



Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 23 July 2015

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

**REGISTRAR'S RULE 31(B) SUBMISSION FOLLOWING THE
ORDER FOR SUBMISSIONS OF 8 JULY 2015**

Rule 31(B) of the Rules of Procedure and Evidence

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow

Counsel for Jean de Dieu Kamuhanda:

Mr. Peter Robinson

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A handwritten signature in black ink, appearing to read 'McGowan Carter', written over the printed text of the receipt box.

Introduction

1. Pursuant to Rule 31 (B) of the Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals (“Rules” and “Mechanism”, respectively), and the Order for Submissions rendered on 8 July 2015, the Registrar brings the following observations to the attention of the Single Judge.
2. On 1 July 2015, Mr. Jean de Dieu Kamuhanda filed a motion (“Motion”) requesting a decision allowing his Counsel to interview any protected person in his case who, through the Witness Support and Protection Unit (“WISP”), consents to the interview, or, in the alternative, authorisation to interview former Prosecution Witness GAE. Mr. Kamuhanda makes this request in the context of a potential request for review of his conviction.¹
3. On 7 July 2015 the President of the Mechanism assigned the application to the Single Judge.² On 8 July 2015, the Single Judge invited the Prosecution and the Registrar to make submissions.³

A. Background

4. On 7 July 2000, Trial Chamber II of the International Criminal Tribunal for Rwanda (“ICTR”) issued a Decision establishing protective measures for victims and potential Prosecution witnesses in Mr. Kamuhanda’s case (“Decision on Protective Measures”).⁴ The Decision on Protective Measures:

[r]equir[es] 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, 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 persons [...] that the Prosecution shall undertake all necessary arrangements to facilitate such interview.⁵

5. The Decision on Protective Measures remains in effect.
6. In the Motion, Mr. Kamuhanda states that as part of his investigation into possible new facts that could warrant review of his conviction, it is necessary to interview persons who benefit from protective measures in his case.⁶ Mr. Kamuhanda asserts that the protective measures

¹ *The Prosecutor v. Kamuhanda*, Case No. MICT-13-33, Motion for Decision on Contact with Persons Benefitting from Protective Measures, 1 July 2015, paras. 1, 3 (“Motion”).

² *The Prosecutor v. Kamuhanda*, Case No. MICT-13-33, Order Assigning a Single Judge to Consider an Application, 7 July 2015.

³ *The Prosecutor v. Kamuhanda*, Case No. MICT-13-33, Order for Submissions, 8 July 2015.

⁴ *The 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”).

⁵ Decision on Protective Measures, paras. 2 (i) and 9.

⁶ Motion, para. 3.

put in place in the Decision on Protective Measures “are out-dated” and therefore requests the establishment of a specific regime “for contact with protected witnesses in post-conviction cases before the Mechanism that could apply on a global basis”.⁷

7. Specifically, Mr. Kamuhanda requests the establishment of a regime whereby he would directly approach WISP, without making a request to the Prosecution or a Chamber, and that WISP would then contact the protected witness in order to determine whether he or she consents to the requested interview. Mr. Kamuhanda proposes that if the witness consents, he or she would then be asked whether he or she wished to have a representative of the calling party present, and that WISP would then inform the parties of the witness’s desires.⁸
8. In the alternative, Mr. Kamuhanda seeks permission to contact protected victim GAE.⁹

B. Submissions

9. The Registrar offers the following considerations to assist the Single Judge in reaching a decision on the matter.
10. Any decision concerning the modalities of contact between Counsel and persons benefitting from protective measures in Mr. Kamuhanda’s case must take into account the following factors: (1) the continued protection of witnesses and the legal regime governing measures for the protection of victims and witnesses; and (2) WISP’s neutral role in providing such protection.

The continued protection of witnesses and governing legal regime

11. The Registrar advises against the establishment of a new regime for contacting witnesses “on a global basis”. Pursuant to Rule 86 of the Rules, protective measures for victims and witnesses put in place in any proceedings before the ICTR, the ICTY or the Mechanism remain in effect unless and until they are rescinded, varied or augmented in accordance with the Rules.¹⁰ Establishing a new system for contacting protected witnesses in the context of post-conviction proceedings would amount to a blanket variation of protective orders issued in ICTR and ICTY cases. Such a broad variation of protective measures is not contained in, nor envisioned by, Rule 86. In addition, this approach would be counter to established best practices in witness protection. The Registrar submits that such requests should be evaluated on a case-by-case basis, in light of existing protective orders.

