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**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, *Presiding*
Judge Patrick Robinson
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Carmel Agius

Registrar: Adama Dieng

Date: 10 April 2012

ICTR-98-44-A
11-4-2012
(270/A-259/A)

UNICTR
JUDICIAL RECORDS ARCHIVES
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[Signature]

KAREMERA et al.

v.

THE PROSECUTOR

Case No. ICTR-98-44-A

**REPLY TO PROSECUTOR'S RESPONSE TO JACQUES MUNGWARERE'S URGENT
MOTION FOR ACCESS TO MATERIAL IN THE KAREMERA ET AL. CASE**

Counsel for Jacques Mungwarere:

Philippe Laroche
Marc Nerenberg
Christian Deslauriers

Public Prosecution Service of Canada

Luc Boucher

Ottawa Superior Court

C/o The Honorable Louis Z. Charbonneau

Office of the Prosecutor:

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

I. INTRODUCTION:

1. The Prosecution opposes the Mungwarere Motion¹ on two grounds, as argued at paragraph 2 the Prosecution Response²: firstly, that Mungwarere's request does not comply with the appropriate procedures as he lacks standing, secondly, that Mungwarere's request lacks specificity, and thirdly, that Mungwarere's request makes no demonstration that consent of the concerned witnesses has been obtained.
2. The Defence for Mr. Mungwarere hereby replies to the Prosecution Response.

II. MUNGWARERE'S APPROACH TAKES INTO ACCOUNT THE RELEVANT PROCEDURE

3. First, the Prosecution alleges that Mr. Mungwarere lacks standing to apply for disclosure of confidential material without authorization by an appropriate judicial or prosecutorial authority.³
4. Mr. Mungwarere acknowledges that the usual practice of this Tribunal has been to provide disclosure of confidential material in national proceedings when requested or otherwise sanctioned by national judicial authorities.
5. However, it has not been infrequent for this Tribunal to enlarge the scope of its own rules by applying them by analogy, and this is a case in which, it is submitted, that the Tribunal's policy of cooperation with State organs, such as the court or the prosecutor of a foreign state, should be applied to cooperation with an individual being prosecuted and tried by those very State organs. To do otherwise would be to fly in

¹ Jacques Mungwarere's Urgent Motion for Access to Material in the Karemera et al. Case, 21 March 2012, (the "Mungwarere Motion")

² Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material in the Karemera et al. Case, 5 April 2012. (the "Prosecution Response")

³ Prosecution Response, paras. 3-9.

the face of the fundamental principles of justice, in particular, the principle long upheld at this Tribunal of equality of arms before the law.

6. Furthermore, in order to address any concerns that this Tribunal might have with disclosing confidential material requested by an accused in national proceeding in his individual capacity, the Defence for Mr. Mungwarere had clearly indicated that it would seek an order of the Superior Court (Ontario) before which the Mungwarere case is being heard, binding the parties to such ICTR protection measures as may be in place.
7. Mr. Mungwarere, in fact, sought the assistance of the Superior Court in this matter by way of a written motion filed on 14 March 2012, which was responded to by Her Majesty in a written response dated 28 March 2012, and argued orally before the Honourable Justice Charbonneau JSC on 3 April 2012.
8. The result of this motion was an official letter of request by the Superior Court (Ontario) to this Tribunal, requesting *inter alia* that Mr. Mungwarere be granted standing for his pending disclosure motions before the ICTR, that he be accorded the same courtesy and cooperation as would be accorded to the Public Prosecution Service of Canada or to an accused being tried before the ICTR, in accordance with all of the ICTR rules governing disclosure motions, that the Chambers disclose to Mr. Mungwarere, in a timely fashion, such requested material as those Chambers may deem him to be entitled to receive, in accordance with all of their rules governing disclosure motions, and that the disclosure of any such material be subject to any witness protection measures in place at the ICTR, applied *mutatis mutandis* to the parties in the Canadian prosecution of Jacques Mungwarere.
9. The Superior Court also simultaneously issued an order binding all the parties in the Mungwarere case to comply with all protective measures in place regarding this material, applied *mutatis mutandis* to the parties in the Canadian prosecution of Jacques Mungwarere. Both documents are included as Annex II to this reply.
10. Thus, it is submitted that this particular problem has already been dealt with.

