

UNITED  
NATIONS

MICT-13-33  
08-05-2017  
(7 - 1/1484bis)

7/1484bis  
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Mechanism  
for International Criminal Tribunals

Case No.: MICT-13-33  
Date: 21 March 2017  
Original: French

**SINGLE JUDGE**

**Before:** Judge Jean-Claude Antonetti  
**Registrar:** Mr Olufemi Elias  
**Decision of:** 21 March 2017

**THE PROSECUTOR**

v.

**JEAN DE DIEU KAMUHANDA**

***PUBLIC***

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

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**The Office of the Prosecutor**

Mr Serge Brammertz  
Mr Richard Karegyesa  
Mr Abubacarr Tambadou

**Counsel for Jean de Dieu Kamuhanda**

Mr Peter Robinson

**Received by the Registry  
Mechanism for International Criminal Tribunals  
08/05/2017 08:55**

A handwritten signature in black ink, appearing to be a stylized 'R' followed by a long horizontal stroke.

I, **JEAN-CLAUDE ANTONETTI**, Judge of the Residual Mechanism for International Criminal Tribunals (“Mechanism”) and Single Judge in this case,<sup>1</sup>

**CONSIDERING** that, on 7 October 2015, Mr Jean de Dieu Kamuhanda filed a motion requesting the disclosure of potentially exculpatory information pertaining to an alleged attempt by a former employee of the International Criminal Tribunal for Rwanda (“ICTR”) to convince Defence Witness GEK to recant her testimony in Case No. ICTR-95-54A-T, *The Prosecutor v. Jean de Dieu Kamuhanda* (“Kamuhanda Case”),<sup>2</sup>

**CONSIDERING** that, on 25 November 2015, Judge Vagn Joensen partially granted the Motion of 7 October 2015 and ordered the Prosecution to disclose to him, in the presence of a Registry representative, all potentially exculpatory material described in the Motion of 7 October 2015 in an *ex parte* hearing in order to be able to rule on the question of their disclosure,<sup>3</sup>

**CONSIDERING** that, on 15 and 21 December 2015, Judge Joensen held *ex parte* hearings during which the Prosecution, in the presence of a Registry representative, presented material for inspection in accordance with the Decision of 25 November 2015,<sup>4</sup>

**CONSIDERING** that, on 29 February 2016, Judge Joensen granted the Motion of 7 October 2015 and ordered the Prosecution to disclose to Mr Kamuhanda, in an appropriate form, all potentially exculpatory information contained in the record of the interview with the former ICTR employee referred to in the Motion,<sup>5</sup>

**CONSIDERING** that, on 13 June 2016, Judge Joensen granted a motion filed on 16 April 2016 by Mr Kamuhanda and ordered the Prosecution to disclose to Mr Kamuhanda any portion of the audio recording of the interview with the former ICTR employee identifying other individuals who may have encouraged Witness GEK to fabricate her account related to the former ICTR employee or to provide this information in some other form,<sup>6</sup>

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<sup>1</sup> “Order Assigning a Single Judge to Consider a Motion”, 1 August 2016 (French version filed on 2 August 2016), p. 1.

<sup>2</sup> “Motion to Compel Disclosure of Witness GEK Exculpatory Material”, 7 October 2015 (French version filed on 27 October 2015) (“Motion of 7 October 2015”).

<sup>3</sup> “Decision on Motion to Compel Disclosure of Witness GEK Material”, 25 November 2015 (French version filed on 9 December 2015) (“Decision of 25 November 2015”), paras 10 and 11.

<sup>4</sup> Transcript of hearing on 15 December 2015, filed on 16 December 2015, p. 1; Transcript of hearing on 21 December 2015, filed on 22 December 2015, p. 1. *See also* “Further Decision on Motion to Compel Disclosure of Witness GEK Material”, 29 February 2016 (French version filed on 22 March 2016) (“Decision of 29 February 2016”), p. 2.

<sup>5</sup> Decision of 29 February 2016, p. 2.

