

UNITED
NATIONS

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Mechanism for International Criminal Tribunals

Case No. MICT-13-33

Date: 25 November 2015

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Vagn Joensen

Registrar: Mr. John Hocking

Decision of: 25 November 2015

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

**DECISION ON MOTION TO COMPEL DISCLOSURE OF
WITNESS GEK MATERIAL**

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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A handwritten signature in black ink, appearing to be 'H. Jallow', written over the date and time stamp.

A handwritten signature in black ink, appearing to be 'V. Joensen', written vertically on the right side of the page.

1. I, Vagn Joensen, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case,¹ am seized of a motion filed by Mr. Jean de Dieu Kamuhanda on 7 October 2015 requesting disclosure of all reports with information provided by a former employee of the International Criminal Tribunal for Rwanda (“ICTR”), which relate to the alleged attempt to influence Prosecution Witness GEK to recant her testimony in the *Kamuhanda* trial.² The Prosecution filed its response on 19 October 2015³ and Mr. Kamuhanda filed his reply on 9 November 2015.⁴

I. BACKGROUND

2. During the appeal proceedings, the ICTR Appeals Chamber granted, in part, Mr. Kamuhanda’s motion for the admission of additional evidence, admitted new statements from two witnesses, and ordered that these witnesses be heard.⁵ On 19 May 2005, the witnesses called by Mr. Kamuhanda testified before the ICTR Appeals Chamber that they had previously lied in the evidence they gave for the Prosecution at the pre-trial or trial phase of the proceedings.⁶ The Prosecution called Witness GEK in rebuttal, who testified, among other things, that, while in a safe house in Arusha, two persons working for the ICTR approached her and offered her money to recant her testimony given against Mr. Kamuhanda in his trial.⁷ In its oral decision of the same date, the ICTR Appeals Chamber directed the ICTR Prosecutor to investigate the allegations of false testimony.⁸ Subsequently, the ICTR Prosecutor appointed Ms. Loretta Lynch as Special Counsel to conduct the relevant investigation.⁹ In its Judgement of 19 September 2005, the ICTR Appeals Chamber found the evidence of the witnesses called on appeal by Mr. Kamuhanda not credible.¹⁰

¹ Order Assigning a Single Judge to Consider an Application, 13 October 2015, p. 1.

² Motion to Compel Disclosure of Witness GEK Exculpatory Material, 7 October 2015 (“Motion”), paras. 25, 30. Noting the non-sequential numbering of some paragraphs in the Motion, the present Decision will refer to the relevant submissions as if the paragraphs had correct numbering.

³ Prosecution Response to Motion to Compel Disclosure of Witness GEK Exculpatory Material, 19 October 2015, (“Response”).

⁴ Reply Brief: Motion to Compel Disclosure of Witness GEK Exculpatory Material, 9 November 2015 (“Reply”).

⁵ See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“Appeal Judgement”), para. 442.

⁶ Appeal Judgement, para. 442.

⁷ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, T. 19 May 2005 pp. 7-9 (closed session).

⁸ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), T. 19 May 2005, pp. 50, 51. See also Appeal Judgement, para. 442.

⁹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor’s Reply by Way of Clarification in Relation to Jean de Dieu Kamuhanda’s Response to the “Prosecutor’s Disclosure Pursuant to Rule 75(F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*”, 20 March 2006, para. 10. See also Motion, para. 10.

¹⁰ Appeal Judgement, paras. 221, 226.

