



Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 23 July 2015

Original: English

**THE OFFICE OF THE PRESIDENT**

**Before: Judge Vagn Joensen**

**Registrar: Mr. John Hocking**

**THE PROSECUTOR**

**v.**

**JEAN DE DIEU KAMUHANDA**

**PROSECUTOR'S SUBMISSIONS ON MOTION  
FOR CONTACT WITH PERSONS BENEFITTING  
FROM PROTECTIVE MEASURES**

**Office of the Prosecutor**

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Peter Robinson, Counsel

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## Introduction

1. On 1 July 2015, Jean de Dieu Kamuhanda (“Applicant”) filed a motion (“Motion”) <sup>1</sup> seeking new modalities for contact with protected witnesses in his case<sup>2</sup> or, in the alternative, permission to interview former Prosecution Witness GAE as part of an investigation into possible new facts that may warrant a review of his conviction <sup>3</sup>.
2. The request for new modalities for contacting protected witnesses is based, *inter alia*, on the grounds that the current protective measures in force are out-dated and do not conform to current practices.<sup>4</sup>
3. The alternative request to interview GAE is based on the Applicant’s unsubstantiated belief that “...Witness GAE may have information concerning the giving of false testimony at Mr. Kamuhanda’s trial.”<sup>5</sup>
4. The Prosecutor submits that neither request is sufficiently justified and, in the result, the Motion should be dismissed.

## Submissions

### *The Applicant’s request to vary the Decision on Protective Measures is not Justified*

5. The Applicant requests, without providing a legal basis or sound factual justification, the variation of the Decision on Protective Measures<sup>6</sup> issued in the Kamuhanda case which regulated the procedure for contacting protected persons by Defence Counsel in that case and, writ large, requests the establishment by the Mechanism of a global regime regulating the contact of protected witnesses that would eliminate judicial supervision of contact and

<sup>1</sup>*The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Motion for Decision on Contact with Persons Benefiting from Protective Measures, 1 July 2015 (Motion).

<sup>2</sup>Motion, paras 1,3 and 6

<sup>3</sup>Motion, paras. 11-13.

<sup>4</sup>Motion, paras. 5-7

<sup>5</sup>Motion, paras. 12-13

<sup>6</sup>*Prosecutor v. Kamuhanda*, Case No. ICTR-99-50-I, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, 7 July 2000 (Decision on Protective Measures)

transfer the responsibility of procuring witness consent from the calling party to the Witness Support Section.<sup>7</sup>

6. *First*, the Prosecutor joins issue with and adopts paragraphs 11 to 15 of the Rule 31(B) submissions filed by the Registrar in this matter.<sup>8</sup> Contrary to the Applicant's assertion that the protective measures in issue are out-dated and do not conform to current practice, the Registrar correctly notes that it is contemporary practice for a calling party to maintain a role in obtaining the consent of a witness both at the ICTR and ICC.<sup>9</sup>
7. *Second*, the Prosecutor submits that judicial oversight is particularly important and necessary to regulate contact with protected persons in concluded cases, post-appeal. Protected victims or witnesses have a right to privacy and deserve closure, which can only be guaranteed by judicial supervision. An applicant's right to protected persons or the information they hold is not absolute and it is only through judicial regulation that an appropriate balance can be struck.<sup>10</sup> The judicial regulation in closed cases serves to guarantee privacy by ensuring first, that requests to interview a protected person are sufficiently justified and, second, that the person consents to the interview.

<sup>7</sup> Motion paras 5-7 and 11

<sup>8</sup> *The Prosecutor v Kamuhanda* MICT-13-33, Registrar's Rule 31(B) Submission Following the Order for Submissions of 8 July 2015, filed 23 July 2015, paras 11-15

<sup>9</sup> *Ibid* para 15 and *fn* 13 and 14

<sup>10</sup> See *Prosecutor v. Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, Declaration of Judge Shahabuddeen, para.4. An analogy can also be drawn here between variation of protective measures to permit access to confidential material, and the requested access to a protected witness; in either case the Chamber or Judge has discretion to strike a balance between the competing rights. For this proposition see *Bagosora v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Augustin Ndirabatware's Motion for Disclosure of Confidential Material Relating to Witness DBN, 8 June 2010, paras. 10-12 (citing *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Decision on Georges A.N. Rutaganda Motion for Access to Confidential Material of Witness CSH from Rukundo Case, 18 February 2010, para. 10; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the Karamera Case, 10 July 2009, para. 10; *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009, para. 7.); *Bagosora v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Augustin Ndirabatware's Motion for Disclosure of Confidential Material Relating to Witness DAK, 23 July 2010, paras. 10-11; *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-R, Decision on Ildephonse Nizeyimana's Motion for Access to Transcripts and Exhibits (Confidential), 15 April 2011, para. 3; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Disclosure, 11 June 2007, para. 5; *Prosecutor v. Nyiramasuhuko et. al*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 10 ("[D]isclosure of the Confidential Requested Material to any third party . . . requires a variation or rescission of the protective measures in effect"); *Simić* Appeal Judgement, para. 214; *Naletilić* Appeal Judgement, para. 79

8. *Third*, it should be noted that the ICTY and ICC decisions cited by the Applicant in paragraph 9 of the motion<sup>11</sup> concerned cases that were in active investigation or trial where, for purposes of efficiency, it may not be practical to seek judicial authorisation every time a party needs to interview a witness of the adverse party in the course of proceedings. In the extant application there are no criminal proceedings before the Mechanism against the Applicant justifying unregulated access to protected witnesses.

