



Mechanism for International Criminal Tribunals

Case No. MICT-13-33-R86.2

Date: 9 November 2015

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Vagn Joensen
Registrar: Mr. John Hocking
Decision of: 9 November 2015

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

**SECOND DECISION ON MOTION FOR ACCESS TO
CONFIDENTIAL MATERIAL FROM THE *NSHOGOZA* CASE**

Counsel for Jean de dieu Kamuhanda:

Mr. Peter Robinson

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Richard Karegyesa
Ms. Sunkarie Ballah-Conteh

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Mechanism for International Criminal Tribunals
09/11/2015 14:55

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1. I, Vagn Joensen, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case, am seised of a motion filed by Mr. Jean de Dieu Kamuhanda on 26 September 2015 requesting access to confidential *inter partes* material from the case of *The Prosecutor v Léonidas Nshogoza*, Case No. ICTR-07-91.¹ The Prosecution filed its response and confidential annex on 8 October 2015.²

I. SUBMISSIONS

2. In the Motion, Mr. Kamuhanda requests access to (i) an exhibit (“P2”), which was admitted in evidence under seal in the *Nshogoza* case and identifies witnesses who are otherwise referred to in evidence by pseudonyms; and (ii) all transcripts of recordings or reports of interviews conducted by counsel appointed to investigate allegations of interferences with witnesses and possible false testimony that relate to the events at the Gikomero Parish on 12 April 1994 and were disclosed to the defence in the *Nshogoza* case.³ He argues that the forensic purpose for seeking this material is to enable him to understand the evidence of witnesses who testified about the events for which he was convicted and conduct an investigation in order to “uncover new facts” for the purposes of a review of his convictions.⁴

3. The Prosecution responds that Mr. Kamuhanda has failed to identify a legitimate forensic purpose for access to the documents requested and is engaging in an inappropriate fishing expedition.⁵ In particular, it submits that he has failed to demonstrate how the identity of specific individuals affects the narrative contained in the open session transcripts of testimonies, which are available to him, and that his request for access to all transcripts or reports of interviews is impermissibly broad.⁶ The Prosecution further observes that Mr. Kamuhanda is in possession of a substantial amount of material from the *Nshogoza* case, including closed-session transcripts of testimonies and witness statements, and is, therefore, able to identify with greater particularity how specific documents could be of assistance to him.⁷

¹ Order Assigning a Single Judge to Consider an Application Pursuant to Rule 86, 7 October 2015, p. 2. See also Second Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 26 September 2015 (“Motion”), paras. 3-5, 9-14.

² Prosecution Response to Second Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 8 October 2015 (“Response”), paras. 1-13. On 9 October 2015 the Prosecution filed a corrected cover page of the Response.

³ Response, paras. 1-13. On 9 October 2015 the Prosecution filed a corrected cover page of the Response.

⁴ Motion, paras. 4-5, 9, 14.

⁵ Prosecution Response to Second Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 8 October 2015 (“Response”), paras. 1-7, 9-12.

⁶ Response, paras. 5, 9.

⁷ Response, paras. 6, 8, 13. On 9 October 2015 the Prosecution filed a corrected cover page of the Response.

II. DISCUSSION

4. Pursuant to Rule 86(F) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), protective measures ordered in proceedings before the International Criminal Tribunal for Rwanda (“ICTR”) continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism unless and until they are rescinded, varied or augmented. Moreover, in accordance with the settled case law of the ICTR and the ICTY, a request for access to confidential material from another case can only be granted where such material is sufficiently identified and a legitimate forensic purpose for granting access is sufficiently demonstrated.⁸

5. In the Motion, Mr. Kamuhanda has identified the material sought with sufficient precision.⁹ However, given that the proceedings against Mr. Kamuhanda have been definitively concluded, the only forensic purpose, which would be legitimate in these circumstances, is for establishing a “new fact” capable of constituting the basis for a review of Mr. Kamuhanda’s convictions.¹⁰ In this respect, although Mr. Kamuhanda has not demonstrated a legitimate forensic purpose for accessing the entire contents of exhibit P2, I am prepared to accept that he is entitled to access a redacted version, which identifies only the names of witnesses who testified both in his case and in the *Nshogoza* case so that he can properly understand their evidence. As to his request related to transcripts of recordings or reports of interviews conducted by counsel investigating allegations of interferences with witnesses and false testimony, Mr. Kamuhanda’s cursory submissions, absent *any* explanation or clarification, fail to demonstrate a legitimate forensic purpose justifying access to the material requested.¹¹ This is despite the fact that Mr. Kamuhanda’s new counsel has been granted access to all material in Mr. Kamuhanda’s case and has access to a substantial amount of material in the *Nshogoza* case.¹²

⁸ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić’s Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009, para. 7; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A. N. Rutaganda’s Appeal against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009 (“*Rutaganda* Decision of 22 April 2009”), para. 10.

⁹ Motion, paras. 4-5, 10-11.

¹⁰ See *Rutaganda* Decision of 22 April 2009, para. 16 (“By noting that the only legitimate forensic purpose that the requested disclosure could have is in relation to a request for review of the final judgement, the Trial Chamber merely placed the request in its proper context. The Appeals Chamber finds no error in this reasoning”).

¹¹ In particular, Mr. Kamuhanda merely asserted that “[he] has a legitimate forensic purpose for this material because any information about the events at Gikomero Parish for which he was convicted will assist his new counsel in his investigation to uncover new facts showing that Mr. Kamuhanda never participated in those events and that the prosecution witnesses who testified to that effect were not telling the truth.” See Motion, para. 13.

¹² See also First Decision on Access to Material from the *Nshogoza* Case, para. 10.

III. DISPOSITION

6. For the foregoing reasons, I **GRANT** Mr. Kamuhanda's request for access to a copy of Exhibit P2, in part;

INSTRUCT the Registry to provide him with a copy of exhibit P2, which is redacted in order to identify only the witnesses who testified in both Mr. Kamuhanda's case and the *Nshogoza* case;

ORDER that any protective measures granted by the ICTR to protect the above-mentioned witnesses shall remain in force;

ORDER that, Mr. Kamuhanda, his counsel, legal associates, and any employees who have been instructed or authorised by him, his counsel, and legal associates to have access to P2 shall not disclose to any third party the names of protected witnesses, their whereabouts, or any information that would enable them to be identified and would breach the confidentiality of the protective measures in place;

ORDER that, should Mr. Kamuhanda's counsel or any legal associate or employee who is authorised to have access to the redacted copy of exhibit P2 withdraw from the case, any copy of exhibit P2 that remains in his or her possession shall be returned to the Registry; and

DISMISS the remainder of the Motion.

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

Done this 9th day of November 2015,
At Arusha,
Tanzania


Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]





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Case Name/ Affaire :	Jean de Dieu Kamuhanda		Case Number/ Affaire n° : MICT-13-35-R 86.2
Date Created/ Daté du :	Date transmitted/ Transmis le :	No. of Pages/ Nombre de pages :	
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