

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE PRESIDENT

Before: Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 1 July 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

MOTION FOR DECISION ON CONTACT WITH
PERSONS BENEFITTING FROM PROTECTIVE MEASURES

Office of the Prosecutor:
Mr. Hassan Jallow

Jean de dieu Kamuhanda:
Mr. Peter Robinson, Counsel

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1. Jean de dieu Kamuhanda respectfully requests that the President, or a Single Judge designated by him, issue a decision concerning contact with persons benefitting from protective measures in his case.

2. Mr. Kamuhanda was convicted of genocide at the ICTR¹ and his conviction has been affirmed on appeal,² and in an initial request for review.³ He has maintained his innocence throughout the proceedings.⁴ He has recently engaged attorney Peter Robinson of the United States to represent him in his effort to overturn his wrongful conviction through a request for review at the Residual Mechanism.⁵ Mr. Robinson has been granted access to the confidential material in Mr. Kamuhanda's case.⁶

3. As part of his investigation into possible new facts that might warrant review of Mr. Kamuhanda's conviction, Mr. Robinson believes it is necessary to interview some persons who benefit from protective measures in Mr. Kamuhanda's case. This motion seeks a decision on the modalities for him to do so.

4. The protective measures that currently apply to Mr. Kamuhanda's case were issued by the ICTR some 15 years ago prior to Mr. Kamuhanda's trial. On 7 July 2000, the Trial Chamber issued a decision that provided, *inter alia*:

(i) Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of (sic) guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview.⁷

5. These protective measures, which speak of potential prosecution witnesses, and which require a motion before a Judge or Chamber, are out-dated. There are no longer any potential prosecution witnesses in Mr. Kamuhanda's case, and subsequent practice at

¹ *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Judgement* (22 January 2004)

² *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005)

³ *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011)

⁴ Transcript of 19 May 2005 at pp. 96-97

⁵ *Request for Access* (30 March 2015) at para. 3

⁶ *Decision on Request for Access* (25 June 2015)

⁷ *Prosecutor v. Kamuhanda*, No. ICTR-99-50-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (7 July 2000)

the ICTR and ICTY has eliminated the involvement of a Judge or Chamber in the process.⁸

6. Mr. Kamuhanda therefore moves the Residual Mechanism for a new decision on contact with persons benefitting from protective measures in his case that takes into account the current post-conviction status of his case as well as current practices.

7. Mr. Kamuhanda notes that given the core function of the Mechanism to adjudicate post-conviction issues arising from the ICTY and ICTR, and the fact that protective measures orders of the ICTY and ICTR have been issued at the pre-trial stage of the cases and have varied greatly over the years, it would be prudent to establish a regime for contact with protected witnesses in post-conviction cases before the Mechanism that could apply on a global basis.

8. A recent study by the International Bar Association recommended that the process when a party seeks to interview a witness of the opposing party be standardised and streamlined to ensure consistency.⁹

9. At the International Criminal Court, where the most recent protective measures decisions have been issued, Chambers have approved a regime whereby the Victims and Witnesses Section (“VWS”) contacts the protected witness and determines if he or she consents to the requested interview.¹⁰ In the *Karadzic* trial at the ICTY, which was completed in 2014, that same system was proposed jointly by the prosecution and defence and worked particularly well.¹¹

10. The fact that contact with a witness is made by a neutral organ such as the VWS removes any influence or appearance of influence on the witness that exists when one party conveys the request for interview by the other party. The witness is asked by the neutral VWS whether he or she consents to being interviewed by the opposing party.

⁸ See, for example, *Prosecutor v Hadzic*, No. IT-04-75-I, *Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence* (23 August 2011) at para. 14d, (most recent ICTY protective measures decision); and *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others* (6 May 2009) at dispositive para. (v); *Decision on Defence Urgent Motion for Witness Protective Measures* (9 February 2010) at dispositive para (v) (most recent ICTR protective measures decisions)

⁹ International Bar Association, *Witnesses before the International Criminal Court* (July 2013) at p. 47

¹⁰ *Prosecutor v Ble Goude*, No. ICC-02/11-02/11 *Second Decision on Issues Related to Disclosure of Evidence* (5 May 2014) at paras. 18-20; *Prosecutor v Bemba et al*, No. ICC-01/05-01/13, *Decision on Babala Request to Obtain Contact Details of Witnesses* (28 April 2015) at para. 7

¹¹ *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses* (15 July 2009)

If the witness consents, he or she is asked whether he or she wishes a representative of the calling party to be present. The VWS thereafter informs the parties of the witness' desires and the parties conduct the interview accordingly. If the witness does not consent, no interview is conducted.

11. Mr. Kamuhanda respectfully requests that the Mechanism issue a decision in his case implementing this regime for contact with protected witnesses.

12. Should the Mechanism decline to do so, and requires Mr. Kamuhanda to make a request to the Chamber each time he wishes to have his defence team contact a protected victim or potential prosecution witness, as a first such request, Mr. Kamuhanda hereby seeks permission for his defence team to contact protected victim GAE.

13. Witness GAE is a victim of the events at the Gikomero Parish for which Mr. Kamuhanda has been convicted and was, at one time, a potential prosecution witness. He was not called to testify. Mr. Kamuhanda has reason to believe that Witness GAE has information concerning the giving of false information to investigators of the Office of the Prosecutor implicating Mr. Kamuhanda in those events and the subsequent giving of false testimony at Mr. Kamuhanda's trial. He believes that since Witness GAE implicated him in his statement to the investigators, but did not testify, he may be more likely to acknowledge these facts than someone who has given his or her testimony under oath. For those reasons, if judicial approval continues to be a requirement, Mr. Kamuhanda requests that the President or Single Judge authorise his defence team to interview Witness GAE.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is fluid and cursive, with the first name "Peter" and last name "Robinson" clearly distinguishable.

PETER ROBINSON
Counsel for Jean de dieu Kamuhanda