<sup>6</sup> “Decision on a Motion to Compel Full Disclosure of Material Related to Witness GEK”, 13 June 2016 (French version filed on 4 July 2016) (“Decision of 13 June 2016”), p. 4. *See also* “Motion to Compel Full Disclosure of Witness GEK Material”, 16 April 2016 (French version filed on 5 May 2016).

**SEISED** of the Motion filed on 27 July 2016, wherein Mr Kamuhanda stated, *inter alia*, that he had informed the Prosecution in a letter that the Prosecution had not disclosed all of the material that identified individuals who may have encouraged Witness GEK to fabricate her account, and pointed out that he had never received a reply to his letter,<sup>7</sup>

**CONSIDERING** that, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Mechanism (“Rules”), Mr Kamuhanda requests that the Single Judge: (i) review *in camera* the withheld portions of the interview of the ICTR employee and order the disclosure of the remaining exculpatory material, and (ii) order the Prosecution to disclose any information obtained from Witness GEK by the special counsel appointed to investigate the allegations of false testimony against Mr Kamuhanda, or by persons working with her, including the interview of this witness by the special counsel,<sup>8</sup>

**CONSIDERING** that, on the basis of Rule 71 (B) of the Rules, Mr Kamuhanda requests that the Single Judge order the Prosecution to: (i) disclose any information obtained by the special counsel or persons working with her from Witness GAG, with whom, according to Mr Kamuhanda, Witness GEK had allegedly discussed the allegation that a former ICTR employee had attempted to convince Witness GEK to recant her prosecution testimony against Mr Kamuhanda, and (ii) disclose any information obtained by the special counsel or persons acting on her behalf relating to alleged efforts by the Victims and Witnesses Support Section of the Registry to influence Prosecution witnesses in the *Kamuhanda* case,<sup>9</sup>

**NOTING** the response filed on 5 August 2016 wherein the Prosecution states that the Motion lacks merit and should be dismissed as the Prosecution denies having redacted the identity of the other individuals in the portion of the interview disclosed to Mr Kamuhanda,<sup>10</sup>

**CONSIDERING** that the Prosecution argues that it has disclosed the potentially exculpatory information as instructed in the Decision of 13 June 2016 and recalls that the Single Judge rejected Mr Kamuhanda’s request for full disclosure of the audio interview since he failed to demonstrate

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<sup>7</sup> “Third Motion to Compel Disclosure of Witness GEK Material”, with confidential Annex A, 27 July 2016 (French version filed on 24 August 2016) (“Motion”), para. 31.

<sup>8</sup> Motion, paras 7 to 9, 33, 34, 37 to 40 and Annex A to the Motion, p. 12. *See also* Decision of 29 February 2016, p. 1, and Decision of 25 November 2015, para. 2. Mr Kamuhanda also requests that all *in camera* proceedings be transcribed. *See* Motion, footnote 31. I note that Mr Kamuhanda does not present any justification in support of such a request. Consequently, this request is rejected.

<sup>9</sup> Motion, paras 35, 36, 41 to 43. *See also* Annex A attached to the Motion, p. 12.

<sup>10</sup> “Prosecution Response to Third Motion to Compel Disclosure of Witness GEK Material”, 5 August 2016 (French version filed on 25 August 2016) (“Response”), paras 1 and 6.

that any other part of the recording that remains undisclosed contains potentially exculpatory information,<sup>11</sup>

**RECALLING** that, pursuant to Rule 73 (A) of the Rules, the material that shall be disclosed by the Prosecutor is any that “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”,

**RECALLING** that the continuous obligation for the Prosecution to disclose exculpatory material, essential for a fair trial, must be broadly interpreted, that it is considered that information likely to exonerate the accused is information that is likely to affect the credibility of the Prosecution evidence,<sup>12</sup> and that the Judge needs only to examine whether the material is potentially – rather than in fact - exculpatory,<sup>13</sup>

**CONSIDERING FURTHERMORE** that the determination as to which material is subject to disclosure pursuant to Rule 73 of the Rules is a fact-based enquiry made by the Prosecution, and that 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 evidence to the contrary, will assume that the Prosecution is acting in good faith,<sup>14</sup>

**CONSIDERING** furthermore that, 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,<sup>15</sup>

**CONSIDERING** that, according to Mr Kamuhanda, the Prosecution has already disclosed a series of excerpts of the interview with the former ICTR employee in execution of the Decision of 29 February 2016 and that, following the Decision of 13 June 2016, the Prosecution also disclosed other excerpts of this interview,<sup>16</sup>

**CONSIDERING** that Mr Kamuhanda argues that, when listening to the excerpts of the interview disclosed by the Prosecution, it appears that the conversation cuts off at the end of tape 3 when the

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<sup>11</sup> Response, paras 4 to 6, referring to the Decision of 13 June 2016.