III. THE MATERIAL REQUESTED BY MUNGWARERE IS PROPERLY IDENTIFIED:

11. Second, the Prosecution alleges that Mr. Mungwarere's request is defective because he fails to particularly identify the material sought.⁴
12. With respect, it is submitted that this argument is misguided. According to the relevant jurisprudence, when a party to other proceedings 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.⁵
13. Mr. Mungwarere submits that by identifying the relevant paragraphs in the Indictment and Trial Judgment of the *Karemera et al.* case, as well as the relevant protected witnesses, he has sufficiently described the material for which he requests access and indicated the nature of the nexus with his own case.
14. The Prosecution has indicated that it has not had access to Confidential Annex I,⁶ detailing the allegations made against Mr. Mungwarere, to which the Mungwarere Motion referred. For greater clarity and precision, Mr. Mungwarere herein provides this non-exhaustive list of allegation as Confidential Annex I to this reply.
15. The bottom line is simply that Mr. Mungwarere needs to know the identities of the witnesses mentioned in the various paragraphs of the judgement and needs to have access to their unredacted statements, and unredacted confidential testimony, in order to adequately prepare his own defence. Had he been charged before this Tribunal, he would have had access to such names and statements long ago as a matter of course. Had the Prosecutor in a national jurisdiction thought such material would assist the

⁴ Prosecution Response, paras. 10-12

⁵ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemera et al.* case (AC), 10 July 2009, para. 28; *See also Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Callixte Nzabonimana's Motion for Access to Exhibit DNZ-461, 23 August 2010, para. 6.

⁶ Prosecution Response, para. 12

prosecution of an individual arrested there, that Prosecutor would have had it long ago. It is contrary to the spirit of international cooperation, and the fundamental principles of justice and fairness, that an accused should be deprived of such essential material for the preparation of his own defence by virtue of the geography of his arrest.

IV. THE CONSENT OF THE PROTECTED WITNESSES IS NOT REQUIRED IN THIS INSTANCE:

16. Third, the Prosecution alleges that Mr. Mungwarere request is premature because no disclosure order can be made without prior consent of the witnesses.⁷
17. It is submitted that this step is unnecessary under the rules in as much as Mr. Mungwarere will be bound by all protective measures in place regarding this material, as can be seen from the order at Annex II of this reply.

V. CONCLUSION:

18. For the aforementioned reasons, the Defence for Mungwarere prays the Trial Chamber to reject the Prosecution objections to the disclosure sought by Mungwarere.

FOR ALL THE ABOVE REASONS, MAY IT PLEASE THE HONOURABLE CHAMBER TO:

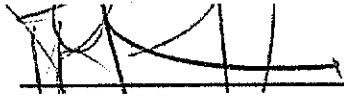
REJECT the Prosecution objection to disclosure

and

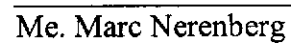
ORDER the disclosure of the requested Material to the Defence of Jacques Mungwarere.

⁷ Prosecution Response, paras. 10-11, 13

10 April 2012

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Me. Philippe Larochelle

A handwritten signature in black ink, appearing to be 'Marc Nerenberg', written over a horizontal line.

Me. Marc Nerenberg

Annex II

THE HONOURABLE MR. JUSTICE MICHEL Z. CHARBONNEAU
SUPERIOR COURT OF JUSTICE

COURT HOUSE
59 COURT STREET, 2ND FLOOR
L'ORIGINAL, ONTARIO K0B 1K0



L'HONORABLE JUGE MICHEL Z. CHARBONNEAU
COUR SUPÉRIEURE DE JUSTICE

PALAIS DE JUSTICE
59, RUE COURT, 2^e ÉTAGE
L'ORIGINAL (ONTARIO) K0B 1K0

TELEPHONE/TÉLÉPHONE (613) 675-4567
FAX/TÉLÉCOPIEUR (613) 675-4507

4 April 2012

By Email (Original by Courier)

Mr. Adama Dieng
Office of the Registrar
International Criminal Tribunal for Rwanda
Arusha International Conference Centre
P.O. Box 6016
Arusha, Tanzania

RE: Motions filed by Jacques Mungwarere

Dear Mr. Registrar,

I am the judge presiding over the prosecution of Jacques Mungwarere before the Superior Court of Justice in Ottawa, Canada, which is scheduled to begin hearing evidence before a jury on 28 May 2012. In this capacity, I have been made aware of several disclosure motions filed by Mr. Mungwarere before various Trial Chambers and the Appeals Chamber at the ICTR. In the interests of international cooperation and mutual assistance, I make the following requests:

