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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE SINGLE JUDGE

Before: Judge Vagn Joensen

Registrar: Mr. John Hocking

Date Filed: 27 August 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

*Public*

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AMICUS BRIEF OF ASSOCIATION OF DEFENCE LAWYERS OF THE  
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ADAD)

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Office of the Prosecutor:  
Mr. Hassan Jallow

Jean de dieu Kamuhanda:  
Mr. Peter Robinson, Counsel

Counsel for Amicus Curiae:  
Mr. John Philpot, Interim President, ADAD

**Received by the Registry**  
**Mechanism for International Criminal Tribunals**  
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1. Pursuant to leave granted by the Single Judge,<sup>1</sup> the Association of Defence Lawyers of the International Criminal Tribunal for Rwanda (ADAD) respectfully submits its amicus brief on the three issues identified by the Single Judge.

### Reconsideration

2. The Single Judge has framed the first issue as:

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?

3. ADAD observes that the Prosecution's response to the motion in this case indicates that it views the answer to be in the affirmative. The Prosecution has contended that the fact that the *Kamuhanda* case is now in the post-appeal stage, judicial regulation of contacts with its witnesses is more necessary and practical than when the case is in active investigation or trial.<sup>2</sup>

4. The jurisprudence of the ICTR provides that a Trial Chamber has inherent power to reconsider its own decisions. However, reconsideration is an exceptional measure available only (1) when a new fact has been discovered that was not known to the Trial Chamber; (2) new circumstances have arisen which affect the premise of the decision; (3) where there was an error of law or the Trial Chamber abused its discretion; or (4) an injustice has been occasioned.<sup>3</sup>

5. These criteria for reconsideration are not cumulative and only one of the factors need to be satisfied to trigger the reconsideration of a previous decision.<sup>4</sup>

6. ADAD submits that reconsideration of the 15 year-old protective measures decision in the *Kamuhanda* case is justified on the grounds that new circumstances have

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

<sup>2</sup> *Prosecutor's Submission on Motion for Contact with Persons Benefitting from Protective Measures* (23 July 2015), paras. 7-8

<sup>3</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005), para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure* (31 October 2005), para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY* (28 September 2007), para. 10; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005), para. 3

<sup>4</sup> *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JFR3* (20 March 2007), para. 3

arisen which affect the premise of the decision. Those new circumstances include the practice and experience with protective measure regimes based at the ICTR over the past 15 years, as well as the development of the *Kamuhanda* case to the post-conviction stage.

7. Intervening decisions of the ICTR Appeals Chamber or Trial Chambers have been found to warrant reconsideration of existing disclosure regimes or practices for admitting evidence.<sup>5</sup> The experience with protective measures over time was also found to warrant reconsideration in the *Karemera* case.<sup>6</sup> Similarly, the intervening decisions and experience at the ICTR with protective measure decisions, as set forth more fully below, warrant reconsideration of the original *Kamuhanda* protective measures decision of 2000.

8. In addition, the MICT Rules of Procedure and Evidence added Rule 155, which provides for systematic review of confidential material in closed cases for possible disclosure. This is itself recognition that the conclusion of a trial and appeal may constitute a change of circumstances that warrants a reconsideration of protective measures.

9. For all of these reasons, ADAD respectfully submits that a change of circumstances exists which warrants a reconsideration of the modalities for access for Kamuhanda's Counsel to interview Prosecution witnesses.

### **Judicial Approval**

10. The Single Judge has framed the second issue as:

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?

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<sup>5</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008), para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006), para. 7; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Reconsidering Exclusion of Evidence Related to Accused Kabiligi* (23 April 2007), para. 3

<sup>6</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006), para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures Orders* (15 October 2009), para. 15

11. ADAD submits that judicial approval, which was, for a short time in July 2000, a standard feature of protective measures decisions at the ICTR,<sup>7</sup> has long since been eliminated from such decisions. Experience with the administration of protective measures at the ICTR has been that placing a burden on the Judges and parties for judicial approval for interviews of protected witnesses was unnecessary.

12. ADAD does not believe that a special rule requiring judicial approval is necessary when a case enters the post-conviction stage. Since the consent of a protected witness is a pre-requisite to an interview by defence counsel, and since defence counsel can only contact the witness through the prosecution or, as proposed, the WISP, there is no danger that a witness will be harassed or interfered with. A party is always free to seek judicial intervention in a particular case where that party believes that a request to interview a protected witness is made in bad faith or is otherwise improper.