<sup>12</sup> Rule 73 of the Rules; Decision of 13 June 2016, p. 3, footnote 10.

<sup>13</sup> See, for example, *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Appeal, 20 October 2010, para. 20 (French version filed on 16 May 2011); *The Prosecutor v. Augustin Ndirabatware*, Case No. MICT-12-29-A, “Decision on Augustin Ndirabatware’s Motion for Sanctions for the Prosecution and for an Order for Disclosure”, 15 April 2014 (French version filed on 14 May 2014), para. 13.

<sup>14</sup> See Decision of 25 November 2015, para 7, and references cited in footnote 25.

<sup>15</sup> See Decision of 25 November 2015, para 7, and references cited in footnote 26.

<sup>16</sup> Motion, paras 25 and 30.

ICTR employee is giving information on the subject of the person who, in his opinion, told Witness GEK to make those statements against him and that, therefore, the Prosecution has not disclosed all of the excerpts identifying the individuals who may have encouraged Witness GEK to fabricate her account,<sup>17</sup>

**CONSIDERING** that it is not disputed that the recording is in the custody of the Prosecution, that the Defence has specifically identified the material sought and that the arguments summarised above constitute a *prima facie* case showing that the other portions of the recording, those which were not disclosed, contain potentially exculpatory material,

**CONSIDERING** that, in order to assist me in ruling on the Motion, I asked the Prosecution to provide me with a copy of the audio recording of the interview conducted with the former ICTR employee, including a transcript in French of the content of this audio recording as well as a copy of the information previously disclosed to Mr Kamuhanda,<sup>18</sup> and that I have duly examined and analysed all of this information,<sup>19</sup>

**CONSIDERING** that, after my analysis, it appears to me that the excerpts from the interview that were not disclosed by the Prosecution contain potentially exculpatory material, despite the decisions previously rendered on this particular matter,

**CONSIDERING** therefore that the particular circumstances of this case call for the disclosure of the entire audio recording of the interview conducted with the former ICTR employee and the transcript of this interview to the Defence, pursuant to Rule 73 of the Rules,

**CONSIDERING** that it is necessary to remind the Defence that the interview conducted with the former ICTR employee and the corresponding transcript are confidential,

**NOTING** Mr Kamuhanda's argument that during the interview conducted by the special counsel with Witness GEK, the latter claimed that ICTR employees had approached her to convince her to change her testimony, and that this information constitutes exculpatory information as it contradicts the testimony of Witness GEK and affects her credibility because this witness failed to mention this

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<sup>17</sup> See Motion, para. 31. M. Kamuhanda gives the following example: at the end of tape 3, side B, excerpt 2 ends abruptly just after the ICTR employee replies to a question as to who he believes told Witness GEK to say those things against him. When the next excerpt begins, the ICTR employee and the person interviewing him are already discussing another topic that has nothing to do with the subject being discussed during the preceding excerpt. See Motion, para. 31.

<sup>18</sup> "Interim Order for Filing of Submissions", 13 September 2016, pp. 2 and 3.

