

MICT-13-33  
13-09-2015  
(590-584)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

Before: Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

Date Filed: 14 September 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

*Public*

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REPLY BRIEF:  
MOTION FOR DECISION ON CONTACT WITH  
PERSONS BENEFITTING FROM PROTECTIVE MEASURES

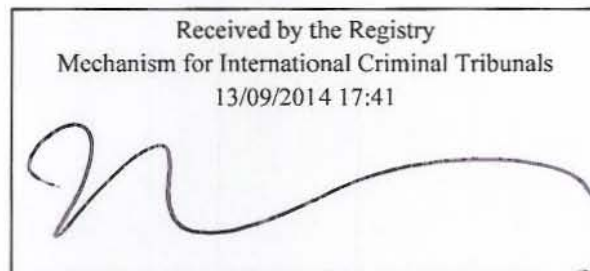
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Office of the Prosecutor:  
Mr. Hassan Jallow  
Mr. Richard Karegyesa

ADAD-ICTR:  
Mr. John Philpot

Jean de dieu Kamuhanda:  
Mr. Peter Robinson, Counsel

ADC-ICTY:  
Ms. Colleen Rohan



1. Jean de dieu Kamuhanda hereby replies, with leave,<sup>1</sup> to the *Prosecutor's Submissions on Motion for Contact with Persons Benefitting from Protective Measures* and the *Registrar's Rule 31(B) Submission following the Order for Submissions of 8 July 2015* and provides his comments on the observations of the *amicus curiae*.

### Reconsideration

Does the conclusion of Kamuhanda's trial and appeal constitute a change of circumstances which warrants a reconsideration of the modalities for access for Kamuhanda's Counsel to interview Prosecution witnesses?

2. Mr. Kamuhanda concurs in the observations made on this issue by the ADAD-ICTR<sup>2</sup> and ADC-ICTY<sup>3</sup> and has nothing to add.

### Judicial Approval

Should access to interview a Prosecution witness, apart from consent from the witness, be at the discretion of Kamuhanda's Counsel or should access require a justification in relation to the particular witness to be approved by a Judge?

3. Mr. Kamuhanda concurs in the observations made on this issue by the ADAD-ICTR<sup>4</sup> and ADC-ICTY.<sup>5</sup>

4. Mr. Kamuhanda notes that the protective measures for defence witnesses in the *Kamuhanda* case do not require judicial approval.<sup>6</sup> Therefore, the prosecution benefits from an inequality of arms in this case—the defence must seek judicial approval to interview a prosecution witness, while the prosecution need not seek judicial approval to interview a defence witness. On this basis alone, it is unfair to retain the judicial approval requirement in this case.

5. Mr. Kamuhanda also notes that even in the *Nshogoza* case, which arose directly out of the *Kamuhanda* proceedings and involved alleged breaches of protective measures,

<sup>1</sup> *Decision on ADAD-ICTR and ADC-ICTY Motions for Leave to Submit Amicus Curiae Observations and Decision on Application for Leave to Reply* (13 August 2015) at para. 13

<sup>2</sup> *Amicus Brief of Association of Defence Lawyers of the International Criminal Tribunal for Rwanda* (27 August 2015) at paras. 3-9

<sup>3</sup> *ADC-ICTY Amicus Curiae Observations* (10 September 2015) at paras. 6-8

<sup>4</sup> *Amicus Brief of Association of Defence Lawyers of the International Criminal Tribunal for Rwanda* (27 August 2015) at paras. 11-20

<sup>5</sup> *ADC-ICTY Amicus Curiae Observations* (10 September 2015) at paras. 9-10

<sup>6</sup> *Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses* (22 March 2001)

the regime for protective measures for prosecution witnesses in that case did not require judicial approval.<sup>7</sup>

6. Therefore, the Single Judge is urged not to retain the requirement of judicial approval in the *Kamuhanda* case.

#### **Involvement of the WISP**

Should consultation of the witness as to the consent and the facilitation of the Interview, if any, be conducted by the Prosecution or by WISP?

