

MICT-12-25-AR14.1
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**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-12-25-AR14.1

Date: 25 May 2016

Original: English

IN THE APPEALS CHAMBER

Before: Judge Burton Hall, Presiding
Judge Joseph E. Chiondo Masanche
Judge Mparany Mamy Richard Rajohnson
Judge José Ricardo de Prada Solaesa
Judge Ben Emmerson

Registrar: Mr. John Hocking

Decision of: 25 May 2016

PROSECUTOR

v.

JEAN UWINKINDI

PUBLIC

DECISION ON MOTIONS FOR DISCLOSURE

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Richard Karegyesa
Mr. Cheickh Bangoura

Counsel for Mr. Jean Uwinkindi:

Mr. Gatera Gashabana

**Received by the Registry
Mechanism for International Criminal Tribunals
25/05/2016 13:18**

A handwritten signature in black ink, appearing to read 'McLau Carter'.

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

NOTING that, on 22 October 2015, a Trial Chamber of the Mechanism (“Trial Chamber”) dismissed Mr. Jean Uwinkindi’s request for revocation of the order referring his case to Rwanda;²

NOTING that Mr. Uwinkindi has since appealed the Impugned Decision;³

NOTING that, in a confidential motion filed on 3 March 2016 seeking the admission of additional evidence on appeal pursuant to Rule 142 of the Rules of Procedure and Evidence of the Mechanism (“Rules”), Mr. Uwinkindi requested, *inter alia*, that the Appeals Chamber order the Prosecution to disclose a report that was sent to the Prosecution in June 2015 (“Report”);⁴

NOTING that, in the Prosecution’s confidential filing of 19 April 2016, filed in response, *inter alia*, to Mr. Uwinkindi’s Second Additional Evidence Motion, it submitted that the Report was not disclosed to Mr. Uwinkindi because it was marked “Confidential – Not for Distribution” by the author and because, in the view of the Prosecution, the Report does not fall within the ambit of material subject to disclosure under Rule 73 of the Rules and that “the unsigned document fell short of being either factual or expert evidence”;⁵

NOTING FURTHER that the Prosecution filed the Report as a confidential and *ex parte* annex to the Prosecution’s Consolidated Response⁶ for determination by the Appeals Chamber as to whether it should be disclosed to Mr. Uwinkindi;⁷

BEING SEISED OF two motions filed confidentially by Mr. Uwinkindi on 26 April 2016 and 4 May 2016 requesting that the Prosecution be ordered to disclose the Report pursuant, *inter alia*,

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 7 December 2015.

² See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Decision on Uwinkindi’s Request for Revocation, 22 October 2015 (“Impugned Decision”), para. 42.

³ See Notice of Appeal from the Defence of Jean Uwinkindi, 20 November 2015 (the English translation of the French original was filed on 27 November 2015).

⁴ Second Motion by Jean Uwinkindi Defence for Admission of Evidence Pursuant to Rule 142 of the Rules of Procedure and Evidence (confidential), 3 March 2016 (the English translation of the French original was filed on 4 May 2016) (“Second Additional Evidence Motion”), paras. 8-18, 41. See also Motion by the Defence of Jean Uwinkindi for Admission of Evidence Pursuant to Rule 142 of the Rules of Procedure and Evidence, 2 March 2016 (the English translation of the French original was filed on 11 March 2016), para. 29.

⁵ Prosecution’s Consolidated Response to *Requête de la Défense d’Uwinkindi Jean aux fins d’admission des moyens de preuve en application de l’article 142 du Règlement de procédure et de preuve* dated 21 Feb[ruary], 3 March 2016 and 17 March 2016 (confidential), 19 April 2016 (“Prosecution’s Consolidated Response”), para. 16.

⁶ Confidential and *Ex Parte* Annex to Prosecution’s Consolidated Response (confidential and *ex parte*), 19 April 2016 (“Annex”).

⁷ Prosecution’s Consolidated Response, para. 16.

to Rules 71(B) and 73 of the Rules in order to allow Mr. Uwinkindi to review it and make submissions as to the admissibility of the Report as additional evidence on appeal;⁸

NOTING Mr. Uwinkindi's submissions that the Report confirms his arguments on appeal that the Trial Chamber erred in the Impugned Decision and that his fair trial rights in Rwanda were violated;⁹

NOTING that the Prosecution has not filed a response to either motion;¹⁰

RECALLING that Rule 73(A) of the Rules provides that "[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material that in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence";

FINDING that Mr. Uwinkindi's submissions¹¹ fail to demonstrate how the Report may suggest his innocence or mitigate his guilt or affect the credibility of Prosecution evidence and, therefore, that Mr. Uwinkindi does not show that the Report constitutes exculpatory material falling within the ambit of Rule 73 of the Rules;

RECALLING that Rule 71(B) of the Rules provides, *inter alia*, that the Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence;¹²

CONSIDERING that Rule 71(B) of the Rules applies to appeal proceedings;¹³

⁸ See Urgent Defence Motion for Disclosure of Additional Evidence by Prosecution (confidential), 26 April 2016 (the English translation of the French original was filed on 6 May 2016) ("Motion"), paras. 5, 7-10, 16, 19-22, 23; *Requête complémentaire de la Défense aux fins de divulgation par le Procureur d'un moyen de preuve additionnel* (confidential), 4 May 2016 (the English translation of the French original was filed on 18 May 2016) ("Supplemental Motion"), paras. 6-20, 24, 28, n. 3.