As a result, the ICTR Appeals Chamber did not find necessary to discuss the Prosecution's evidence tendered in rebuttal, including the evidence of Witness GEK.¹¹

II. SUBMISSIONS

3. In the Motion, Mr. Kamuhanda requests an order compelling the Prosecution to disclose to him "all reports reflecting information provided by the [ICTR] employee concerning the allegation of Witness GEK that the employee attempted to convince her to recant her testimony against Mr. Kamuhanda."¹² He submits that, in a recently held interview with the employee in question, the latter stated that "he was interviewed about [the allegations that he had tried to influence the witness to recant her testimony against Kamuhanda] on two or three occasions by Loretta Lynch, who had been appointed [...] to conduct an investigation into those allegations" and had told [Ms. Lynch] "that there was no truth to the allegation that he had tried to influence [the witness] to recant her testimony in the Kamuhanda case and that these were complete fabrications."¹³ Mr. Kamuhanda states that, in response to his request related to the sought material, the Prosecution confirmed that "the OTP has the [relevant] documents but has determined that they are not exculpatory and therefore not disclosable".¹⁴ Mr. Kamuhanda therefore argues that disclosure should be ordered given that he has shown that the Prosecution is in possession of specifically identified potentially exculpatory material, which undermines the credibility of prosecution evidence.¹⁵

4. The Prosecution responds that the Motion should be dismissed and maintains its position that it "has reviewed all the material in [its] possession, regarding [Witness] GEK's allegations of witness tampering, for potentially exculpatory content, and has determined that, beyond what has already been disclosed to [Mr.] Kamuhanda by the ICTR Prosecutor, there is no additional disclosable material."¹⁶ It further argues that the relevant material is not exculpatory given that the ICTR Appeals Chamber has already held, during the appeals hearing in Mr. Kamuhanda's case, that evidence from the ICTR employees refuting Witness GEK's testimony that they had attempted to bribe her would not be helpful in assessing the witness's credibility.¹⁷ The Prosecution also requests

¹¹ See Appeal Judgement, paras. 221, 226-227.

¹² Motion, para. 30.

¹³ Motion, para. 16, referring to Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Prosecution Witness GEK, 2 August 2015 ("Motion for Appointment of *Amicus Curiae* Prosecutor"), Annex C, RP. 513. I note that Mr. Kamuhanda has incorporated in the Motion a number of the Annexes to his Motion for Appointment of *Amicus Curiae* Prosecutor. Mr. Kamuhanda and his counsel are reminded that each motion should be filed complete with all the relevant supporting annexes and documentation. On an exceptional basis, I will consider the relevant annexes but such a practice will not be accepted for the purposes of future filings.

¹⁴ Motion, para. 22.

¹⁵ Motion, paras. 25-26, 30.

¹⁶ Response, para. 3 (internal references omitted).

¹⁷ Response, paras. 4-6.

that, should the Single Judge deem it necessary to review the material in question, an *ex parte* hearing be held *in camera*.¹⁸

5. Mr. Kamuhanda replies that the ICTR Appeals Chamber's decision not to call the ICTR employees to testify was not a determination that their evidence would not effect the credibility of Witness GEK's testimony at Mr. Kamuhanda's trial but was made for reasons of judicial economy and for the purposes of the hearing on the Defence motion for admission of additional evidence on appeal.¹⁹ Mr. Kamuhanda argues that the Prosecution is under an obligation to disclose any material that may affect the credibility of the Prosecution's evidence even after completion of the appeal and that the information of the ICTR employee "clearly affects the credibility of Witness GEK's evidence at Mr. Kamuhanda's trial."²⁰ He also submits that newly discovered information related to a witness's credibility may amount to a new fact for the purposes of review proceedings.²¹

III. DISCUSSION

6. The Prosecution has a positive and continuous obligation under Rule 73(A) of the Rules to "as soon as practicable, disclose to the Defence any material that in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".²² Rule 73(E) of the Rules provides that the Prosecution's positive obligation under paragraph (A) continues notwithstanding the completion of the trial and any subsequent appeal. Nonetheless, under Rule 76(A) of the Rules "reports, memoranda or other internal documents prepared by a Party, its assistants, or representatives in connection with the investigation, preparation, or presentation of the case are not subject to disclosure or notification".²³

7. The determination as to which material is subject to disclosure under this provision is a fact-based enquiry made by the Prosecution.²⁴ A chamber will not intervene in the exercise of the Prosecution's discretion unless it is shown that the Prosecution has abused it and, where there is no

¹⁸ Response, para. 7.