1. I respectfully request each of the aforementioned Chambers to grant Mr. Mungwarere the requisite standing to proceed with each of his pending requests.
2. I respectfully request each of the aforementioned Chambers to accord Mr. Mungwarere the same courtesy and cooperation as would be accorded to the Public Prosecution Service of Canada or to an accused being tried before the ICTR, in accordance with all of their rules governing disclosure motions.
3. I respectfully request each of the aforementioned Chambers to disclose to Mr. Mungwarere, in a timely fashion, such requested material as those Chambers may deem him to be entitled to receive, in accordance with all of their rules governing disclosure motions.

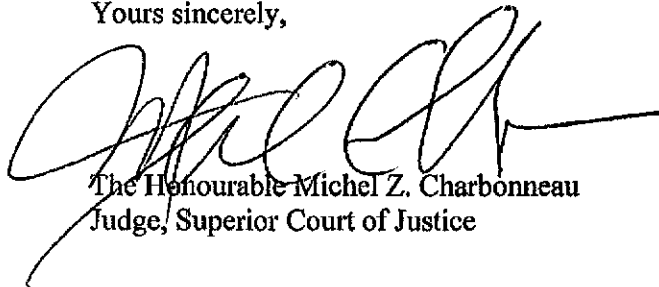
4. I respectfully request each of the aforementioned Chambers to subject the disclosure of such material to any witness protection measures in place at the ICTR, applied *mutatis mutandis* to the parties in the Canadian prosecution of Jacques Mungwarere.
5. I respectfully request each of the aforementioned Chambers to forward copies of the relevant witness protection measures currently in place to the file of *R. v. Jacques Mungwarere* (Superior Court of Justice (Ontario), Case No. 09-30466), so that those orders may be enforced by this court.

Please find enclosed a copy of my order binding all parties who may receive disclosure from the ICTR to comply with all relevant witness protection measures.

Please convey copies of this letter and the enclosed court order to each of the Trial and Appeals Chambers seized with Mr. Mungwarere's disclosure motions, a list of which appears in annex to this letter.

Thank you for your consideration of my requests.

Yours sincerely,



The Honourable Michel Z. Charbonneau
Judge, Superior Court of Justice

Encl : Order (dated 4 April 2012)
List of ICTR Cases Having Jacques Mungwarere Pending Disclosure Motions

Cc: Judge Vagn Joensen, President of ICTR
Office of the President
International Criminal Tribunal for Rwanda
Arusha International Conference Centre
P.O. Box 6016
Arusha, Tanzania

261/A

Court File No. 09-30466

COURT OF ONTARIO
SUPERIOR COURT OF JUSTICE
(East Region)

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JACQUES MUNGWARERE

Accused

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

CONSIDERING that this Court is aware that Jacques Mungwarere, through his counsel, has made several requests for disclosure of material at the International Criminal Tribunal for Rwanda (ICTR), which requests are still pending at this time;

CONSIDERING that Jacques Mungwarere, through his counsel, may possibly make further requests for disclosure of material at the ICTR;

CONSIDERING that the pending requests for material include requests for access to material that is confidential under witness protection measures at the ICTR;

CONSIDERING that any potential future requests for material will likely include requests for access to material that is confidential under witness protection measures at the ICTR;

CONSIDERING that an order of this Court is necessary so as to ensure the compliance with and enforcement of those witness protection measures regarding any material that may be disclosed to Mr. Mungwarere by the ICTR;

BY THIS PRESENT:

THE COURT ORDERS the Accused, his representatives and Her Majesty the Queen's representatives, upon receiving such disclosure from the International Criminal Tribunal of Rwanda, to comply with all such witness protection measures in place at the International Criminal Tribunal for Rwanda, applied *mutatis mutandis* to the parties in the case of Jacques Mungwarere before the Superior Court of Justice (Ontario), Canada.

ORDER rendered at Ottawa, Ontario, Canada, this 4th day of April 2012.

A handwritten signature in black ink, appearing to read 'Michel Charbonneau', written over a horizontal line.

