



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

2347/H  
ICTR-98-42-A  
17<sup>th</sup> May 2012  
{2347/H - 2338/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Andréia Vaz  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 17 May 2012

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: ROSETTE MUZIGO-MORRISON  
SIGNATURE: [Signature] DATE: 17/05/12

ICTR Appeals Chamber  
Date: 17<sup>th</sup> May 2012  
Action: R. Tsimba  
Copied To: Concerned

Judge,  
JAV, LDs  
[Signature]

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO  
Arsène Shalom NTAHOBALI  
Sylvain NSABIMANA  
Alphonse NTEZIRYAYO  
Joseph KANYABASHI  
Élie NDAYAMBAJE

Case No. ICTR-98-42-A

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

**Counsel for the Applicant**

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Marc Nerenberg  
Christian Deslauriers

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

Justice Michel Z. Charbonneau

**Office of the Prosecutor**

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Normand Marquis

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**Counsel for Alphonse Nteziryayo**

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Michel Marchand and Alexandra Marcil

**Counsel for Élie Ndayambaje**

Pierre Boulé

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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 a motion for access to material in the *Nyiramasuhuko et al.* case filed on 22 March 2012 by Mr. Jacques Mungwarere, who is being prosecuted before the Ontario Superior Court of Justice in Canada for genocide and crimes against humanity allegedly committed in Rwanda in 1994.<sup>1</sup>

#### A. Submissions

2. Mr. Mungwarere requests access to the closed session transcripts of the testimony of Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, D-1-4-O, D-2-16-P, AND-30, AND-41, AND-59, WMCZ, WNMN, and QA in the *Nyiramasuhuko et al.* case (together, "Witnesses") as well as to all exhibits tendered during the Witnesses' testimonies ("Requested Material").<sup>2</sup> Mr. Mungwarere explains that 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 against him in Canada.<sup>3</sup> He contends that the Requested Material relates to evidence of witness tampering, intimidation, collusion, and recantation, and that it shares a factual nexus with his case.<sup>4</sup> According to Mr. Mungwarere, the Requested Material would serve a "legitimate forensic purpose" and would materially assist him in the preparation of his defence.<sup>5</sup>

3. Mr. Mungwarere acknowledges that "most, if not all, of the [Requested Material] might be covered by protective measures"<sup>6</sup> but submits that he should be granted access to the material pursuant to Rule 75 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>7</sup> He contends that it would be both "impracticable" and impossible for him to seek the Witnesses' consent to a variation of their protective measures.<sup>8</sup> According to Mr. Mungwarere, the consent of

<sup>1</sup> Jacques Mungwarere's Urgent Motion for Access to Material in the *Nyiramasuhuko et al.* Case, 22 March 2012 ("Motion"), para. 1.

<sup>2</sup> Motion, para. 33, p. 9.

<sup>3</sup> Motion, para. 27.

<sup>4</sup> Motion, paras. 28, 30-33. Mr. Mungwarere refers in particular to "allegations of systematic fabrication of evidence, intimidation and bribing concerning members of the IBUKA organization". See *ibid.*, para. 33. See also *ibid.*, paras. 30-32.

<sup>5</sup> Motion, paras. 28, 34.

<sup>6</sup> Motion, para. 16.

<sup>7</sup> Motion, paras. 8-15.

<sup>8</sup> Motion, paras. 16, 17.

witnesses is in any case “not an absolute necessity in order to vary protective measures.”<sup>9</sup> He argues that access to confidential Tribunal material must be allowed if there is a “legitimate forensic purpose”.<sup>10</sup> Alternatively, he argues that, since he does not intend to contact or disclose the identity of the Witnesses but only to access their confidential material, it would be sufficient for the Appeals Chamber to order that the existing protective measures apply *mutatis mutandis* to the parties in his proceedings in Canada, without the need for any variation under Rule 75 of the Rules.<sup>11</sup>

4. Additionally, Mr. Mungwarere submits that the Requested Material is “of interest to the general public” and as such should “be filed as public documents with the redaction of information identifying protected witnesses.”<sup>12</sup>

5. Mr. Joseph Kanyabashi responded on 23 March 2012 that the confidential material of Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, D-1-4-O, and D-2-16-P, who testified for him in the *Nyiramasuhuko et al.* case, should not be disclosed because, *inter alia*, Mr. Mungwarere does not establish any link between the evidence of these witnesses and his proceedings in Canada and does not show that the witnesses consented to a variation of their protective measures.<sup>13</sup> Mr. Kanyabashi points out, in particular, that the witnesses testified about incidents in the Butare prefecture in 1994, whereas Mr. Mungwarere is being prosecuted in relation to events that allegedly occurred in the Kibuye prefecture.<sup>14</sup>