13. For non-protected witnesses, and in national systems, a party is always free to interview a witness of the other party regardless of the stage of the proceedings and without seeking judicial approval.<sup>8</sup> This flows from the universally accepted principle that a witness is not the property of either party.<sup>9</sup>

14. The mere fact that a person has agreed to testify for one party does not prohibit the other party from interviewing him or her provided there is no interference with the course of justice.<sup>10</sup> Interviews of prosecution witnesses at the post-conviction stage serve an important interest for an accused who is innocent and has been wrongfully convicted. Among the thousands of cases of innocent persons who have later been exonerated, many involved testimony by witnesses who were mistaken or deliberately

<sup>7</sup> See *Prosecutor v Kajelijeli*, No. ICTR-98-44-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (6 July 2000) item 3(i). (The Trial Chamber later deleted the condition of judicial approval when presented with a motion for protective measures for defence witnesses. *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion for Protective Measures for Defence Witnesses* (3 April 2001) item (i)); *Prosecutor v Niyitegeka*, No. ICTR-96-14-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (12 July 2000), item 3(i)

<sup>8</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 Nov 2006) para. 13

<sup>9</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 7; paras. 8, 13;; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) para. 3

<sup>10</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Order of 2 October 2003 Related to Access Jean Kambanda* (24 August 2004) para. 18

provided false testimony.<sup>11</sup> It is vital that an accused not be unnecessarily restricted from producing evidence of his innocence, even long after a trial has concluded.

15. The right to interview a witness is not absolute and must be balanced against the witness' interest in maintaining his or her security. However, the ICTR Appeals Chamber has recognized that the rights of the accused are the first consideration and the need to protect victims and witnesses is a secondary one.<sup>12</sup> When balancing the strong need for a post-conviction investigation to exonerate a wrongfully convicted person against the minimal inconvenience to a protected witness in being asked by the prosecution or WISP for his or her consent to be interviewed, the rights of the convicted person must prevail.

16. The ICTR Appeals Chamber has also held that when a Trial Chamber adopts a witness protection measure, it must adopt the least restrictive measure necessary to provide for the protection of victims or witnesses.<sup>13</sup> Therefore, any restriction on interviews of protected witnesses must be proportional to the goal sought to be advanced by the protective measures.

17. Those goals are to protect the security of the witness and avoid his or her identity being revealed. Judicial approval of interviews of protected witnesses is not necessary to accomplish those goals. The requirement that the Prosecution or the WISP convey the request for an interview by defence counsel to the witness ensures that there could be no infringement on the witness' security or disclosure of the witness' identity as a result of the inquiry.

18. In the *Renzaho* case, the Trial Chamber held that a request for a condition that the accused not possess any documents at the UNDF that identify protected witnesses was not strictly necessary and intruded upon the rights of the accused.<sup>14</sup> Likewise, a requirement for judicial approval of interviews at the post-conviction stage is not strictly necessary to maintain the goal of the protective measures to ensure the witness' security.

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<sup>11</sup> See Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75 (2008), <http://lawdigitalcommons.bc.edu/twlj/vol28/iss1/2>

<sup>12</sup> *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001), para. 68

<sup>13</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005), para. 19

<sup>14</sup> *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005), para.14

19. The requirement of judicial approval also implies that a certain showing must be made to justify a request to interview a protected witness.<sup>15</sup> Imposing such a requirement would be disproportionate to maintaining the security of the witness, and would violate the principle that witness is not the property of a party, since the calling party is free to contact the witness at any time without judicial approval.

20. For all of these reasons, ADAD respectfully submits that judicial approval should not be a requirement for defence counsel to interview a Prosecution witness who benefits from protective measures.

### **Contacting the Witness**

21. The Single Judge has framed the third issue as:

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?

22. ADAD submits that, given the adversarial nature of the cases at the ICTR, the contact with the witness should be made by the WISP. The experience of its members with the practice of having the Prosecution contact the witness and ask if the witness consents to an interview by the defence has been very negative. The practice resulted in both the appearance, and in some cases the reality, of discouraging the witness to consent.

