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Mechanism for International Criminal Tribunals

Case No. MICT-13-33

Date: 10 September 2015

Original: English

BEFORE THE SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

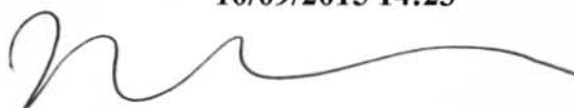
ADC-ICTY AMICUS CURIAE OBSERVATIONS

The Office of the Prosecutor
Mr. Hassan Bubacar Jallow

Counsel for Jean de Dieu Kamuhanda
Mr. Peter Robinson

Association of Defence Counsel
Ms. Colleen Rohan, ADC-ICTY President

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ADC-ICTY AMICUS CURIAE OBSERVATIONS

I. INTRODUCTION

1. By leave of the Single Judge in the instant case,¹ the Association of Defence Counsel practising before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY) hereby submits observations as *amicus curiae* pursuant to Rule 83 of the MICT Rules of Procedure and Evidence.
2. Specifically, the Single Judge has allowed *amicus curiae* observations on three issues:
 - (i) *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;*
 - (ii) *If so, 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; and*
 - (iii) *Should consultation of the witness as to the consent and the facilitation of the interview, if any, be conducted by the Prosecution or by the WISP.*
3. The ADC-ICTY herein submits observations on all three inquiries demonstrating that witnesses who possess ongoing protective measures from ICTY/ICTR proceedings,

¹ *Prosecutor v. Kamuhanda*, MICT-13-33, 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, para. 10.

and who are later sought for interview related to review proceedings at the MICT initiated by the party who did not call the witness in the original proceedings, should be contacted through the neutral body of the Witnesses Support and Protection Unit (WISP) as a matter of policy to ensure the safety and well-being of the witnesses, efficiency of proceedings and fairness to all parties.²

II. SUBMISSIONS

4. The ADC-ICTY confines its observations to the matters outlined by the Single Judge and frames its submissions so as to address the case of contacting witnesses, who have been granted protective measures by the ICTY/ICTR, for the purposes of review proceedings before the MICT. These submissions do not contemplate the entire regime of contacting witnesses of another party, nor do they necessarily apply to trial or appellate proceedings that may come before the MICT.

5. At the same time, any procedures put in place must accommodate both parties equally. To do otherwise could jeopardize the security and well-being of protected witnesses as well as establish an unequal position between a convicted person and the Office of the Prosecutor of the MICT with respect to the conduct of investigations and contact with witnesses while pursuing and during review proceedings.
 - (i) *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?*

6. The ADC-ICTY submits that the fact that the original proceedings have been terminated by a 'final judgement'³ constitutes a changed circumstance warranting reconsideration of the procedures in place to contact witnesses with ongoing protective measures, especially those that restrict access to those witnesses by one of the parties. At the ICC, for example, in *Katanga & Ngudjolo* the Trial Chamber held that, as the presentation of evidence was formally closed, "*the prohibition of contact*

² See *Prosecutor v. Kamuhanda*, MICT-13-33, Motion for Decision on Contact with Persons Benefitting from Protective Measures, 1 July 2015.

³ See, e.g., *Prosecutor v. M. Lukić*, MICT-13-52-R.1, Order Assigning Judges to a Case Before the Appeals Chamber, 24 February 2014, p. 2 ("a final judgement is one that terminates the proceedings").

between a party which called a witness and that witness is now lifted, [and] [] the Chamber's leave is no longer required".⁴ By analogy, in review proceedings, both the trial and appeal have come to a final conclusion and, therefore, the prior orders that limited contact of a party to witnesses and potential witnesses may no longer serve the originally intended purpose applicable at trial and appeal.

7. Additionally, both present versions of ICTR Rule 75(F) and MICT Rule 86(F) distinguish between 'first proceedings' and 'second proceedings' in setting forth the provisions for protective measures.⁵ The ADC-ICTY agrees with the MICT Registry that "[p]ursuant 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".⁶ It notes that this Rule, however, specifically contemplates the potential need for variation of the previous protective measures. Similarly, the reality that previously ordered measures may no longer be necessary is envisioned in the MICT *Policy for the Provision of Support and Protection Services to Victims and Witnesses* ("MICT Policy") which tasks the WISP with a direct mandate to regularly review protective measures. Article 19 requires that:

1. *WISP shall undertake regular review of previously implemented protective measures.*
2. *WISP shall recommend to the Registrar any needed variation of measures, in accordance with its review.*

8. This is precisely why "*a new system for contacting protected witnesses in the context of post-conviction proceedings*"⁷ would serve to ensure the original purpose behind these protective orders rather than to vary them. The changed circumstances of terminated original proceedings, a new jurisdiction for the review proceedings, and

⁴ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-3236-Red-t-ENG, Decision on the Prosecutor's request seeking leave to meet Witness P-219 in the presence of the Victims and Witnesses Unit, 8 February 2012, paras 8-9.

⁵ In 2000, Rule 75 was far less detailed and did not contain any provision about the measures having any continuing effect, especially as related to non-contact orders. At that time, it was permitted for a Chamber to "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused", ICTR Rules of Procedure and Evidence (as amended 26 June 2000), Rule 75(A), <http://ict-archive09.library.cornell.edu/ENGLISH/rules/260600/index.html> (last accessed: 4 September 2015).

⁶ *Prosecutor v. Kamuhanda*, MICT-13-33, Registrar's Rule 31(B) Submissions Following the Order for Submissions of 8 July 2015, 23 July 2015, para. 11.

the significant passage of time all warrant close reconsideration and modification of such highly restrictive measures when appropriate.