7. Mr. Kamuhanda concurs in the observations made on this issue by the ADAD-ICTR<sup>8</sup> and ADC-ICTY.<sup>9</sup>

8. The Registrar has contended that a judicial order authorizing the involvement of the WISP in contacting protected witnesses is necessary to avoid compromising the neutrality of the WISP.<sup>10</sup> However, if the modification proposed by Mr. Kamuhanda is accepted, the Single Judge will have issued a judicial order authorizing the involvement of the WISP whenever a party seeks to interview a person benefitting from protective measures in this case. Such an order will have the same effect as an order issued for each witness individually. Therefore, the WISP will be acting pursuant to a judicial order and, as in the *Karadzic* case and in the many cases at the ICC in which the unit plays such a role, its integrity will not be compromised when it contacts a protected witness on behalf of a party without an individual order for each witness.

9. The Registrar has also observed that the prosecution is better placed to contact its own protected witnesses to convey the defence request for interview than the WISP.<sup>11</sup> Mr. Kamuhanda disagrees.

10. As pointed out by the *amici*, contact by the WISP at the post-conviction stage is more appropriate because after a case has concluded, the Prosecution no longer has

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<sup>7</sup> *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses* (24 November 2008) at para. 19

<sup>8</sup> *Amicus Brief of Association of Defence Lawyers of the International Criminal Tribunal for Rwanda* (27 August 2015) at paras. 22-30

<sup>9</sup> *ADC-ICTY Amicus Curiae Observations* (10 September 2015) at paras. 11-16

<sup>10</sup> *Registrar's Submission* at para. 13

<sup>11</sup> *Registrar's Submission* at para. 14



regular contact with the witnesses, while the WISP often follows up with the witnesses and provides post-testimony services to them.<sup>12</sup>

11. More importantly, the prosecution has a conflict of interest when contacting a witness on behalf of a person seeking to overturn his wrongful conviction. The prosecution has an interest in maintaining its conviction. Having the prosecution asking its witnesses if they are willing to meet with a representative of the convicted person is akin to having a ruling political party in a contested election asking voters if their vote was recorded correctly. Just as such an inquiry can only be made by independent election officials to be done fairly and seen to be done fairly, an inquiry of protected witnesses can only be made by the WISP to be done fairly and seen to be done fairly.

12. For his part, Mr. Kamuhanda's counsel prefers to have the WISP contact protected defence witnesses on behalf of the prosecution rather than contacting those witnesses himself, so that there can be no question that the result is a product of the witness' own free will. He is disappointed that the prosecution does not see it the same way, and cannot discern any reason from the *Response* why the prosecution wishes to retain the burden of contacting witnesses on behalf of the defence.

13. The truth is that administration of the current protective measures in the *Kamuhanda* case has been a disaster. On two separate occasions involving five different witnesses, members of the Office of the Prosecutor have been found to have violated the protective measures regime by directly contacting protected defence witnesses and bypassing the defence. The prosecution received a formal warning by the Trial Chamber pursuant to Rule 46(A) as a result of this violation.<sup>13</sup>

14. Mr. Kamuhanda's investigator has also been found to have improperly contacted two protected prosecution witnesses without getting judicial authorization or going through the prosecution.<sup>14</sup>

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<sup>12</sup> *Amicus Brief of Association of Defence Lawyers of the International Criminal Tribunal for Rwanda* (27 August 2015) at para. 29; *ADC-ICTY Amicus Curiae Observations* (10 September 2015) at para. 13

<sup>13</sup> *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002) at para. 20; *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Allegations of Contempt by Members of the Office of the Prosecutor* (25 November 2010)

<sup>14</sup> *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at paras 168-69.

15. This is a strong argument for the need for a regime in which requests for interviews are conveyed by a neutral party such as the WISP and not left in the hands of a party's opponent.

16. The current protective measures regime will continue to result in rancor and disputes if left to the parties. Neither the objections of the Registrar nor those of the Prosecution should prevent the Single Judge from improving the protective measures regime by putting the responsibility of conveying a request for an interview into the neutral and capable hands of the WISP and removing it from the contentious hands of the parties.

