

MICT-13-33-R86.1
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UNITED
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Mechanism for International Criminal Tribunals

Case No. MICT-13-33-R86.1

Date: 21 September 2015

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

Decision of: 21 September 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

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

The Office of the Prosecutor

Hassan Bubacar Jallow
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Peter Robinson

Counsel for Léonidas Nshogoza

Allison Turner

Received by the Registry
Mechanism for International Criminal Tribunals

21/09/2015 14:35

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1. I, VAGN JOENSEN, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) am seised of a motion filed by Jean de Dieu Kamuhanda (“Kamuhanda”) in which he requests access to confidential *inter partes* material from the case of *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91 (“*Nshogoza* case”) before the International Criminal Tribunal for Rwanda (“ICTR”).¹

I. BACKGROUND

2. On 31 August 2015, Kamuhanda requested access to all confidential *inter partes* material in the *Nshogoza* case and stated that the confidential access will assist him in identifying new facts that can support a motion for the review of his judgement that he is preparing to file with the Mechanism (“Application”).²

3. On 10 September 2015, the Prosecution filed a response and objected to the Application by stating that Kamuhanda failed to identify a legitimate forensic purpose for access to all of the confidential material from the *Nshogoza* case.³

4. On 11 September 2015, I was assigned as Single Judge to rule on the Application.⁴

II. DISCUSSION

5. Where protective measures have been ordered in any proceedings before the ICTR, they shall continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism, unless and until they are rescinded, varied, or augmented.⁵

6. I further recall that a party is entitled to seek material from any source, including another source before the ICTR, to assist in the preparation of its case⁶ and that, where a party requests

¹ Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 31 August 2015, paras. 1, 11 (“Application”).

² *Id.*, paras. 1, 5, 7, 9, 11.

³ Prosecution Response to Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 10 September 2015, paras. 3, 5, 10 (“Prosecution Response”).

⁴ Order Assigning a Single Judge to Consider an Application Pursuant to Rule 86, 11 September 2015.

⁵ See Rule 86(F)(i) of the Mechanism Rules of Procedure and Evidence.

⁶ *Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze *Pro Se* Motion for Disclosure of Confidential Decision in the Kajelijeli Case, 22 July 2014, p. 1 (“*Ntabakuze* Decision”). See, e.g., *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on Ildéphonse Nizeyimana’s Request

access to confidential material from another case, such material must be identified or described by its general nature and the party must demonstrate a legitimate forensic purpose for accessing it.⁷ Further, a Chamber or, in this case, the Single Judge must be satisfied that the requesting party has established that this material is likely to assist its case materially or that there is at least a good chance that it would.⁸

7. In support of his request for access to all confidential *inter partes* material in the *Nshogoza* case, Kamuhanda references two decisions from the Appeals Chamber in which such a request was granted.⁹ However, a case-specific analysis is required when a party requests access to confidential material from another case¹⁰ and, as such, I find the cases cited by Kamuhanda distinguishable from his present request. Indeed, in those cases the Prosecution did not object to the requested access,¹¹ which is not the situation here,¹² and in each case the Appeals Chamber determined that the requests dealt with events that were, respectively, largely overlapping and related to the case of each applicant.¹³

for Access to Closed Session Transcripts, 31 March 2011, para. 3 (“*Muvunyi Decision*”); *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-A, Decision on Georges A.N. Rutaganda’s Motion for Access to Confidential Material of Witness CSH from the *Rukundo* Case, 18 February 2010, para. 11 (“*Rukundo Decision*”); *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 (“*Zigiranyirazo Decision*”). See also *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-A, Decision on the Prosecution’s Motion Regarding the Terms of Access by Radovan Karadžić to Confidential Materials, 2 May 2014, p. 2 (“*Stanišić Decision*”).

⁷ *Ntabakuze Decision*, pp. 1-2; *Muvunyi Decision*, para. 3; *Rukundo Decision*, para. 11; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda’s Appeals Concerning Access to Confidential Materials in the *Karemura Et Al.* Case, 10 July 2009, para. 13 (“*Rutaganda Decision*”); *Zigiranyirazo Decision*, para. 7. See also *Stanišić Decision*, p. 2.

⁸ *Ntabakuze Decision*, p. 2; *Muvunyi Decision*, para. 3; *Rukundo Decision*, para. 12; *Rutaganda Decision*, para. 13; *Zigiranyirazo Decision*, para. 7.

