



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

3166/H

ICTR-00-56-A

24<sup>th</sup> May 2012

{3166/H - 3162/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding

**Registrar:** Mr. Adama Dieng

**Decision of:** 24 May 2012

ICTR Appeals Chamber  
Date: 24<sup>th</sup> May 2012  
Action: R. Juma  
Copied To: All concerned

Augustin NDINDILYIMANA  
Augustin BIZIMUNGU  
François-Xavier NZUWONEMEYE  
Innocent SAGAHUTU

v.

**THE PROSECUTOR**

Case No. ICTR-00-56-A

**DECISION ON JACQUES MUNGWARERE'S MOTION  
FOR ACCESS TO CONFIDENTIAL MATERIAL**

**Counsel for the Applicant**

Mr. Philippe Larochelle  
Mr. Marc Nerenberg  
Mr. Christian Deslauriers

**Superior Court of Justice, Ontario,  
Canada**

Justice Michel Z. Charbonneau

**Office of the Prosecutor**

Mr. Hassan Bubacar Jallow  
Mr. James J. Arguin  
Mr. Richard Karegyesa  
Mr. Abdoulaye Seye  
Mr. Abubacarr Tambadou  
Mr. Frederick Nyiti

**Defence Counsel**

Mr. Christopher Black and Mr. Vincent  
Lurquin for Augustin Ndindiliyimana

Mr. Gilles St-Laurent for Augustin  
Bizimungu

Mr. Charles A. Taku and Ms. Beth Lyons  
for François-Xavier Nzuwonemeye

Mr. Fabien Segatwa and Mr. Scott Martin  
for Innocent Sagahutu

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS

NAME / NOM: Nouhou Diallo  
SIGNATURE: [Signature] DATE: 24/05/2012

1. I, THEODOR MERON, Presiding Judge of 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) and Presiding Judge in this case,<sup>1</sup> am seized of a motion filed on 22 March 2012 by Mr. Jacques Mungwarere for access to closed session and confidential material.<sup>2</sup> The Prosecution responded on 2 April 2012,<sup>3</sup> and Mr. Mungwarere replied on 10 April 2012.<sup>4</sup>

2. Mr. Mungwarere is being prosecuted by the Public Prosecution Service of Canada for genocide and crimes against humanity allegedly committed in 1994 in Kibuye Prefecture, Rwanda.<sup>5</sup> Mr. Mungwarere requests access pursuant to Rule 75 of the Rules to the closed session transcripts of the testimonies of Witnesses GFA, GFR, and GAP in this case, if any, and to all material relating to the recantation of the witnesses' testimonies, including particular defence exhibits and *amicus curiae* reports.<sup>6</sup>

3. Mr. Mungwarere submits that he has established a legitimate forensic purpose for his request because he intends to "raise the issues of false allegations and fabrication of evidence against people accused in connection with the Rwandan genocide of 1994 before this Tribunal, in Rwanda, and elsewhere" as part of his defence in the proceedings in Canada.<sup>7</sup> According to Mr. Mungwarere, the material sought relates to allegations of systemic fabrication of evidence, witness intimidation, and collusion involving high-ranking officials in Rwanda and the Rwandan prison system.<sup>8</sup> He further notes that almost all prosecution witnesses in his case currently live in Rwanda and many are or have been incarcerated there.<sup>9</sup>

4. The Prosecution responds that Mr. Mungwarere lacks standing to request a variation of protective measures and disclosure of confidential material under Rule 75 of the Rules and, in any

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<sup>1</sup> Pursuant to Rule 75(1) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), an application to vary protective measures may be dealt with by a Chamber or a Judge of that Chamber.

<sup>2</sup> Jacques Mungwarere's Urgent Motion for Access to Material in the Ndindiliyimana et al. Case, 22 March 2012 ("Motion").

<sup>3</sup> Prosecutor's Response to "Jacques Mungwarere's Urgent Motion for Access to Material in the Ndindiliyimana et al. Case["]", 2 April 2012 ("Response").

<sup>4</sup> Reply to Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material in the Ndindiliyimana et al. Case, 10 April 2012 ("Reply").

<sup>5</sup> Motion, para. 1.

<sup>6</sup> Motion, paras. 8, 32, pp. 8, 9. I understand Mr. Mungwarere's request to relate only to confidential material.

<sup>7</sup> Motion, para. 27. See also Motion, paras. 28-33.

<sup>8</sup> Motion, paras. 30-32. See also Reply, para. 13.

event, fails to demonstrate that he has a legitimate forensic purpose for accessing the material sought.<sup>10</sup>

5. In his reply, Mr. Mungwarere annexed a letter from Justice Michel Z. Charbonneau, the judge presiding over his trial in Canada, requesting that Mr. Mungwarere be granted standing to proceed with his Motion and such access to the requested material as the Appeals Chamber may deem him to be entitled to receive.<sup>11</sup> In addition, Mr. Mungwarere also attached an order by Justice Charbonneau requiring the parties in the case of *R. v. Jacques Mungwarere* before the Ontario Superior Court of Justice to comply with all protective measures regarding this material.<sup>12</sup>

6. Witnesses GFA, GFR, and GAP were granted protective measures pursuant to Rule 75 of the Rules, including the non-disclosure to the public of any information identifying the witnesses or likely to reveal their identity.<sup>13</sup> Consequently, the disclosure of the material which Mr. Mungwarere seeks requires a variation or rescission of the protective measures currently in effect.

