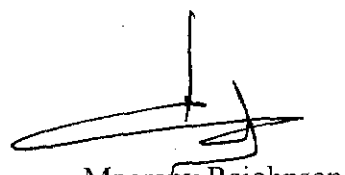
DENIES the Munyagishari Defence Motion.

Arusha, 1 February 2012


William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

23 July 2010 ("*Bagosora et al.* Appeals Decision of 23 July 2010"), para. 10; *Bagosora et al.*, Decision on Augustin Ndirabatware's Motion for Disclosure of Confidential Material Relating to Witness DBN (AC), 8 June 2010 ("*Bagosora et al.* Appeals Decision of 8 June 2010"), para. 11.

¹⁵ *Bagosora et al.* Appeals Decision of 23 July 2010, para. 11; *Bagosora et al.* Appeals Decision of 8 June 2010, para. 12.

¹⁶ *Karemera et al.* Decision of 21 December 2011, para. 7, p. 3.

¹⁷ See *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions (AC), 16 December 2011, n. 214 (observing that, in the event of a referral, "[t]he Prosecutor General's Office of the Republic [of Rwanda] shall adapt the ICTR indictment in order to make [it] compliant with the provisions of the Code of Criminal Procedure of Rwanda").