⁹ See Second Additional Evidence Motion, paras. 11, 12, 43-46. Cf. Supplemental Motion, para. 21.

¹⁰ See Practice Direction on Requirements and Procedures for Appeals, MICT/10, 6 August 2013, para. 19.

¹¹ See Motion, para. 8; Supplemental Motion, paras. 6-20.

¹² The Appeals Chamber observes that, in material respects, Rule 71(B) of the Rules tracks the language of Rules 66(B) of the Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia ("ICTY") and for the International Criminal Tribunal for Rwanda ("ICTR") (collectively, "*ad hoc* Tribunals"). Consequently, the Appeals Chamber finds the Appeals Chamber jurisprudence of the *ad hoc* Tribunals interpreting Rule 66(B) of the ICTY and ICTR Rules of Procedure and Evidence highly relevant in its interpretation of Rule 71(B) of the Rules. See *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 6.

¹³ See *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo's Motion for Admission of Additional Evidence (confidential), 12 January 2007 ("*Bralo* Decision of 12 January 2007"), para. 25; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB (public redacted version), 1 December 2006 ("*Nahimana et al.* Decision of 1 December 2006"), para. 16; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 26 September 2006 ("*Bagosora et al.* Decision

CONSIDERING that the obligation to provide access pursuant to Rule 71(B) of the Rules is only triggered by a sufficiently specific request by the Defence;¹⁴

CONSIDERING FURTHER that, prior to obtaining a judicial order for the inspection of any item material the preparation of the defence, the applicant must: (i) demonstrate that the material sought is in the custody or control of the Prosecution; (ii) establish the *prima facie* materiality of the document sought to the preparation of the defence case; and (iii) specifically identify the requested material;¹⁵

FINDING that, as Mr. Uwinkindi has specifically identified the requested material and that there is no dispute that the Report is in the custody and control of the Prosecution,¹⁶ the first and last criteria triggering inspection under Rule 71(B) of the Rules have been satisfied;

CONSIDERING that, in relation to appellate proceedings, the Prosecution should consider the following criteria to determine if material in its possession is material to the preparation of the defence in accordance with Rule 71(B) of the Rules: (i) whether the issue to which the material relates is the subject of a ground of appeal; or (ii) whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence admissible on appeal;¹⁷

CONSIDERING that Mr. Uwinkindi has made a sufficient showing that the Report pertains to issues raised in his appeal and could reasonably lead to further investigation and the discovery of additional evidence which may be potentially admissible under Rule 142 of the Rules;

FINDING that Mr. Uwinkindi has also satisfied the second criterion triggering inspection under Rule 71(B) of the Rules;

CONSIDERING that the Prosecution should not disclose the Report, which was provided confidentially, without first obtaining consent to disclose it from its author;¹⁸

of 26 September 2006'), para. 9, n. 35; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Prosecution's Motion to be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C) (confidential), 27 March 2003 ("Krstić Decision of 27 March 2003"), p. 4.

¹⁴ *Bagosora et al.* Decision of 26 September 2006, para. 10.

¹⁵ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (public redacted version), 23 January 2008 ("Karemera et al. Decision of 23 January 2008"), para. 12. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 18 May 2010, para. 13.

¹⁶ See Motion, paras. 2, 3, 19, 23; Supplemental Motion, paras. 10, 11, 20, 21, p. 8. Prosecution's Consolidated Response, para. 16; Annex.

¹⁷ See *Bralo* Decision of 12 January 2007, para. 25; *Nahimana et al.* Decision of 1 December 2006, para. 16; *Krstić* Decision of 27 March 2003, p. 4.

¹⁸ Cf. Rule 76(B) of the Rules.

PURSUANT TO Rules 55, 71(B), and 131 of the Rules;

HEREBY GRANTS, in part, the Motion and the Supplemental Motion;

ORDERS the Prosecution, within five (5) days of the filing of this decision, to contact the author of the Report to ascertain whether the author consents to disclose the Report on a confidential or non-confidential basis to Mr. Uwinkindi;

ORDERS the Prosecution to file written submissions within seven (7) days of the filing of this decision stating whether the author consents to the disclosure of the Report on a confidential or non-confidential basis to Mr. Uwinkindi;

In the event that the author of the Report will consent to its disclosure, the Appeals Chamber

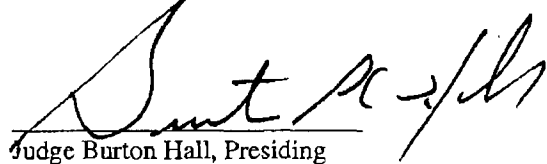
FURTHER ORDERS the Prosecution to allow Mr. Uwinkindi to inspect the Report consistent with Rule 71(B) of the Rules as soon as practicable;

ORDERS Mr. Uwinkindi to file any motion related to the Report within seven (7) days of having inspected it; and

DENIES the Motion and the Supplemental Motion in all other respects.

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

Done this 25th of May 2016,
At The Hague,
The Netherlands.


Judge Burton Hall, Presiding

[Seal of the Mechanism]





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