

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-18-116-PT

Date: 2 September 2019

Original: English

**BEFORE A SINGLE JUDGE**

**Before:** Judge Vagn Joensen

**Registrar:** Mr. Olufemi Elias

**Decision of:** 2 September 2019

**PROSECUTOR**

**v.**

**MAXIMILIEN TURINABO  
ANSELME NZABONIMPA  
JEAN DE DIEU NDAGIJIMANA  
MARIE ROSE FATUMA  
DICK PRUDENCE MUNYESHULI**

***PUBLIC***

**DECISION ON JEAN DE DIEU NDAGIJIMANA'S  
URGENT MOTION FOR DISCLOSURE OF HARMONISED  
CALL DATA RECORDS**

**Office of the Prosecutor:**

Mr. Serge Brammertz  
Mr. Rashid S. Rashid

**Counsel for the Defence:**

**Mr. Maximilien Turinabo**  
Mr. Stéphane Bourgon  
**Mr. Anselme Nzabonimpa**  
Mr. Geoffrey Roberts  
**Mr. Jean de Dieu Ndagijimana**  
Mr. Philippe Larochelle  
**Ms. Marie Rose Fatuma**  
Mr. Gatera Gashabana  
**Mr. Dick Prudence Munyeshuli**  
Mr. Kurt Kerns

**I, VAGN JOENSEN**, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and the Single Judge in this case;<sup>1</sup>

**BEING SEISED OF** a confidential motion filed by Mr. Jean de Dieu Ndagijimana on 28 May 2019 requesting that the Prosecution be ordered to “disclose, or re-disclose as appropriate”, material in its “possession and which purportedly support the Indictment allegations”, including:<sup>2</sup> (i) the original raw call data records (“CDR’s”) transmitted pursuant to requests for assistance (“RFA’s”); and (ii) CDR’s in a “harmonised”, “analysed and searchable format”, including a “spreadsheet of telephone contacts” created by Prosecution Investigator Tomasz Blaszczyk upon analysis of raw data;<sup>3</sup>

**NOTING** Ndagijimana’s submissions that: (i) digital evidence is at the heart of the Prosecution’s case and the Accused have a paramount right to receive all intercepted materials and data, including CDR’s, collected pursuant to surveillance requests;<sup>4</sup> (ii) the disclosure of CDR’s in varying forms is unintelligible, hampers meaningful review by the Defence, and renders the disclosure ineffective;<sup>5</sup> (iii) access to the analysed CDR’s would permit the Defence to test the reliability and accuracy of the methods relied upon by the Prosecution to identify “key calls” in support of the allegations against the Accused;<sup>6</sup> and (iv) undertaking the task already done by the Prosecution would be unnecessarily burdensome on the Defence, in breach of the equality of arms, and may lead to

<sup>1</sup> Order Assigning a Single Judge, 11 September 2018, p. 1.

<sup>2</sup> Urgent Motion for Disclosure of Harmonised Call Data Records, 28 May 2019 (confidential, with confidential Annexe A) (“Motion”), paras. 1, 18, 21. Ndagijimana refers in turn to Rules 71, 72, 73, and “73(ii)” of the Rules of Procedure and Evidence of the Mechanism (“Rules”), to Rule 66(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for the former Yugoslavia (“ICTY”), and to Rule 110(B) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon. *See* Motion, paras. 4, 5, 9, 13.

<sup>3</sup> Motion, paras. 1, 21. I note that Ndagijimana requests the “spreadsheet of telephone contacts made by certain individuals” created by Blaszczyk on the basis of raw data provided by a Rwandan telecommunications company, submitting that this is the “type of document which, pursuant to appellate [case law], would make disclosure reasonably accessible and available to the Defence”. *See* Motion, paras. 10, 17. *See also* Motion for an Order of Disclosure – Telecommunication-Related Material with Confidential Annexes A to F, 13 February 2019 (confidential, with confidential Annexes A to F), Annex A, Registry pagination 2603 (in which Blaszczyk states that “[b]ased on the telephone call logs [he] created a spreadsheet of telephone contacts made by certain individuals during the following dates of interest: 10-31 August 2015, 20-27 November 2015, and 26-27 January 2016.”).

<sup>4</sup> Motion, paras. 14, 15, 19.

<sup>5</sup> Motion, paras. 1, 2, 8-10. Ndagijimana states that, at the date of the Motion, he received 145 CDR’s documents in varying formats, which had “forced [the Defence] to expend considerable time and resources in reviewing and cataloguing the material”. *See* Motion, para. 8. Ndagijimana further draws a parallel with decisions of the Appeals Chambers of the ICTR and ICTY in the *Karemera* and *Mladić* cases regarding the provision of material through the Electronic Disclosure Suite (“EDS”). *See* Motion, paras. 4, 5, 9, referring to, *inter alia*, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (“*Karemera et al.* Decision of 30 June 2006”), paras. 8-10, 13, 15; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber’s Decision on EDS Disclosure Methods, 28 November 2013 (“*Mladić* Decision of 28 November 2013”), para. 27.

