

MICT-13-33
20-07-2015
(483 - 477)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE PRESIDENT

Before: Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 20 July 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

MOTION TO RECLASSIFY *EX PARTE* MATERIAL

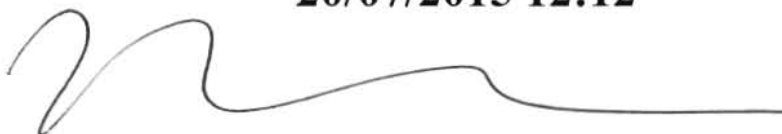
Office of the Prosecutor:

Mr. Hassan Jallow

Jean de dieu Kamuhanda:

Mr. Peter Robinson, Counsel

Received by the Registry
Mechanism for International Criminal Tribunals
20/07/2015 12:12



1. Jean de dieu Kamuhanda respectfully requests that the President, or a Single Judge designated by him, issue a decision reclassifying certain *ex parte* material in his case.

2. When Mr. Kamuhanda filed his first pleading with the Mechanism on 30 March 2015, he was advised that a case number had already been opened for his case with the Mechanism in 2013. His pleading received Registry sequential document number #430, indicating that 429 pages of material was already on file in his case.

3. The Registry subsequently informed Mr. Kamuhanda's counsel, Peter Robinson, that he could not have access to the 429 pages of material because it was classified as *ex parte*.

4. On 29 June 2015, Mr. Robinson wrote to the Registrar, asking to be informed of the identity of the filing party and pursuant to what Rule the material was filed.¹ The Registrar acknowledged receipt of the letter, but never responded to the request.

5. Mr. Kamuhanda now requests that the President, or Single Judge, review the material and order reclassification so that Mr. Kamuhanda can have access to it.

6. Mr. Kamuhanda has no information of the nature of the material, but cannot imagine any circumstances in which material concerning his case should be kept from him at this stage of the case.

7. Given the absence of any other apparent reason for judicial activity in his case, Mr. Kamuhanda suspects that the material may be related to requests for variation of protective measures of witnesses to allow closed session testimony and/or confidential statements to be disclosed to a State or third party pursuant to Rule 86.

8. Rule 86(H) provides that

A judge or bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the ICTY, the ICTR, or the Mechanism may seek to rescind, vary, or augment protective measures ordered in proceedings before the ICTY, the ICTR, or the Mechanism by applying to the President of the Mechanism, who shall refer the application to a Single Judge or to the Chamber remaining seised of the proceedings.

9. Nothing in this Rule indicates that the proceedings are to be *ex parte*.

¹ A copy of the letter is attached as Annex "A".

10. It is an important principle for the Mechanism that the defence be a party to any applications pursuant to Rule 86(H).²

11. The defence has an important interest in being heard when variance of protective measures is sought regardless of whether the witness was called to testify by the prosecution or the defence. For example, in the case of prosecution witnesses, the defence may be concerned if the witness referred by name to a person who later became a protected defence witness, and may suggest redaction where appropriate.

12. Where a protected prosecution witness consents to testify in another jurisdiction without protective measures, the defence may be prompted to request that the witness consent to rescission of his protective measures in his case, thus promoting his right to a public trial and facilitating making the archives of the Mechanism more transparent.

13. Knowledge that a prosecution witness is giving evidence in another proceeding may also assist the defence in discovering new facts that could form the basis of a request for review of a conviction.³

14. Finally, the defence can be of genuine assistance to the applicant by calling to its attention other relevant evidence that the applicant may wish to consider that contradicts or impeaches the requested testimony of a prosecution witness.

15. Mr. Kamuhanda accepts that there may be situations where redactions in a Rule 86(H) application may be appropriate, but he cannot imagine any situation where the fact of the application must be withheld from the defence.

16. There are three aspects to a motion pursuant to Rule 86(H)—the identity of the witness whose material is sought, the identity of the individual who is the subject of the investigation or proceeding for which the testimony is sought, and the identity of the State seeking disclosure.

² Public decisions have been issued on some Rule 86(H) applications before the MICT: *In Re Ntakirutimana et al*, No. MICT-12-17, *Decision in Respect to Jacques Mungwarere's Motions to Access Materials* (18 January 2013) at para. 15; *In Re Bagosora et al*, No. MICT-12-26, *Decision in Respect of the Request for Access to Materials Concerning Pascal Simbikangwa* (21 January 2013) at para. 10; *Prosecutor v Gatete*, MICT-13-42, *Decision in Respect to the Application for Variation of Protective Measures* (15 May 2013) at para. 13

³ See, for example, *Niyitegeka v Prosecutor*, No. MICT-12-16-R, *Decision on Niyitegeka's Request for Review and Assignment of Counsel* (13 July 2015) at para. 12

17. There is never any justification for withholding the identity of the protected witness whose testimony or evidence is sought, since the defence already knows the identity of the witnesses in his or her case.