7. Rule 75(F)(i) of the Rules provides that “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the ‘first proceedings’), such protective measures [...] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the ‘second proceedings’) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule”. According to Rule 75(G) of the Rules, “[a] party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: (i) to any Chamber, however constituted, remaining seised of the first proceedings; or (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings”.

<sup>9</sup> Motion, para. 31.

<sup>10</sup> Response, paras. 2, 9, 10.

<sup>11</sup> Reply, Annex 1, Letter by Justice Michel Z. Charbonneau, dated 4 April 2012 (“Justice Charbonneau Letter”), paras. 1, 3. The Justice Charbonneau Letter was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

<sup>12</sup> Reply, Annex 1, *R. v. Jacques Mungwarere*, Court of Ontario, Superior Court of Justice, Court File No. 09-30466, Order Binding the Parties to Comply with All Witness Protection Measures in Place at the International Criminal Tribunal for Rwanda with Regard to Any Disclosure Which May Be Received from the International Criminal Tribunal for Rwanda as a Result of Any Disclosure Motions that Have Been Made or May Be Made by Jacques Mungwarere to the International Criminal Tribunal for Rwanda, dated 4 April 2012 (“Justice Charbonneau Order”), p. 2560/A (Registry pagination). The Justice Charbonneau Order was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

<sup>13</sup> See *The Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-I, Order for Protective Measures for Witnesses, 12 July 2001, pp. 5, 6; *The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-I, Decision on the Prosecutor’s Motion for Review, Variation, and Extension of Protective Measures for Victims and Witnesses, filed in French on 19 March 2004, English translation filed on 17 May 2004, pp. 11, 12. See also *The Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecutor’s Urgent *Ex Parte* Motion to Vary the Protective Measures for Witnesses GAP & GFC, 19 May 2011.

8. Mr. Mungwarere does not seek variation for a case before the Tribunal and he is not “a party to the second proceedings” within the meaning of Rule 75 of the Rules. Nonetheless, the Appeals Chamber has held that the interests of justice require that Rule 75(F)(i) of the Rules be interpreted to provide for the variation of protective measures even when the second proceedings are not before the Tribunal, but before another jurisdiction.<sup>14</sup> In such cases, the procedure set out in Rule 75(G)(i) of the Rules may apply *mutatis mutandis* to variations requested by a judge, a court, or a party for proceedings before another jurisdiction.<sup>15</sup> A party to proceedings before another jurisdiction should be authorized by an appropriate judicial authority to apply for the variation of protective measures pursuant to Rule 75 of the Rules,<sup>16</sup> as is the case here.<sup>17</sup>

9. The Appeals Chamber has held that where access to confidential Tribunal material is sought for proceedings before another jurisdiction the applicant should specifically identify such material and demonstrate a legitimate forensic purpose for the request.<sup>18</sup> In this regard, consideration must be given to the relevance of the material requested, 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, and whether the material requested is likely to materially assist the applicant’s case.<sup>19</sup> The Appeals Chamber has also underscored the importance of the protected witness’s consent to the disclosure of the material in question.<sup>20</sup>

10. I am satisfied that Mr. Mungwarere has identified the transcripts, exhibits, and reports listed in the Motion<sup>21</sup> with sufficient specificity. However, Mr. Mungwarere’s request for access to “[a]ll material in the *Ndindiliyimana et al.* case relating to the recantation of GFA, GFR and GAP’s testimony”<sup>22</sup> is not sufficiently specific except insofar as he has identified particular exhibits and reports.

11. In any event, Mr. Mungwarere’s general assertions of fabrication of evidence, witness intimidation, and collusion demonstrate only a tenuous nexus between the *Ndindiliyimana et al.* case and the specific allegations and witnesses in his own trial. This is not a sufficiently substantial basis for a finding that the material sought is likely to assist his case *materially* or that

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<sup>14</sup> See, e.g., *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 17 May 2012 (“*Nyiramasuhuko et al.* Decision”), para. 13.

<sup>15</sup> *Nyiramasuhuko et al.* Decision, para. 13.

<sup>16</sup> *Nyiramasuhuko et al.* Decision, para. 14.

<sup>17</sup> See *supra*, para. 5.

<sup>18</sup> *Nyiramasuhuko et al.* Decision, para. 17.

<sup>19</sup> *Nyiramasuhuko et al.* Decision, para. 17.

<sup>20</sup> See, e.g., *Nyiramasuhuko et al.* Decision, para. 18.

<sup>21</sup> Motion, para. 32, pp. 8, 9.

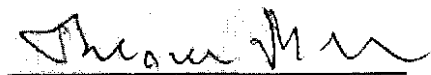
<sup>22</sup> Motion, para. 32, p. 9.

there is at least a good chance that it would.<sup>23</sup> Mr. Mungwarere has therefore failed to demonstrate a legitimate forensic purpose for his request.<sup>24</sup>

12. Accordingly, Mr. Mungwarere has not satisfied the criteria for access to the requested confidential material in this case, and the Motion is therefore **DENIED**.

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

Done this 24th day of May 2012,  
At The Hague,  
The Netherlands.

  
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Judge Theodor Meron  
Presiding Judge



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<sup>23</sup> Cf. *Nyiramasuhuko et al.* Decision, para. 20.

<sup>24</sup> Mr. Mungwarere also submits that the material sought is "of interest to the general public" and that public redacted versions should be filed. *See* Motion, para. 34. However, this assertion does not give standing to Mr. Mungwarere to request the Appeals Chamber to review material put under seal by a trial chamber and to decide whether parts of this confidential material could be disclosed in public redacted form. Cf. *Nyiramasuhuko et al.* Decision, para. 22.