23. For example, in the *Karempera* case, the original protective order decision provided that the prosecution would contact the witness to determine if the witness consented to a meeting with the defence. However, the Chamber later held that “in light of the prior experience in this case and since a witness is the property of neither the Prosecutor nor the Defence, when the Defence seeks to contact a Prosecution witness in the future, WVSS should make the necessary arrangements for this meeting to take place and provide its assistance where necessary.”<sup>16</sup>

24. In the *Bizimungu* case, the Trial Chamber varied its standing protective measures order after the prosecution included former Prime Minister Jean Kambanda on

<sup>15</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008), para. 14; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu’s Extremely Urgent Motion to Contact and Meet With Prosecution Witness GAP* (26 October 2007), para. 3

<sup>16</sup> *Prosecutor v Karempera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006), para. 9



its witness list, but refused to make him available for interview by the defence. The Trial Chamber held that the Registry should contact Mr. Kambanda to determine if he consented to an interview by the defence.<sup>17</sup> It did the same on another occasion when the defence sought to interview a prosecution witness who had later recanted his testimony.<sup>18</sup>

25. In the *Ndindiliyimana* case, the Trial Chamber ordered the WVSS to contact a witness to determine if he consented to an interview with the defence after the prosecution reported that the witness did not consent.<sup>19</sup> It also did the same on another occasion when the defence sought to interview a prosecution witness who had later recanted his testimony.<sup>20</sup>

26. In the *Kajelijeli* case, the prosecution contacted a defence witness without notifying the defence in violation of the protective measures decision. The Trial Chamber found that “violation of the procedure laid down by the Chamber in an Order with regard to the formalities of contacting protected witnesses for the other side is antithetical to the integrity of, and causes serious damage to, the proceedings.” It excluded the statement taken by the prosecution at the interview.<sup>21</sup>

27. In the *Nahimana* case, the Prosecution instigated deposition testimony in Belgium from two defence witnesses without notifying the defence. While finding that technically this was a violation of the protective measures decision, the Trial Chamber encouraged the parties to “exercise sound professional judgment and follow the well-established tradition of one party obtaining the prior consent of the other party, before communicating with the witnesses of the other party.”<sup>22</sup>

<sup>17</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Extremely Urgent Motion to Vary Conditions of Interview with Jean Kambanda* (2 October 2003)

<sup>18</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008)

<sup>19</sup> *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in Military I Case* (3 November 2004) paras. 22-23

<sup>20</sup> *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet With Prosecution Witness GAP* (26 October 2007)

<sup>21</sup> *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal* (15 November 2002)

<sup>22</sup> *Prosecutor v Nahimana*, No. ICTR-96-11-T, *Decisions on the Defence Motion relating to Violations of the Witness Protection Order by the Prosecutor* (5 July 2001) para. 18

28. Ironically, in the *Bagosora* case, the Prosecution itself complained of the procedure that required the defence, rather than the Registry, to convey its requests to meet with defence witnesses.<sup>23</sup> While it denied that request, the Trial Chamber later noted its preferred practice of channeling requests for consent to interviews by the opposing party through the Registry.<sup>24</sup>

29. Contact by the WISP at the post-conviction stage is made even more appropriate by the circumstance that after a case has concluded, the Prosecution no longer has regular contact with the witnesses, while the WISP often follows up with the witnesses and provides post-testimony services to them. Since orders requiring the VWSS at the ICTR to determine if a witness consents to a meeting with defence counsel have been in place for a number of years without any claims that the WVSS was not acting as a neutral organ, there is no practical impediment to the WISP undertaking the role of contacting the witnesses.

30. For all of the above reasons, ADAD respectfully submits that the contact to determine if a prosecution witness consents to be interviewed by defence counsel should be made by the WISP.

#### **Conclusion**

31. The members of ADAD are convinced that there are innocent persons who have been wrongfully convicted at the ICTR. It respectfully suggests that it is in the interests of justice for the Mechanism to put in place conditions that strike a fair balance between the rights of those wrongfully convicted and those witnesses benefitting from protective measures. Removal of the barrier of judicial approval for each interview of a protected witness and insertion of the neutral WISP as the organ conveying the request for interview to the witness will ensure justice for all concerned.

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<sup>23</sup> *Prosecutor v. Bagosora et al.*, No. ICTR-98-41-T *Motion to Harmonize and Amend Witness Protection Measures* (14 March 2005) para. 53

<sup>24</sup> *Prosecutor v. Bagosora et al.*, No. ICTR-98-41-T *Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him* (31 October 2005)



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Respectfully submitted,

A handwritten signature in black ink, appearing to be 'John Philpot', written in a cursive style.

John Philpot  
Interim President  
ADAD