6. Mr. Mungwarere replied on 27 March 2012 that Mr. Kanyabashi’s objection to the Motion should be rejected.<sup>15</sup> He argues, *inter alia*, that any “specific geographic congruity” between the evidence of the Witnesses and his proceedings in Canada is irrelevant as “[t]he nexus is based upon the nature of the evidence sought, that is, evidence pertaining to systematic fabrication of

<sup>9</sup> Motion, para. 18, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-R75, Decision on Charles Munyaneza’s Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal, 9 April 2008 (“*Simba* Trial Decision”), para. 8; *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada, 23 June 2011 (“*Nizeyimana* Trial Decision”). See also Motion, para. 29, referring to *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana’s Motion for Access to Exhibit DNZ-461, 23 August 2010 (“*Karemera and Ngirumpatse* Trial Decision”).

<sup>10</sup> Motion, para. 10. See also *ibid.*, paras. 29, 34.

<sup>11</sup> Motion, paras. 19, 20.

<sup>12</sup> Motion, para. 35, referring to *Karemera and Ngirumpatse* Trial Decision.

<sup>13</sup> *Réponse de Joseph Kanyabashi à la procédure initulée*: Jacques Mungwarere’s Urgent Motion for Access to Material in the *Nyiramasuhuko et al.* Case, 23 March 2012 (“*Kanyabashi Response*”), paras. 2, 7, 9, 10, p. 4.

<sup>14</sup> *Kanyabashi Response*, para. 6.

<sup>15</sup> Reply to Joseph Kanyabashi’s Response to ‘Jacques Mungwarere’s Urgent Motion for Access to Material in the *Nyiramasuhuko et al.* Case’, 27 March 2012 (“*Reply to Kanyabashi*”), para. 14, p. 4.

evidence in Rwandan genocide trials",<sup>16</sup> and that the consent of the Witnesses to a variation of their protective measures is not required in this instance.<sup>17</sup>

7. On 2 April 2012, the Prosecution responded that the Motion should be denied as Mr. Mungwarere lacks standing to apply for a variation of protective measures and access to confidential material under Rule 75(G) of the Rules.<sup>18</sup> The Appeals Chamber understands the Prosecution to submit that parties to proceedings other than those before the Tribunal have no standing to request a variation of protective measures and disclosure of confidential material unless they are authorised by an appropriate judicial authority.<sup>19</sup> The Prosecution also points out that none of the Witnesses consented to the disclosure of their confidential material or acted in any way that could be interpreted as a tacit waiver of their existing protective measures, and expressly objects to any variation of these measures.<sup>20</sup> The Prosecution further argues that Mr. Mungwarere fails to show the existence of a nexus between his case and the *Nyiramasuhuko et al.* case, which have no common witnesses, crime scenes, or alleged criminal acts, and fails to demonstrate that the Requested Material is likely to materially assist his case.<sup>21</sup> In its view, Mr. Mungwarere therefore fails to establish a sufficient legitimate forensic justification to access the Requested Material.<sup>22</sup> Finally, the Prosecution submits that the Trial Chamber properly exercised its discretion in ordering closed sessions and sealing exhibits with respect to the Witnesses and that Mr. Mungwarere fails to demonstrate that the Requested Material should be filed publicly.<sup>23</sup>

8. Mr. Mungwarere replied to the Prosecution Response on 10 April 2012, submitting that "the Tribunal's policy of cooperation with State organs [...] should be applied to cooperation with an individual being prosecuted and tried by those very State organs."<sup>24</sup> Annexed to the Reply to the Prosecution is a letter addressed to the Registrar of the Tribunal by Justice Michel Z. Charbonneau, the judge presiding over the proceedings against Mr. Mungwarere before the Ontario Superior Court of Justice.<sup>25</sup> In his letter, Justice Charbonneau requests, *inter alia*, that

<sup>16</sup> Reply to Kanyabashi, para. 4. *See also ibid.*, para. 6.

<sup>17</sup> Reply to Kanyabashi, paras. 11-13.

<sup>18</sup> Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material in the *Nyiramasuhuko et al.* Case, 2 April 2012 ("Prosecution Response"), paras. 2, 11, 19.

<sup>19</sup> Prosecution Response, paras. 6-8, 11.

<sup>20</sup> Prosecution Response, para. 10.

<sup>21</sup> Prosecution Response, paras. 12-16. The Prosecution submits that "establishing a nexus means more than merely relying on a similar defence." *See ibid.*, para. 14.