¹⁹ Reply, paras. 7-11.

²⁰ Reply, para. 14. See also Reply, para. 19.

²¹ Reply, para. 20, referring to *Aloys Niabakuze v The Prosecutor*, Case 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, n. 43.

²² See also Rule 68(A) of the ICTR Rules.

²³ See also Rule 70(A) of the ICTR Rules.

²⁴ See *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014 ("*Ngirabatware* Decision"), para. 12; *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 ("*Mugenzi* Appeal Decision"), para. 7; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("*Kamuhanda*

evidence to the contrary, will assume that the Prosecution is acting in good faith.²⁵ To establish that the Prosecution is in breach of its disclosure obligations under Rule 73 of the Rules, the Defence must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.²⁶

8. In the Motion, Mr. Kamuhanda has identified the material sought with sufficient precision and has sufficiently demonstrated that it is in the Prosecution's custody.²⁷

9. As to the material's probable exculpatory nature, Mr. Kamuhanda relies on recent statements by the relevant ICTR employee indicating that he had stated to Ms. Lynch that Witness GEK had fabricated her account related to him. In the event that this is the case, I consider that any transcripts of interviews conducted by Ms. Lynch with the relevant ICTR employee are potentially exculpatory and should be disclosed to Mr. Kamuhanda as this material may affect the credibility of Prosecution evidence. To the extent that they form part of an internal report or document within the meaning of Rule 76(A) of the Rules, then any relevant potentially exculpatory material should be provided in some other form.²⁸ The fact that the ICTR Appeals Chamber decided not to admit this material in connection with its own assessment of Witness GEK's credibility does not mean that it should not be disclosed in accordance with Rule 73 of the Rules. In this respect, the Prosecution's obligation to disclose exculpatory material, which is essential to a fair trial, needs to be interpreted broadly.²⁹ The assessment of whether material is subject to disclosure does not turn on its probative value.³⁰

10. I note, however, that Mr. Kamuhanda's submission that the Prosecution actually has disclosable material in its possession remains speculative at this stage and is denied by the Prosecution. I further note that the parties have agreed that the relevant material should be

Appeal Decision"), para. 14; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 183.

²⁵ See *Ngirabatware* Decision, para. 12; *Mugenzi* Appeal Decision, para. 7; *Kamuhanda* Appeal Decision, para. 14; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34.

²⁶ See *Ngirabatware* Decision, para. 13; *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgment, 4 February 2013, ("Mugenzi and Mugiraneza Appeal Judgement"), para. 39; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Disclosure, 18 January 2011, para. 7; *Kamuhanda* Appeal Decision, para. 14.

²⁷ Motion, para. 22; Annex I.

²⁸ See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006, para. 7, fn. 20.

²⁹ See *Ngirabatware* Decision, para. 12; *Mugenzi* Appeal Decision, para. 7; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgment, 20 October 2010 ("Kalimanzira Appeal Judgement"), para. 18.

³⁰ *Kalimanzira* Appeal Judgement, para. 20.

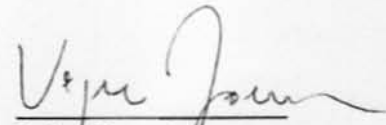
submitted to me *in camera* to assess whether it should be disclosed in the event that the Prosecution maintains its position that the material is not exculpatory.³¹ Accordingly, I hereby order the Prosecution to provide me with all transcripts of interviews of the relevant ICTR employee as well as all related reports and material in its possession in an *ex parte* hearing so that I can rule on the question of disclosure.

IV. DISPOSITION

11. For the foregoing reasons, I grant the Motion in part and order the Prosecution to submit all relevant material as identified above in an *ex parte* hearing before me in the presence of a representative of the Mechanism's Registry on a date to be communicated in due course.

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

Done this 25th day of November 2015,
At Arusha,
Tanzania



Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]



³¹ Motion, para. 27; Response, paras. 3, 7, Reply, fn. 4.