<sup>19</sup> I point out, moreover, that taking into account the limited nature of the material of which I was seised, this analysis did not extend to either the substance or the form of the interview and its sole purpose was to identify potentially exculpatory information for Mr Kamuhanda.

when she was questioned at the hearing in the *Kamuhanda* case before the ICTR Appeals Chamber on 19 May 2005,<sup>20</sup>

**CONSIDERING** that the arguments put forth by Mr Kamuhanda fail to show how the alleged information contained in the interview conducted by the special counsel with Witness GEK contains potentially exculpatory material, but that, if this were the case, I deem that the Prosecution should then disclose this information to the Defence due to its potentially exculpatory nature pursuant to Rule 73 of the Rules,

**RECALLING** furthermore that, pursuant to Rule 71 (B) of the Rules, the documents that the Prosecution shall make available to the Defence are either those documents material to the preparation of the Defence of the Accused or are intended for use by the Prosecutor as evidence at trial, or were obtained from or belonged to the accused,

**CONSIDERING** that the provisions of Rule 71 (B) of the Rules are not applicable in this case,<sup>21</sup> and that, consequently, the arguments presented by Mr Kamuhanda pursuant to this rule should be rejected,

**FOR THE FOREGOING REASONS,**

**PURSUANT TO** Rules 71 and 73 of the Rules,

**PARTIALLY GRANT** the Motion,

**ORDER** the Prosecution to disclose to the Defence the full audio recording of the interview conducted by the special counsel with the former ICTR employee and the transcript of this interview as soon as possible,

**ORDER** that the confidentiality of the information to be disclosed to the Defence in execution of the present Decision be respected, that the information released pursuant to this decision not be

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<sup>20</sup> Motion, paras 39 and 40.

<sup>21</sup> By requesting that he be provided with the interview conducted by the special counsel with another witness, Witness GAG, as well as all other information obtained by the special counsel or persons acting on her behalf about the supposed efforts of the Registry's Victims and Witnesses Support Section to influence Prosecution witnesses in the *Kamuhanda* case, Mr Kamuhanda claims that these documents are material to the preparation of a motion for the appointment of an *amicus curiae* prosecutor to investigate the allegations of Witness GEK's false testimony before the ICTR Appeals Chamber. *See* Motion, para. 43. There is nothing to indicate that these documents are material to the preparation of the Accused's defence, that they are intended for use by the Prosecutor as evidence at trial, or even that they were obtained from or belonged to the Accused. Moreover, there is nothing to indicate that Rule 71 (B) of the Rules will be applicable in the post-trial stage.

disclosed or provided to any other parties or persons except as required by the Defence and that it only be used for the purpose described by the Defence,<sup>22</sup>

**REMINDE** the Prosecution that it has the continuous obligation to examine all of the documents in its possession and to honour its disclosure obligations under Rule 73 of the Rules,

**DENY** the Motion in all other respects,

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

Single Judge

/signed/ \_\_\_\_\_

Jean-Claude Antonetti

Done this twenty-first day of March 2017,  
Arusha (Tanzania)

**[Seal of the Mechanism]**



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<sup>22</sup> See Motion, para. 43, stating that the items in question “are material to the preparation of the Defence motion for the appointment of an *amicus curiae* prosecutor to investigate Witness GEK’s false testimony at the Appeals Hearing”.



**TRANSMISSION SHEET FOR FILING OF TRANSLATIONS  
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<b>Case Name</b>	KAMUHANDA	<b>Case Number</b>	MICT-13-33 <b>No. of Pages</b> 7
<b>Original Document No.</b>	MICT-13-33-0221	<b>Translation Reference No.</b>	REG49882
<b>Date of Original</b>	21/03/2017	<b>Original Language</b>	<input type="checkbox"/> English <input checked="" type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Date Transmitted</b>	08/05/2017	<b>Language of Translation</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of original document</b>	Décision relative a la troisième demande aux fins d'ordonner la communication d'éléments de preuve concernant le témoin GEK		
<b>Title of translation</b>	Decision on Third Motion to Compel Disclosure of Witness GEK Material		
<b>Classification Level</b>	<input checked="" type="checkbox"/> Unclassified <input type="checkbox"/> Confidential <input type="checkbox"/> Strictly Confidential	<input type="checkbox"/> Ex Parte Defence excluded <input type="checkbox"/> Ex Parte Prosecution excluded <input type="checkbox"/> Ex Parte R86(H) Applicant excluded <input type="checkbox"/> Ex Parte Amicus Curiae excluded <input type="checkbox"/> Ex Parte other exclusion (specify) :	
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