<sup>22</sup> Prosecution Response, paras. 2, 16, 19.

<sup>23</sup> Prosecution Response, paras. 17-19.

<sup>24</sup> Reply to Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material in the *Nyiramasuhuko et al.* Case, 10 April 2012 ("Reply to the Prosecution"), para. 5.

<sup>25</sup> Reply to the Prosecution, Annex 1, Letter of Justice Michel Z. Charbonneau dated 4 April 2012 ("Justice Charbonneau Letter"). The Justice Charbonneau Letter was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

Mr. Mungwarere be granted standing to proceed with his Motion and access to such requested material as the Appeals Chamber may deem him to be entitled to receive.<sup>26</sup> Also annexed to the Reply to the Prosecution is an order by Justice Charbonneau binding the parties in the case *R. v. Jacques Mungwarere* to comply with all protective measures regarding this material.<sup>27</sup> In addition, Mr. Mungwarere reiterates that the allegation of fabrication of evidence establishes the requisite nexus between his case and the *Nyiramasuhuko et al.* case and, thus, the legitimate forensic purpose of his request for access to the Requested Material.<sup>28</sup>

## B. Discussion

9. At the outset, the Appeals Chamber observes that some of the material requested by Mr. Mungwarere in his Motion is public and, as such, readily accessible to him.<sup>29</sup> The Appeals Chamber will therefore only consider Mr. Mungwarere's request to the extent that it relates to the disclosure of confidential material ("Confidential Requested Material").

10. The Appeals Chamber notes that the Witnesses were granted protective measures pursuant to Rule 75 of the Rules.<sup>30</sup> These measures include the non-disclosure to the public of any information identifying the Witnesses or likely to reveal their identities.<sup>31</sup> The Appeals Chamber also observes that the closed sessions and sealed transcripts of the Witnesses' testimonies as well as the confidential filing of some of the exhibits tendered during their testimonies were ordered to

<sup>26</sup> Justice Charbonneau Letter.

<sup>27</sup> Reply to the Prosecution, 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"). The Justice Charbonneau Order was also filed before the Appeals Chamber by Justice Charbonneau on 16 April 2012.

<sup>28</sup> Reply to the Prosecution, para. 13. See also *ibid.*, paras. 11, 12, 15.

<sup>29</sup> See Exhibit D651, admitted in the course of Witness D-1-4-O's testimony, and Exhibits D515 and D516, admitted in the course of Witness AND-30's testimony.

<sup>30</sup> See *The Prosecutor v. Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Decision on the Defence Motion for Protective Measures for Witnesses, 18 September 2001; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 27 March 2001; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members, 20 March 2001; *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 17 June 1999; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and Their Families, signed 25 November 1997, filed 26 November 1997; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Motion filed by the Prosecutor for the Protection of Victims and Witnesses, signed 11 March 1997, filed 13 March 1997; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, signed 6 March 1997, filed 14 April 1997.

<sup>31</sup> See *supra*, fn. 30.

protect their identities.<sup>32</sup> Contrary to Mr. Mungwarere's submission, disclosure of the Confidential Requested Material to any third party therefore requires a variation or rescission of the protective measures in effect.

11. The Appeals Chamber will now consider whether Mr. Mungwarere has standing to apply for the variation of protective measures granted pursuant to Rule 75 of the Rules for the purposes of being granted access to confidential material.

#### 1. Standing

12. 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". Pursuant 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."

13. In this case, variation is not sought for a case before the Tribunal, and Mr. Mungwarere is not "a party to the second proceedings" within the meaning of Rule 75 of the Rules. However, while Rule 75 of the Rules does not provide for such variation, 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, as in the present case.<sup>33</sup> The Appeals Chamber has also considered