⁷ Motion, para. 7.

⁸ Motion, paras. 8-11.

⁹ Motion, paras. 12-13.

¹⁰ See Mechanism Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 86(F).

12. The Registrar also notes that protective measures ordered for potential witnesses who are ultimately not called to testify during trial remain in effect and are also governed by Rule 86, even during post-conviction proceedings.¹¹ With regard to Counsel's request to interview Witness GAE, the Registrar notes that, while the witness was not called to testify during Mr. Kamuhanda's trial, the witness remains under protective measures, and in the absence of a judicial decision varying these measures, must be contacted using the modalities described in the Decision on Protective Measures.

WISP's neutral role in providing protection

13. In providing support and protection to victims and witnesses, WISP is mandated to "operate with the highest levels of integrity, impartiality and confidentiality, and ensure that all witnesses have equitable access to its services".¹² Establishing a regime in which WISP contacts witnesses on behalf of a party, absent an intermediary judicial order, could potentially violate this neutrality and impartiality. WISP cannot be perceived by witnesses as advocating or representing a particular party to the proceedings. Should the proposed system be adopted, WISP could be seen as acting on behalf of a party. The Registrar submits that this could have a negative impact upon WISP's patina of neutrality.

14. The Registrar also submits that, as set out in the existing Decision on Protective Measures governing the case at bar, the Prosecution is better placed to explain to its witnesses that Mr. Kamuhanda is interested in interviewing them, and answering any subsequent questions regarding the reasons for the interview and its context.

15. In this regard, the Registrar also notes that recent decisions on protective measures issued by the ICTR,¹³ as well as recent protocols established in cases before the International Criminal

¹¹ See *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules, 17 January 2003, para. 14 (relevant protection order remained in force "[...] even in respect of witnesses the Prosecutor or the Defence has not called", and noting that "[a] witness who has not been called during presentation of a party's case may be called at a later stage, for instance, during rebuttal, appeal or review").

¹² Mechanism Policy for the Provision of Support and Protection Services to Victims and Witnesses, 26 June 2012, Article 6(2).

¹³ See e.g. *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, p. 7 and *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Urgent Motion for Witness Protective Measures, 9 February 2010, p. 9 (involving the ICTR Witness and Victims Support Section ("WVSS") only after consent obtained by the calling party); *The Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-PT, Decision on the Prosecution's Second Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 3 September 2010, p. 5 and *The Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-PT, Decision on the Prosecution's Third Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 4 November 2010, p. 5 (requiring the Prosecution to obtain consent from witnesses, with the services of WVSS).

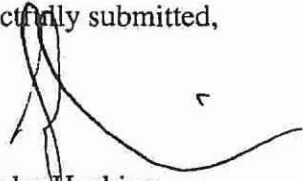
Court,¹⁴ maintain a role for the calling party in obtaining the consent of a witness to be interviewed.

C. Conclusion

16. For the reasons set out above, the Registrar requests that the Single Judge deny Mr. Kamuhanda's request to establish a "global" approach towards such interview requests, and instead address such requests on a case-by-case basis. The Registrar also requests that the existing Decision on Protective Measures not be varied to require WISP to obtain consent from witnesses on behalf of a party and absent an intermediary judicial order.

17. The Registrar does not take a position on Mr. Kamuhanda's request to interview Witness GAE. Should the Single Judge grant the request, WISP stands ready to provide assistance, as required.

Respectfully submitted,



John Hocking
Registrar

Dated this 23rd day of July, 2015
At The Hague,
The Netherlands.

¹⁴ See e.g. *The Prosecutor v. Nourain and Jamus*, Case No. ICC-02/05-03/09, Decision on the Protocol on the Handling of Confidential Information and Contact of (*sic*) Between a Party and Witnesses of the Opposing Party, 18 February 2013, para. 38 (requiring involvement of the Victims and Witnesses Unit ("VWU") only where necessary, and once consent has been given), and Public Annex, para. 22 (requiring consent to be obtained by the calling party); *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant', Public Annex A, 12 December 2014, para. 34 (requiring consent to be obtained by the calling party).