

MICT-12-10-R86G.1

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Mechanism for International Criminal Tribunals

Case Nos.: MICT-12-16-R86G.1  
MICT-12-15-R86G.1  
MICT-12-10-R86G.1

Date: 27 February 2018

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge

Registrar: Mr. Olufemi Elias

Decision of: 27 February 2018

PROSECUTOR

PROSECUTOR

v.

v.

ELIÉZER NIYITEGEKA

CLÉMENT KAYISHEMA  
&  
OBED RUZINDANA

*PUBLIC*

**DECISION ON MOTIONS FOR ACCESS TO CONFIDENTIAL MATERIALS  
IN THE NIYITEGEKA AND KAYISHEMA AND RUZINDANA CASES**

The Office of the Prosecutor

Mr. Serge Brammertz  
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Mr. Steven Kay  
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1. I, THEODOR MERON, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Presiding Judge in the case of *Prosecutor v. Eliézer Niyitegeka*, Case No. MICT-12-16-R,<sup>1</sup> am seized of two motions filed by Mr. Alfred Musema (“Musema”) on 1 and 2 November 2017, respectively, in which he requests variation of protective measures and access to *inter partes* confidential materials in the International Criminal Tribunal for Rwanda (“ICTR”) cases of *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14 (“*Niyitegeka* case”) and *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1 (“*Kayishema and Ruzindana* case”).<sup>2</sup> On 13 November 2017, the Prosecution filed its response,<sup>3</sup> to which Musema did not reply.

2. Musema seeks, *inter alia*, access to all confidential *inter partes* material in the form of witness statements, transcripts, exhibits, filings, and other confidential materials with respect to: (i) Witness HR, who testified in the *Niyitegeka* case, and appeared as Witness F in the case of *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13 (“Witness HR/F” and “*Musema* case”, respectively); and (ii) Witness GGR or JJ, who testified in the *Niyitegeka* and *Kayishema and Ruzindana* cases, respectively, and appeared as Witness R in the *Musema* case (“Witness GGR/JJ/R”).<sup>4</sup> Musema argues that a legitimate forensic purpose exists as there is a clear temporal and geographic nexus between the evidence in his case and the other two cases and that the “good chance” standard has also been satisfied.<sup>5</sup>

3. With respect to Witness HR/F, Musema contends that the Trial Chamber in his case relied on this witness’s testimony to convict him of attacks at Muyira Hill on 13 and 14 May 1994, and that this witness testified about the same attacks in the *Niyitegeka* case.<sup>6</sup> He further submits that Witness GGR/JJ/R was the sole witness in relation to his conviction for the attack on Rwirambo

<sup>1</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Order Assigning Judges to a Case Before the Appeals Chamber, 21 June 2017. In accordance with Rule 86(K) of the Rules of Procedure and Evidence of the Mechanism, an application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber.

<sup>2</sup> Motion for Access to Confidential *Inter Partes* Material from *The Prosecutor v. Eliézer Niyitegeka*, 1 November 2017 (confidential with public Annex A) (“First Motion”), paras. 3, 4, 6, 13-18; Motion for Access to Confidential *Inter Partes* Material from *The Prosecutor v. Clément Kayishema and Obed Ruzindana* and *The Prosecutor v. Eliézer Niyitegeka*, 1 November 2017 (confidential with public Annex A) (“Second Motion”), paras. 3, 4, 6, 13-18 (collectively, “Motions”). See also *Prosecutor v. Eliézer Niyitegeka, Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. MICT-12-10-R86G.1, Order Assigning a Chamber to Consider an Application Pursuant to Rule 86, 14 November 2017 (confidential), p. 1; *Prosecutor v. Eliézer Niyitegeka*, Case No. MICT-12-16-R86G.1, Order Assigning a Chamber to Consider an Application Pursuant to Rule 86, 14 November 2017 (confidential), p. 1.

<sup>3</sup> Prosecutor’s Consolidated Response to Motion for Access to Confidential *Inter Partes* Material, 13 November 2017 (confidential) (“Prosecution Response”).

<sup>4</sup> First Motion, paras. 4, 6, 18; Second Motion, paras. 4, 6, 18. See also First Motion, paras. 9-15; Second Motion, paras. 9-15.

<sup>5</sup> First Motion, paras. 13, 15; Second Motion, paras. 13, 15.

<sup>6</sup> First Motion, paras. 10-12.

Hill between late April and early May 1994,<sup>7</sup> and that during trial he already highlighted discrepancies between this witness's evidence in the *Musema* case and the *Kayishema and Ruzindana* case.<sup>8</sup> Musema avers that Witness GGR/JJ/R also testified about attacks on Muyira Hill in all three cases, but unlike in the *Niyitegeka* and *Kayishema and Ruzindana* cases, the Trial Chamber in his case did not rely on this witness for his conviction.<sup>9</sup> According to Musema, disclosure of the requested confidential material would enable his counsel to conduct a comprehensive examination of the evidence of Witnesses HR/F and GGR/JJ/R and assess whether or not sufficient discrepancies exist to merit the raising of a "new fact" for the purposes of a review.<sup>10</sup>

4. The Prosecution responds that the Motions are unjustified and should be dismissed in their entirety.<sup>11</sup> It submits that Musema's "broad and speculative assertions" of potential discrepancies between these witnesses' testimonies in various cases fail to demonstrate a legitimate forensic purpose relating to a "new fact" capable of constituting the basis for a review application of his convictions.<sup>12</sup> It further responds that Musema has access to, and has already requested, public materials that he may use to establish the existence of any "new fact".<sup>13</sup>

5. In accordance with the settled jurisprudence, a party is entitled to seek material from any source, including from another case before the ICTR or the International Criminal Tribunal for the former Yugoslavia, to assist in the preparation of its case.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

<sup>7</sup> Second Motion, para. 10.