<sup>32</sup> See Witness D-2-21-T, T. 3 November 2008 p. 9 (closed session), T. 4 November 2008 p. 10, and T. 5 November 2008 p. 6; Witness D-2-18-O, T. 15 May 2008 p. 11, T. 19 May 2008 p. 12, and T. 20 May 2008 p. 7 (closed session); Witness D-13-D, T. 14 February 2008 p. 36, T. 18 February 2008 p. 21, T. 19 February 2008 p. 7, and T. 25 February 2008 p. 4; Witness D-2-13-D, T. 28 August 2007 p. 50, T. 29 August 2007 p. 12, T. 30 August 2007 p. 6, T. 3 September 2007 p. 4, T. 5 September 2007 pp. 6, 7, T. 6 September 2007 p. 7, and T. 10 September 2007 p. 7; Witness D-1-4-O, T. 6 May 2008 p. 36 (closed session), T. 7 May 2008 pp. 64, 65, T. 8 May 2008 p. 57, and T. 2 May 2008 p. 8; Witness D-2-16-P, T. 12 March 2008 pp. 8 (public session), 11 (closed session), T. 13 March 2008 p. 38 (closed session), T. 17 March 2008 p. 5, T. 18 March 2008 p. 45, and T. 19 March 2008 p. 4; Witness AND-30, T. 21 February 2007 p. 7, T. 22 February 2007 p. 70, T. 26 February 2007 p. 44 (closed session), and T. 27 February 2007 p. 22; Witness AND-41, T. 22 March 2007 p. 20 and T. 26 March 2007 p. 64 (closed sessions); Witness AND-59, T. 26 April 2007 p. 44 (closed session), T. 30 April 2007 p. 5, and T. 1 May 2007 p. 15; Witness WMCZ, T. 1 February 2005 p. 68, T. 2 February 2005 p. 23, T. 3 February 2005 p. 5, and T. 7 February 2005 p. 6; Witness WNMN, T. 14 June 2005 p. 13 and T. 15 June 2005 p. 5 (closed session); Witness QA, T. 18 March 2004 p. 84, T. 22 March 2004 p. 25, T. 23 March 2004 p. 5, and T. 29 October 2008 p. 12. See also Rule 79(A)(ii) of the Rules.

<sup>33</sup> See, e.g., *Dominique Ntawukuliyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Prosecutor's Motion to Rescind Protective Measures for Witnesses, *ex parte* and confidential, 17 May 2011, para. 3; *Théoneste Bagosora*

that 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>34</sup>

14. However, the Appeals Chamber considers that a distinction must be drawn between requests from a judge or a court from another jurisdiction, and requests emanating from a party to proceedings before another jurisdiction. While any judge or bench, as a judicial authority, may directly apply for the variation of protective measures ordered pursuant to Rule 75 of the Rules, the Appeals Chamber considers that a party to proceedings before another jurisdiction should be authorized by an appropriate judicial authority to apply for such variation.<sup>35</sup>

15. In the present case, the Appeals Chamber considers that the Justice Charbonneau Letter provides the necessary authorization. Accordingly, the Appeals Chamber finds that Mr. Mungwarere has standing to apply for access to the Confidential Requested Material pursuant to Rule 75 of the Rules.

## 2. Applicable Standard

16. The Appeals Chamber notes that Mr. Mungwarere expressly refers to the legal standard applicable to requests for access to confidential material by an accused in another case before the Tribunal.<sup>36</sup> However, the Appeals Chamber emphasizes that, in the present instance, access to

*et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Order in Relation to Prosecutor's Motion to Vary Protective Measures for Witnesses [redacted], *ex parte* and confidential, 23 July 2010, para. 3; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Order in Relation to Prosecutor's Motion to Rescind Protective Measures for Witness [redacted], *ex parte* and confidential, 26 February 2010 ("*Bagosora et al.* Order of 26 February 2010"), para. 3.

<sup>34</sup> See, e.g., *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Order in Relation to Prosecution Motion to Vary Protective Measures for Witnesses [redacted], *ex parte* and confidential, 8 February 2012 ("*Nyiramasuhuko et al.* Order"), para. 2; *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, confidential, 15 July 2011 ("*Gatete* Decision of 15 July 2011"), para. 6; *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Order in Relation to [redacted] Application for Variation of Protective Measures and Disclosure of Documents, confidential, 1 June 2011 ("*Gatete* Order of 1 June 2011"), p. 2; *Bagosora et al.* Order of 26 February 2010, para. 4. The Appeals Chamber emphasizes that, while it has stated on several occasions that the procedure set out in Rule 75(G)(i) of the Rules may apply *mutatis mutandis* to variations requested, *inter alia*, by a party, it has never granted a request for variation of protective measures which was not from State authorities.

<sup>35</sup> The Appeals Chamber notes that such a requirement is expressly provided for under Rule 75(H) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.

<sup>36</sup> See Motion, paras. 10, 11; Reply to Kanyabashi, para. 3; Reply to the Prosecution, para. 12. The legal standard applicable to requests for access to confidential material from an accused in another case before the Tribunal as defined by the Appeals Chamber is as follows:

A party [before the Tribunal] 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 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. Further, the requesting party must establish 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

confidential material is not sought by an accused in another case *before the Tribunal*, but by an accused *before another jurisdiction*.