⁹ Application, para. 5. The Applicant cites the following two cases from the International Criminal Tribunal for the former Yugoslavia: *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007 (“*Brđanin Decision*”); *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the *Blagojević and Jokić* Case, 18 January 2006 (“*Jokić Decision*”).

¹⁰ *Rukundo Decision*, para. 11; *Rutaganda Decision*, para. 13.

¹¹ *Brđanin Decision*, para. 2; *Jokić Decision*, para. 2.

¹² Prosecution Response, para. 3.

¹³ *Brđanin Decision*, para. 13; *Jokić Decision*, para. 5. In *Brđanin*, the Appeals Chamber found that the “events alleged in each Indictment clearly established the existence of a temporal and geographical overlap between the *Brđanin* Case and the Applicant’s case. Moreover, the Applicant’s and *Brđanin*’s alleged participation in the same JCE suggests a clear nexus between their cases”. The Chamber added that “the Applicant has clearly identified the confidential material to which he seeks access”. In *Jokić*, the Appeals Chamber determined that a legitimate forensic purpose existed after addressing the relation between the events in the *Jokić* case and in Momcilo Perisic’s case and also identified that “at the first status conference in the *Perisic* case, the Prosecution specifically acknowledged that

8. In the present matter, Kamuhanda submits that there is a “geographical, temporal and otherwise material overlap between the *Kamuhanda* and *Nshogoza* cases” but does not provide any specific information or reference from either case to support this assertion.¹⁴ Considering that the Kamuhanda case addressed his conduct in relation to events that took place in Gikomero commune in April 1994¹⁵ and that the *Nshogoza* case primarily concerned Nshogoza’s role as an investigator in the Kamuhanda case and his interaction with witnesses from 1 March 2004 to 31 May 2005,¹⁶ I fail to see any geographical or temporal overlap between the two cases.

9. I, however, note that the *Nshogoza* case focused on allegations of witness interference arising in the Kamuhanda trial, which does constitute a material overlap between the two cases. In this regard, Kamuhanda’s Application merely states that “several witnesses” testified in his case and in the *Nshogoza* case and only makes a general reference to Witnesses GAA, GAF and to his lead counsel and investigator at the time.¹⁷ Therefore, I find that the circumstances described above do not sufficiently demonstrate a legitimate forensic purpose for access to all confidential *inter partes* material in the *Nshogoza* case and that Kamuhanda has not sufficiently demonstrated a factual nexus between his case and all elements of the *Nshogoza* case.

10. Counsel for Kamuhanda has been granted access to all material in the Kamuhanda case¹⁸ and he is also entitled to access all public materials in the *Nshogoza* case. Considering the material available, I advise Kamuhanda that any future request should identify with greater particularity the witnesses and exhibits related to the points of overlap between his case and the

the Applicant should have access to the confidential materials in the *Blagojevic and Jokic* case, and requested that the Defence seek such access through the present Motion”.

¹⁴ Application, para. 6. Kamuhanda appears to support his contention that there is a material overlap between the two cases by referring to “several witnesses” who testified in both cases and by stating the charges against Mr. Nshogoza and his role in the Kamuhanda case.

¹⁵ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54-I, Indictment, 27 September 2009, paras. 6.44-6.46; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, Judgement, 22 January 2004, paras. 18, 59, 249, 292-294; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 15 March 2010, paras. 2-3.

¹⁶ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009, paras. 3-4; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, paras. 2-5.

¹⁷ Application, para. 6.

¹⁸ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Request for Access, 25 June 2015.

Nshogoza case in order to facilitate his access to the specific material relevant to his case.¹⁹ If Counsel for Kamuhanda does not currently possess the relevant public materials from the *Nshogoza* case he may request them directly from the Mechanism Registry.

11. Further, since the Application has not with sufficient particularity identified the material that will materially assist Kamuhanda, I need not address matters relating to witness protection.

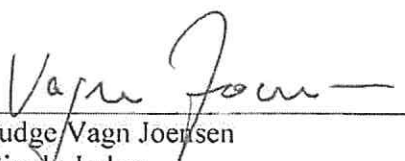
III. DISPOSITION

12. For the foregoing reasons, I

I. **DISMISS** the Application from Jean de Dieu Kamuhanda in its entirety.

Done in English and French, the English being authoritative.

Done this 21st day of September 2015,
At Arusha,
Tanzania



Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]



¹⁹ See *Édouard Karemera et al. v The Prosecution*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 11; *Zigiranyirazo* Decision, para. 9.