9. In view of the foregoing, the Prosecutor submits that the Applicant has failed to show sufficient cause why the protective measure in force should be varied.

*The Applicant's request to interview GAE is not sufficiently justified*

10. The Applicant seeks permission to interview GAE, whom he believes has information concerning the giving of false information to OTP investigators and false testimony at trial.<sup>12</sup> Neither the objective basis of this belief nor any detail of the nature of information GAE may allegedly have is provided. Additionally, the Applicant omits to state when he first became aware of the existence of this alleged information and why it wasn't available to him at trial or on appeal. The Prosecutor submits, in the premises, that the Applicant has not advanced sufficient justification warranting the unnecessary intrusion of GAE's privacy.

11. While the Applicant's right to information or evidence during the trial or appeal phase is conceded, the Prosecutor submits that this right should not be absolute and must be counterbalanced by a protected witness' right to privacy, particularly once the case is closed post-appeal.<sup>13</sup> For the Applicant to succeed therefore there must be a showing that the potential information being sought from a protected witness was not otherwise available – with due diligence – at trial or on appeal; has the prospects of meeting the “*new fact*” threshold for Review under Rule 146 and, that the interview is necessary to avoid a miscarriage of justice. In sum, the Applicant must show that he is not merely embarking on a fishing expedition.<sup>14</sup> The Prosecutor submits that it should only be upon satisfaction of these

<sup>11</sup> Motion fn 10 and 11

<sup>12</sup> Motion para 13

<sup>13</sup> See supra fn 10

<sup>14</sup> An analogy can be drawn here between this kind of request and a request for the Mechanism to fund an investigation for purposes of generating unspecified evidence for a Rule 115 submission of additional evidence. In

requirements that the witness consent envisaged in the order for protective measures should be sought.

12. With regard to the availability of GAE during trial, it is a matter of record that the OTP disclosed his redacted statement to the Kamuhanda defence on 8 November 2000 and the unredacted version on 31 July 2001, prior to trial commencement. At a minimum, the Applicant knew of the existence of this witness, his identity and evidence since 2001 and had the opportunity to interview him but failed or neglected to do so.
  
13. Second, it is also a matter of record that during the Rule 115 Appeal Chamber hearing of 18 May 2005, the Kamuhanda defence proffered the now discredited testimony of witnesses GAA and GEX in which they sought to malign GAE by suggesting he was a co-conspirator in suborning perjury<sup>15</sup>. It is equally on record that the Kamuhanda defence interviewed – without Chamber authorisation- GAA and GEX as early as August 2003 prior to procuring their recantation statements which were used for the Rule 115 hearing on appeal and would have had a similar opportunity to interview GAE about what he knew, but failed or neglected to do so.<sup>16</sup> In sum, the Applicant now seeks to impermissibly remedy his failings at trial or on appeal by seeking to interview GAE.
  
14. Regarding the potential of the anticipated information from GAE meeting the Rule 146 threshold for review, the Prosecutor submits that there is insufficient detail in the Application for the Judge to assess the prospects of success, but notes that on the face of it the information sought from GAE would appear to be additional evidence of matters already litigated at trial and on appeal, rather than new information of a fact that was not in issue during the proceedings. Kamuhanda advanced the defence – found to be without merit- at trial, on appeal and on review that prosecution witnesses fabricated evidence against him. This Application appears to be yet another attempt to obtain additional evidence from GAE

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the latter scenario the Appeals Chamber has required the applicant to show that he had specific information to be investigated and that the specific information was not available at trial and could not have been discovered at trial through due diligence: See *Gacumbitsi v The Prosecutor* ICTR-01-6A-64-A, 21 October 2005 paras 12 -15, citing *Prosecutor v Nahimana et al* ICTR-99-52-A, 3 May 2005 p.5

<sup>15</sup> *Kamuhanda v Prosecutor* T 18.05.05- Closed Session- pages 10 to 68

<sup>16</sup> *Prosecutor v Nshogoza* ICTR-2007-91-T, Judgement, 7 July 2009, paras 188-189

of issues sufficiently canvassed at trial and on appeal, in circumstances where he waived the right to interview GAE at the time.

15. Finally, there is absolutely no showing by the Applicant that a miscarriage of justice would result from a denial of his application. At best, the Applicant seeks judicial authorisation to impermissibly embark on what appears to be a fishing expedition, which should be denied.
16. In view of the foregoing, the Prosecutor submits that permission to interview GAE be denied, without prejudice to the Applicant renewing his request with sufficient justification. Should the Judge however be disposed to granting permission for the requested interview of GAE, the Prosecution undertakes to seek the necessary consent and, if obtained, to make arrangements for the interview in the terms stipulated in the Decision on Protective Measures.

#### **Conclusion**

17. For the reasons set out above the Prosecutor requests that the Motion be denied in its entirety.

**Word count: 1,791**

**DATED at Arusha this 23<sup>rd</sup> day of July 2015**

  
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