17. In such a case, the Appeals Chamber considers that the material sought should be specifically identified.<sup>37</sup> In addition, as is the case with requests by an accused in proceedings before the Tribunal, the applicant seeking access to confidential material for proceedings before another jurisdiction must demonstrate a legitimate forensic purpose. The Appeals Chamber recalls in this regard that consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the applicant's case and the case from which such material is sought.<sup>38</sup> The applicant must further establish that this material is likely to assist his case materially, or that there is at least a good chance that it would.<sup>39</sup>

18. Moreover, the Appeals Chamber has repeatedly underscored the importance of the protected witness's consent to the disclosure of confidential material for proceedings before another jurisdiction.<sup>40</sup> In the absence of such consent, variation of protective measures may only be granted where the applicant demonstrates that the protective measures are no longer justified or that exceptional circumstances warrant the variation sought.<sup>41</sup>

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which protective measures shall apply to the material, as it is within the Chamber's discretionary power to strike the 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.

*See, e.g., Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-A, Decision on Ildephonse Nizeyimana's Request for Access to Closed Session Transcripts, 31 March 2011, para. 3 (internal references omitted), referring to *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, para. 7. *See also, e.g., Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Augustin Ngirabatware's Motion for Disclosure of Confidential Material Relating to Witness DAK, 23 July 2010, paras. 10, 11.

<sup>37</sup> The date of the witness's testimony, the pseudonym used to identify the witness, and/or the exhibit number should, for example, be provided.

<sup>38</sup> *See supra*, fn. 36.

<sup>39</sup> *See supra*, fn. 36.

<sup>40</sup> *See, e.g., Nyiramasuhuko et al. Order*, para. 5; *Gatete Order* of 1 June 2011, p. 2; *Bagosora et al. Order* of 26 February 2010, para. 7. *See also Gatete Decision* of 15 July 2011, paras. 7, 10, 11.

<sup>41</sup> *Cf. Nizeyimana Trial Decision*, paras. 14, 18; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecutor's Urgent *Ex Parte* Motion to Vary Protective Measures for Prosecution Witness CNAT, 16 September 2010, para. 11; *Simba Trial Decision*, para. 8. *Cf. also* Rule 81(B) of the Rules ("The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.").



### 3. Merits of the Motion

19. In the present case, although the Appeals Chamber considers that Mr. Mungwarere could have further identified the material sought by providing the dates of the closed session testimonies and the numbers of the exhibits requested,<sup>42</sup> it is satisfied that, by providing the pseudonyms of the concerned witnesses, Mr. Mungwarere has identified the material sought with sufficient specificity.

20. Turning to whether a legitimate forensic purpose has been demonstrated, the Appeals Chamber observes that the material relating to the alleged fabrication of evidence in the *Nyiramasuhuko et al.* proceedings is potentially relevant to the issues of false allegations and fabrication of evidence that Mr. Mungwarere intends to raise in his trial. However, the Appeals Chamber is not convinced that the tenuous nexus between the two cases established by Mr. Mungwarere is sufficiently substantial to conclude that the Confidential Requested Material is likely to assist his case *materially*, or that there is at least a good chance that it would.<sup>43</sup> The Appeals Chamber emphasizes in this regard that Mr. Mungwarere does not assert that the Confidential Requested Material relates to the issues of false allegations pertaining to the incidents for which he is being prosecuted in Canada or argue that it concerns witnesses expected to appear in his case. Accordingly, the Appeals Chamber finds that Mr. Mungwarere has not established a legitimate forensic purpose to access the Confidential Requested Material.

21. In these circumstances, the Appeals Chamber considers it unnecessary to instruct the Witness and Victims Support Section of the Tribunal to consult with the Witnesses to inquire whether they consent to the disclosure of their confidential material to Mr. Mungwarere.

22. As regards Mr. Mungwarere's request for public redacted versions of the Confidential Requested Material, the Appeals Chamber notes that Mr. Mungwarere merely contends that "this Material is of interest to the general public".<sup>44</sup> The Appeals Chamber considers that 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 decide whether parts of this confidential material could be disclosed in public redacted form.

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<sup>42</sup> The Appeals Chamber notes that the Witnesses' closed session testimonies and the confidential exhibits admitted in the course of their testimonies are identified in the public transcripts of their testimonies which are readily available on the Tribunal's website.

<sup>43</sup> See *supra*, para. 17.


<sup>44</sup> Motion, para. 35.

**C. Disposition**

23. For the foregoing reasons, the Appeals Chamber **DISMISSES** Mr. Mungwarere's Motion in its entirety.

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

Done this 17<sup>th</sup> day of May 2012,  
at The Hague,  
The Netherlands.



Judge Fausto Pocar  
Presiding

[Seal of the Tribunal]