<sup>6</sup> Motion, paras. 11, 16.



potentially divergent results, while working on the same sets of data and derivative information would benefit all parties and the Trial Chamber;<sup>7</sup>

**NOTING** that the Prosecution opposes the Motion<sup>8</sup> on the basis that: (i) it has fulfilled its disclosure obligations under the Rules and provided all CDR's in the formats that are in its custody, including, where possible, searchable Excel formats as received from the Rwandan authorities; (ii) it is not in possession of any "unified" collection of all CDR's data; and (iii) the Prosecution's disclosure obligations do not extend to work product and the request for analysed CDR's created upon analysis of raw data is without basis;<sup>9</sup>

**CONSIDERING** that the Prosecutor shall, *inter alia*, disclose: (i) pursuant to Rule 71(B) of the Rules, any books, documents, photographs, and tangible objects which, *inter alia*, are material to the preparation of the defence or are intended for use by the Prosecutor as evidence at trial; and (ii) pursuant to Rule 73 of the Rules, any material that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

**CONSIDERING** that the Prosecution has unequivocally stated that it has already fulfilled its disclosure obligations under Rules 71(B) and 73 of the Rules by providing the entirety of the CDR's in its custody, in the formats that it received from the Rwandan authorities and, where available, in the Excel format created as part of its analysis of the original raw CDR's, and that it does not have a "harmonised" or "unified" collection of CDR's;<sup>10</sup>

**CONSIDERING**, in view of the Prosecution's submission that it has already disclosed the entirety of the CDR's in the same format that is available to it, that Ndagijimana's allegation of breach of the equality of arms is unfounded;<sup>11</sup>

**FINDING**, in light of the above, that the request to disclose or re-disclose the original raw CDR's transmitted by the Rwandan authorities is moot, and that the request for the provision of CDR's in a harmonised, searchable or analysed format is without basis;<sup>12</sup>

<sup>7</sup> Motion, paras. 2, 10, 18-20.

<sup>8</sup> Response to Ndagijimana's "Urgent Motion for Disclosure of Harmonised Call Data Records", 3 June 2019 (confidential) ("Response"), paras. 1, 3.

<sup>9</sup> Response, paras. 1, 2. The Prosecution indicates that, as a courtesy, it nevertheless provided Ndagijimana with the requested Excel files created as part of its analysis of the original raw CDR's. *See* Response, para. 2.

<sup>10</sup> *See* Response, paras. 1, 2. *See also* Prosecution Response to Motion for an Order of Disclosure – Telecommunication-Related Material, 27 February 2019 (confidential), paras. 1, 2, 6; T. 14 March 2019 pp. 23, 24.

<sup>11</sup> *See* Motion, para. 10.

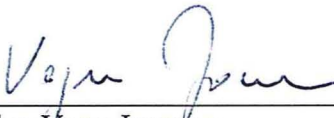
<sup>12</sup> In making this finding, I note that the decisions in the *Karemera* and *Mladić* cases relied upon by Ndagijimana concern the disclosure of exculpatory material under Rule 68 of the ICTR and ICTY Rules, and that the Appeals

**FOR THE FOREGOING REASONS,**

**HEREBY DISMISS** the Motion.

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

Done this 2nd day of September 2019,  
At Arusha,  
Tanzania

  
\_\_\_\_\_  
Judge Vagn Joensen  
Single Judge

**[Seal of the Mechanism]**

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Chamber found that “the Prosecution’s Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection in a searchable format” and that it should “at the very least, inform the accused of its existence”, draw “the attention of the Defence to such material in writing”, or provide “descriptive indices and written notice of disclosed material” to “make EDS materials reasonably available and accessible to the Defence”. *See Karemera et al.* Decision of 30 June 2006, paras. 10, 15; *Mladić* Decision of 28 November 2013, para. 27. I do not consider the comparison relevant to the present case or compelling, since Ndagijimana has not demonstrated that the manner in which the CDR’s have been disclosed is analogous to the EDS disclosure considered in the *Karemera* and *Mladić* cases, or that the material he seeks is *prima facie* exculpatory and, therefore, within the ambit of Rule 73 of the Rules. Likewise, he fails to demonstrate that CDR’s in a “harmonised” and “searchable” formats – were they to exist despite the Prosecution’s contention that they do not – or CDR’s in an “analysed” format – including spreadsheet(s) of telephone contacts created by Prosecution investigators – would not constitute material that is not subject to disclosure under Rule 76(A) of the Rules, to the extent that such material is not intended for use by the Prosecutor as evidence at trial and subject to Rule 71(B) of the Rules. In any case, the Prosecution agreed as a courtesy to provide the Excel files created as part of its analysis of the raw data. *See* Response, para. 2. I further note that Ndagijimana incidentally requests a detailed schedule listing the dates when the Prosecution collected information derived from the telecommunications material, including CDR’s, telephone logs, and intercepts. *See* Motion, para. 12. For the same reasons as above, I consider that Ndagijimana fails to substantiate this request and to provide a legal basis for it, and therefore dismiss it.



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