18. There may be justification for redacting the name of the subject of the investigation or the proceeding if the moving party can make a showing that disclosure of that information to the defence may prejudice ongoing investigations or affect the security interests of the State.⁴ That may depend on the stage of the proceedings, and would be subject to change if an investigation resulted in public proceedings, for example.

19. There may also be justification for redacting the name of the State if there are so few Rwandans in that State that disclosing the fact that the State is investigating crimes from Gikomero may easily lead to the identity of the subject of the investigation. On the other hand, redacting the name of Rwanda as the requesting State would serve no purpose since it would not reveal the identity of the subject of the investigation.

20. In each of the three aspects discussed above, there is no justification whatsoever for the matter being heard entirely *ex parte*.

21. The ICTR has held that as a general rule, applications must be filed *inter partes*. Such a rule finds its expression in the general principle of *audi alteram partem*. *Ex parte* proceedings should be entertained only where disclosure to the other party or parties would be likely to unfairly prejudice either the party making the application or some persons involved in or related to that application.⁵

22. The ICTY has also held that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so as disclosure would be likely to prejudice the party making the application or some other person.⁶

⁴ See, for example, Rule 71(C)

⁵ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Exclude Testimony of Prosecution Witness ADE* (30 March 2006) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 6

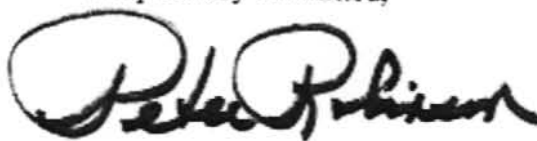
⁶ *Prosecutor v. Blaskic*, No.:IT-95-14-R, *Decision on Defence's Request for Relief with Regard to Ex Parte Filings* (20 November 2006) at p. 4

23. At the International Criminal Court, it has been held that *ex parte* proceedings are only to be used exceptionally when they are truly necessary and when no other lesser procedures are available. Even when an *ex parte* procedure is used, the other party should be notified and its legal basis should be explained, unless to do so would risk revealing the very thing that requires protection.⁷ The existence of decisions issued in *ex parte* proceedings shall be made known to the public, unless specifically ordered postponed by the Chamber upon a showing of good cause.⁸

24. It is therefore respectfully requested that the *ex parte* material in Mr. Kamuhanda's case be reclassified as *inter partes* and that to the extent that good cause is shown that parts of the material be withheld from the defence, the filing party should be ordered to file redacted versions.⁹

Word count: 1794

Respectfully submitted,



PETER ROBINSON
Counsel for Jean de dieu Kamuhanda

⁷ *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Decision on the Procedures to be Adopted for ex parte Proceedings* (6 December 2007) at para. 12

⁸ *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and 81(4) of the Statute* (19 May 2006) at para. 27; *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Judgment on the Prosecutor's Appeal of the Decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure ..."* (13 October 2006) at para. 67

⁹ Should the *ex parte* material in question be something other than Rule 86-related material, the President or Judge is requested to review the material and consider its reclassification in light of the general principles set forth in paragraphs 21-23 above.

ANNEX “A”

PETER ROBINSON
Defence Counsel
E-mail: peter@peterrobinson.com

29 June 2015

Mr. John Hocking
Registrar
Mechanism for International
Criminal Tribunals
AICC Complex
P.O. Box 6106
Arusha, Tanzania

Re: Prosecutor v Jean de dieu Kamuhanda
MICT No. 13-33

Dear Mr. Hocking,

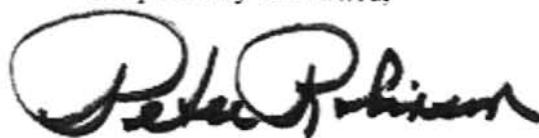
In my capacity as counsel for Jean de dieu Kamuhanda before the MICT, I am writing to request some information about documents that have been filed in the *Kamuhanda* case.

When Mr. Kamuhanda filed his first pleading with the MICT in 2015, it received the Registry number of 430-434, indicating that 429 pages of material had already been placed in his MICT file, which had been opened in 2013. When I inquired of the Registry, I was informed that the 429 pages were classified as *ex parte*.

I would like to know who the filing party was and pursuant to what Rule the material was filed, i.e. Rule 86, or general subject matter of the filing. This explanation of the general nature of that material will enable me to determine whether to contact the filing party or file a motion for reclassification of that material so that Mr. Kamuhanda and I can have access to it if appropriate.

Thank you very much for your consideration of this request.

Respectfully submitted,



PETER ROBINSON
Counsel for Jean de dieu Kamuhanda