The Honourable Justice, Michel Z. Charbonneau
Judge of the Superior Court of Justice,
Court of Ontario
CANADA

**LIST OF ICTR CASES HAVING JACQUES MUNGWARERE PENDING
DISCLOSURE MOTIONS**

TRIAL CHAMBER LEVEL:

Jacques Mungwarere's various pending disclosure motions at the Trial Chamber level are in the following cases, and are all before Judge Vagn Joensen, President of the ICTR:

PROSECUTOR v. KAYISHEMA et al. - Case No. ICTR-95-1
PROSECUTOR v. BAGILISHEMA - Case No. ICTR-95-1A
PROSECUTOR v. MUHIMANA - Case No. ICTR-95-1B
PROSECUTOR v. NDIMBATI - Case No. ICTR-95-1
PROSECUTOR v. SIKUBWABO - Case No. ICTR-95-1D
PROSECUTOR v. NIYITEGEKA - Case No. ICTR-96-14
PROSECUTOR v. NTAKIRUTIMANA et al. - Case No. ICTR-96-10/17
PROSECUTOR v. MUSEMA - Case No. ICTR-96-13
PROSECUTOR v. MUNYAKAZI - Case No. ICTR-97-36A
PROSECUTOR v. NCHAMIHIGO - Case No. ICTR-01-63
PROSECUTOR v. NDINDABAHIZI - Case No. ICTR-01-71

APPEALS CHAMBER LEVEL:

The following four Jacques Mungwarere disclosure motions are before the relevant panels of the ICTR Appeals Chamber hearing each of these appeals:

**JACQUES MUNGWARERE'S URGENT MOTION FOR ACCESS TO
MATERIAL IN THE BIZIMUNGU ET AL. CASE** - Case No. ICTR-99-50-A

**JACQUES MUNGWARERE'S URGENT MOTION FOR ACCESS TO
MATERIAL IN THE KAREMERA ET AL. CASE** - Case No. ICTR-98-44-A

**JACQUES MUNGWARERE'S URGENT MOTION FOR ACCESS TO
MATERIAL IN THE NDINDILYIMANA ET AL. CASE** - Case No. ICTR-00-56-A

**JACQUES MUNGWARERE'S URGENT MOTION FOR ACCESS TO
MATERIAL IN THE NYIRAMASUHUKE ET AL. CASE** - Case No. ICTR-98-42-A

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	☐ Team I N. M. Diallo	☐ Team II C. K. Hometowu N. M. Diallo	☐ Team III C. K. Hometowu
	☐ OIC, JLSD P. Besnier	☐ OIC, JPU C. K. Hometowu	☒ Appeals Chamber / The Hague R. Muzigo-Morrison
From:	☐ Chamber (names)	☐ Defence (names)	☐ Prosecutor's Office (names)
	☐ Other: Jacques Mungwarere (names)		
Case Name:	The Prosecutor vs. Karemera et al		Case Number: ICTR-98-44-A
Dates:	Transmitted: 10 April 2012		Document's date: 10 April 2012
No. of Pages:	7 + 5 (Annex II)	Original Language:	☒ English ☐ French ☐ Kinyarwanda
Title of Document:	REPLY TO PROSECUTOR'S RESPONSE TO JACQUES MUNGWARERE'S URGENT MOTION FOR ACCESS TO MATERIAL IN THE KAREMERA ET AL. CASE + Annex II		
Classification Level:		TRIM Document Type:	
☐ Ex Parte ☐ Strictly Confidential / Under Seal ☐ Confidential ☒ Public		☐ Indictment ☐ Warrant ☐ Correspondence ☐ Submission from non-parties ☐ Decision ☐ Affidavit ☐ Notice of Appeal ☐ Submission from parties ☐ Disclosure ☐ Order ☐ Appeal Book ☐ Accused particulars ☐ Judgement ☐ Motion ☐ Book of Authorities	

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

☐ Filing Party hereby submits only the original, and **will not submit** any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):

☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	☐ English ☐ French ☐ Kinyarwanda
Translation	in	☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

☐ English ☐ French ☐ Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

☐ The OTP is overseeing translation. The document is submitted for translation to: ☐ The Language Services Section of the ICTR / Arusha. ☐ The Language Services Section of the ICTR / The Hague. ☐ An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	☐ DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	COMMENTS	☐ Required date:
☐ Urgent		☐ Hearing date:
☐ Normal		☐ Other deadlines: