

MICT-13-33
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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: 31 August 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

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

Office of the Prosecutor:

Mr. Hassan Jallow

Mr. Richard Karegyesa

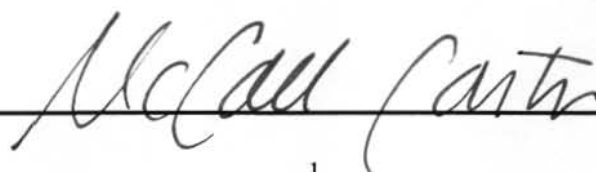
Jean de dieu Kamuhanda:

Mr. Peter Robinson, Counsel

Leonidas Nshogoza:

Ms. Allison Turner, Lead Counsel

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1. Jean de dieu Kamuhanda respectfully requests that the President designate a Single Judge to consider granting access to confidential *inter partes* material from the case of *Prosecutor v Nshogoza*, No. ICTR-07-91, pursuant to Rule 86.

2. Rule 86 provides in pertinent part that:

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the ICTY, the ICTR, or the Mechanism (the “first proceedings”), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A Party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seized of the first proceedings; or

(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

3. Inasmuch as no Chamber remains seized of the *Nshogoza* proceedings, Mr. Kamuhanda has filed this motion in his own case.

4. The ICTR Appeals Chamber has held that a party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.¹ In determining whether a party must be given access to confidential material, a Chamber must balance the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses.²

¹ *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005) at page. 2

² *Prosecutor v. Hadzihasanovic & Kubura*, No. IT-01-47-AR73, *Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case*, (23 April 2002), p. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on General Augustin Bizimungu's Motion for the Disclosure of the Closed Session Transcripts of the Testimony of Witness BTH and the Exhibits Tendered Under Seal During the Said Hearings* (26 May 2008) at para. 5

5. Requests for access to “all confidential material” in this context is sufficiently specific to meet the specificity requirement.³ With regards to confidential *inter partes* material, a legitimate forensic purpose for disclosure in subsequent proceedings will be shown if there is a geographical, temporal or otherwise material overlap between the two proceedings,⁴ and that there is a good chance that access to this evidence will materially assist the applicant in preparing his case.⁵

6. There is a geographical, temporal, and material overlap between the *Kamuhanda* and *Nshogoza* cases. Mr. Nshogoza, a defence investigator for Mr. Kamuhanda, was charged with contempt by attempting to persuade prosecution witnesses in the *Kamuhanda* case to give false exculpatory evidence. Several witnesses who testified in *Nshogoza*'s trial also testified in the *Kamuhanda* trial, including Prosecution Witnesses GAA and GAF. Mr. Kamuhanda's lead counsel and investigator also testified in the *Nshogoza* trial. The events at Gikomero Parish for which Mr. Kamuhanda stands convicted, and in particular, the issue of whether Prosecution Witness GAA was present at the Parish at the time of the killings, were a central feature of the *Nshogoza* trial.⁶

7. There is a good chance that access to this evidence will materially assist the applicant in preparing his case. Mr. Kamuhanda contends that he is innocent and was never in Gikomero after 6 April 1994. He is preparing to file a motion for review of his conviction with the Mechanism. Access, in particular to the confidential witness statements disclosed by the prosecution to the defence in the *Nshogoza* case, will materially assist Mr. Kamuhanda in identifying new facts that can support a motion for review. Such new facts may include newly discovered information related to credibility of prosecution witnesses such as GAA and GEK.⁷

8. Mr. Kamuhanda has already uncovered instances where interviews conducted

³ *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Decision on Mico Stanasic's Motion for Access to All Confidential Materials in the Brdjanin Case* (24 January 2007), para. 10; *Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Momcilo Perisic's Motion Seeking Access to Confidential Materials in the Blagojevic and Jokic Case* (18 January 2006), para. 8;

⁴ *Prosecutor v. Kordic & Cerkez*, No. IT-95-14/2-A, *Decision on Motion by Hadzihasanovic, Alagic and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case* (23 January 2003), p. 4

⁵ *Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Motions for Access to Confidential Material* (16 November 2005), para. 11

⁶ *Prosecutor v. Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009)

⁷ *Ntabakuze v. Prosecutor*, No. MICT-14-77-R, *Decision on Ntabakuze's Pro Se Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review* (19 January 2015) at fn. 43

by Special Counsel Loretta Lynch have not been disclosed to him.⁸ The prosecution represented at the *Nshogoza* pre-trial conference that “any material generated by [Ms. Lynch’s] investigation, relevant to this case, has been disclosed to the Accused.”⁹ Some of that material was referred to during the *Nshogoza* trial.¹⁰

9. By obtaining access to the confidential *inter partes* material in the *Nshogoza* case, particularly the disclosure made to the defence by the prosecution via the Registry, there is a good chance that Mr. Kamuhanda can obtain material, such as prosecution or Special Counsel interviews with Witness GEK and other prosecution witnesses in his case, as well as other persons who were at Gikomero Parish at the time of the killings, that will assist him in demonstrating his innocence through new facts in a motion for review.

10. The fact that Mr. Kamuhanda’s case is in the post-conviction, rather than pre-trial, stage does not preclude him from obtaining access to confidential material. The Single Judge has already found that access to confidential information from Mr. Kamuhanda’s own case was necessary for his new counsel to prepare an application for review of Mr. Kamuhanda’s judgement.¹¹ Likewise, the ICTR Appeals Chamber has held that a person seeking access for use in review proceedings may have a legitimate forensic purpose for doing so, and should be allowed to demonstrate that the material may be of assistance to preparation of his request for review.¹²

11. Therefore, it is respectfully requested that Mr. Kamuhanda be provided with access to all confidential *inter partes* material in the *Nshogoza* case.

⁸ See *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (3 August 2015) at Annex C

⁹ Transcript of 30 October 2008 at p. 11 (remarks by Richard Karegyesa)

¹⁰ See for example Exhibit D24, Transcript of 19 February 2009 at p. 37

¹¹ *Decision on Request for Access* (25 June 2015) at para. 18

¹² *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Rutaganda’s Appeal Concerning Access to Confidential Materials in the Karemera et al Case* (10 July 2009) at para. 25

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive style with large, rounded letters.

PETER ROBINSON
Counsel for Jean de dieu Kamuhanda