<sup>8</sup> Second Motion, para. 11. Musema further argues that Judge Aspegren, in a separate opinion, determined that discrepancies in Witness GGR/JJ/R's testimonies regarding Rwirambo Hill touched on "serious matters" and that it was not established beyond a reasonable doubt that Musema participated in attacks at Rwirambo Hill. *See* Second Motion, paras. 11, 14, referring to *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 ("*Musema* Trial Judgement"), Separate Opinion of Judge Lennart Aspegren, paras. 23, 26, 27.

<sup>9</sup> Second Motion, paras. 12, 13. According to Musema, the credibility of Witness GGR/JJ/R remains a live issue as the witness's evidence was relied upon to convict him for the attack on Rwirambo Hill. *See* Second Motion, para. 13.

<sup>10</sup> First Motion, paras. 2, 6, 13, 14; Second Motion, paras. 2, 6, 13, 14.

<sup>11</sup> Prosecution Response, paras. 7, 11, 15.

<sup>12</sup> Prosecution Response, paras. 7, 8, 10, 13.

<sup>13</sup> Prosecution Response, paras. 11, 12.

<sup>14</sup> *See, e.g., Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Stanislav Galić's Further Motion for Access to Confidential Materials in the *Karadžić* Case, 4 August 2016 ("*Karadžić* Decision of 4 August 2016"), para. 11 and references contained therein.

<sup>15</sup> *See, e.g., Karadžić* Decision of 4 August 2016, para. 11 and references contained therein.

<sup>16</sup> *See, e.g., Karadžić* Decision of 4 August 2016, para. 11 and references contained therein.

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.<sup>17</sup>

6. Musema has sufficiently identified the *inter partes* confidential materials to which he seeks access from the *Niyitegeka* and *Kayishema and Ruzindana* cases as well as nexus between these cases and the *Musema* case.<sup>18</sup> Specifically, he has identified that material related to Witnesses HR/F and GGR/JJ/R and their evidence on a large-scale attack against Tutsi refugees at Muyira Hill on 13 and 14 May 1994 temporally and geographically overlap in all three cases.<sup>19</sup>

7. While access to confidential material in another case may be requested at the stage where a case has concluded, the only legitimate forensic purpose for obtaining access is to establish a “new fact” capable of constituting the basis for a review application.<sup>20</sup> However, to demonstrate a legitimate forensic purpose, Musema, whose case has concluded, only makes general submissions that the witnesses in question testified in his case as well as in the *Niyitegeka* and/or the *Kayishema and Ruzindana* cases and that access to confidential material in those cases would assist his counsel in conducting a comprehensive review for determining whether a “new fact” warranting review exists. A party requesting access to confidential material may not engage in a “fishing expedition”.<sup>21</sup> In the absence of more particularised submissions, based on publicly available material that Musema has already requested,<sup>22</sup> the mere fact that these witnesses testified in other cases on related events does not demonstrate that their evidence is relevant to establishing a “new fact” in the context of review proceedings in Musema’s case or that any related material may be of material assistance to the preparation of his review application.<sup>23</sup> Consequently, the Motions do not

<sup>17</sup> See, e.g., *Karadžić* Decision of 4 August 2016, para. 11 and references contained therein.

<sup>18</sup> See First Motion, paras. 4, 6, 10-13, 18; Second Motion, paras. 4, 6, 10, 12, 13, 18. See also *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Stanislav Galić’s Motion for Access to Confidential Materials in the *Karadžić* Case, 9 June 2016 (“*Karadžić* Decision of 9 June 2016”), para. 9.

<sup>19</sup> See First Motion, paras. 6, 10-13; Second Motion, paras. 6, 10, 12, 13. See also *Musema* Trial Judgement, paras. 901-915; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, paras. 413, 414, 420, 440, 451, 454, 480; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 25 May 1999, paras. 567-571.

<sup>20</sup> See *Karadžić* Decision of 9 June 2016, para. 10 and references contained therein.

<sup>21</sup> See *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. 11 and references contained therein. See also *Eliézer Niyitegeka v. Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016 (“*Niyitegeka* Decision of 29 January 2016”), para. 9.

<sup>22</sup> According to Musema, his counsel has already requested copies from the Registry of public witness statements, transcripts, and exhibits along with other public material, including filings, decisions, and hearing transcripts related to both witnesses in the *Niyitegeka* and *Kayishema and Ruzindana* cases. See First Motion, para. 6; Second Motion, para. 6.

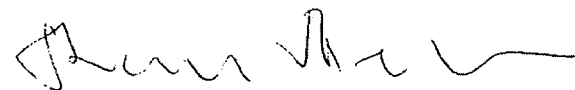
<sup>23</sup> See, e.g., *Karadžić* Decision of 9 June 2016, para. 10; *Niyitegeka* Decision of 29 January 2016, para. 9.

satisfy the applicable standard for gaining access to *inter partes* confidential materials from the *Niyitegeka* and *Kayishema and Ruzindana* cases.<sup>24</sup>

8. For the foregoing reasons, the Motions are **DISMISSED** in their entirety.

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

Done this 27th day of February 2018,  
The Hague,  
The Netherlands



Judge Theodor Meron  
Presiding Judge

[Seal of the Mechanism]



<sup>24</sup> Musema has also requested variation of protective measures granted to Witnesses HR/F and GGR/JJ/R in the *Niyitegeka* and/or the *Kayishema and Ruzindana* cases. See First Motion, paras. 3, 18; Second Motion, paras. 3, 18. Given that access to confidential materials is not granted, these requests are also dismissed.



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