#### **The Required Showing**

17. Should the Single Judge opt to retain the requirement of judicial approval of the interviews, Mr. Kamuhanda has shown a legitimate forensic purpose for his request to interview prosecution witness GAE.

18. The prosecution has contended that a showing akin to that required for granting a request for review needs to be made for judicial permission to interview a witness.<sup>15</sup> The prosecution's position puts a convicted person in an impossible position—he cannot interview a witness to develop the factual basis for a request for review because he cannot show that he already has the material sufficient for review to be granted.

19. There is nothing to prevent a convicted person from contacting a non-protected witness in a bid to develop facts for review of his conviction. The only justification for restriction on his right to contact a protected witness is the security of that witness. Requiring a showing of success on the merits in order to conduct an interview is wholly unrelated to the witness' security and would be a disproportionate restriction on individual rights.

20. The standard proposed by the prosecution is even higher than that need to compel a witness to submit to an interview with the opposing party, where no showing of likelihood of success on the merits of the case is required.<sup>16</sup> The prosecution's response

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<sup>15</sup> *Prosecutor's Submissions* at paras. 11-15

<sup>16</sup> *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 5



completely ignores the voluntary nature of the inquiry to Witness GAE in this case. If the witness declines to be interviewed, his wishes will be respected.

21. The prosecution's claim that an interview should be denied because it could have been conducted with due diligence at an earlier time ignores the Mechanism's own jurisprudence that holds that in exceptional circumstances, the due diligence requirements can be dispensed with.<sup>17</sup> The prosecution simply puts the cart before the horse.

22. Mr. Kamuhanda contends that should the Single Judge opt to retain the requirement of judicial approval for interviews of protected prosecution witnesses in this case, the showing required is simply that of a legitimate forensic purpose for the interview.<sup>18</sup>

23. Here, as the prosecution has itself pointed out, Witness GAA testified at the Appeals Hearing that he was with Witness GAE and Witness GEK when they discussed incriminating Mr. Kamuhanda.<sup>19</sup> Witness GEX testified that Witness GAE told her that, contrary to his statement to the Office of the Prosecutor, he had not seen Mr. Kamuhanda at Gikomero Parish and that Witness GAE had showed her a photograph of Mr. Kamuhanda to help her identify him in court.<sup>20</sup>

24. This information provides more than an ample showing that Mr. Kamuhanda has a legitimate forensic purpose in seeking the consent of Witness GAE to submit to an interview.

25. Therefore, if judicial approval is required, the Single Judge should authorize Mr. Kamuhanda to interview Witness GAE if the witness consents.

### **Conclusion**

26. The objections of the Registrar and the Prosecution to the proposed modification of protective measures are without merit. It is respectfully requested that the protective measures decision in this case be modified so as to eliminate the

<sup>17</sup> *Prosecutor v Lukic*, No. MICT-13-52-R.1, *Decision on Milan Lukic's Application for Review* (7 July 2015) at para. 7; *Prosecutor v Lukic*, No. MICT-14-67-R.1, *Decision on Sreten Lukic's Application for Review* (8 July 2015) at para. 7; *Niyitegeka v Prosecutor*, No. MICT-12-16-R, *Decision on Niyitegeka's Request for Review and Assignment of Counsel* (13 July 2015) at para. 6

<sup>18</sup> *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; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214

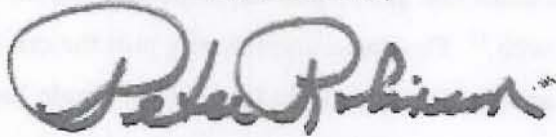
<sup>19</sup> Transcript of 14 May 2005 at p. 40 (CS)

<sup>20</sup> Transcript of 14 May 2005 at p. 51 (CS)

requirement of judicial approval and to allow for the WISP to determine if persons benefitting from protective measures consent to be interviewed by the defence.

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Respectfully submitted,



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