(ii) *If so, 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?*

9. The ADC-ICTY submits that it is in the interests of judicial economy and procedural efficiency to allow *inter partes* solutions to such issue, facilitated by the WISP. While there is generally no 'ownership' of witnesses before the international courts,⁸ this may be the case with review proceedings when the original proceedings have come to a final conclusion. This includes protected witnesses who were not actually called at the original proceedings. In *Lukić & Lukić* the ICTY held that "*it would be improper for a party to withhold contact information of persons whom it has chosen not to call or of other persons, who are not witnesses in the proceedings, without an order by the Chamber granting protective measures to this effect*".⁹

10. If the Single Judge determines that the circumstances warrant reconsideration of the previous access restrictions, there should be no need for an additional justification to seek the consent of a witness for interview if done through WISP. If notice is given by the party seeking to interview a protected witness to the other party prior to WISP making contact with the witness to seek consent, it will allow the other party to raise any concerns *inter partes* and, if necessary, formally object to the relevant Bench. Only in the event of an objection would the Bench be seized of the matter before the witness is contacted. At the same time, the greatest care in considering the particular sensitivities of each witness situation will be ensured by the WISP.

⁷ *Ibid.*

⁸ See, e.g., *Prosecutor v. Mrkšić*, IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, p. 3; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2192-Red, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, para. 49. This Decision also established that contact should be made through Victims and Witness Unit (VWU), *ibid.*, para. 51.

⁹ *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Decision on Milan Lukić Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information, 30 March 2009, para. 30.

(iii) *Should consultation of the witness as to the consent and the facilitation or the interview, if any, be conducted by the Prosecution or by WISP?*

11. The ADC-ICTY submits that when a party is seeking to interview a protected witness who was previously called by (or proposed to be called by) the opposing party, the WISP, which is a neutral entity, should contact the witness regarding consent and assist in any facilitation of the interview.

12. At the ICC, each Trial Chamber issues a protocol that regulates, *inter alia*, 'Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant'. While there are slight variations in the protocols issued by different ICC Trial Chambers, these protocols tend to distinguish the modalities of contacting witnesses generally and contacting protected witnesses. For example, in the *Ntaganda* case the Trial Chamber distinguished between modalities for generally contacting a known witness of the opposing party and witnesses ". . . *Participating in the ICCPP [ICC Protection Programme] and those subject to an assisted move*".¹⁰ In the latter cases the Victims and Witnesses Unit (VWU) should be the one to contact the opposing party's witness, specifically:

36. When the party or participant wishing to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise relocated with the assistance of the Court, the party or participant shall, in addition to notifying the calling party or participant, also inform the VWU.

*37. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.*¹¹

13. Established practices of the VWU of the ICTY demonstrate that it was also the practice of the *ad hoc* Tribunals to have the Victims and Witnesses Section (VWS) follow-up with the witness "*two to three weeks after they return home*"¹² which would suggest that the VWS (or Witnesses and Victims Support Section (WVSS) in the case of the ICTR) was likely the last Tribunal-contact with the protected witness. The

¹⁰ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-412-AnxA, 12 December 2014, p. 10.

¹¹ *Ibid.*, paras 36-37. The Trial Chamber in *Bemba et al.* recently adopted these provisions in its own protocol, see *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1093-Anx, Decision adopting a Protocol on the Handling of Confidential Information during Investigations and contact Between a Party and Witnesses of the Other Parties, 20 July 2015, see especially, ICC-01/05-01/13-1093-Anx, paras 38-39.

¹² ICTY Manual on Developed Practices, para. 122:

WISP is the most logical point to re-contact, therefore, should this need arise in review proceedings. Further, pursuant to the MICT Policy, the “*WISP shall be responsible for providing information on witnesses’ rights and obligations as well as entitlements. WISP shall also be responsible for providing information to witnesses regarding their testimony experience*”.¹³

14. The use of the WISP’s expertise in this regard will not violate the WISP’s neutrality or its impartiality. In fact, the MICT Rules envision that the WISP shall be the conduit by which it can secure the consent of a witness to rescind or augment protective measures.¹⁴ The WISP is the logical interlocutor to seek a witness’s consent for the specific purposes discussed here. At the ICC, it has been recognized that contacts seeking consent to interviews, such as those at issue in this case, do not violate the neutrality of its VWU. On the contrary, one ICC Trial Chamber noted that it did “*not consider that conveying such a request from one of the parties conflicts with the VWU role as a neutral organ of the Court or its responsibilities under the statutory framework*”.¹⁵ In that instance, the Trial Chamber ordered the VWU to make contact with witnesses in order to determine whether they consented to provide their contact information to a Defence team for purposes of being contacted for an interview.¹⁶
15. As the witness contact protocols enacted by the various Chambers of the ICC are typically issued just prior to the trial’s start, there are several other guiding decisions in this area that have been taken outside of the scope of such protocols. For example, in *Mbarushimana*, the Pre-Trial Chamber considered “*the [well-established] principle that the party who wishes to contact the witness shall convey this to the calling party*”, but found that “*by virtue of its statutory mandate, the VWU is the best placed organ of the Court to provide independent professional advice as to the security measures which are necessary and appropriate as a consequence of one party’s wish to contact*”

http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf.

¹³ MICT Policy, Article 10(2). This policy is derivative of the MICT Statute, Article 20, which states that “*The Mechanism shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses in relation to the ICTY, the ICTR, and the Mechanism. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.*”

¹⁴ MICT Rule 86(I); *see also* (J).

¹⁵ *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-924, Decision on Babala Request to Obtain Contact Details of Witnesses, 28 April 2015, para. 6.

¹⁶ *Ibid.*, para. 7 and relief.

a witness to be relied upon by the other party".¹⁷ The Mbarushimana Chamber therefore held, *inter alia*, "that contact with a witness by a party other than the calling party takes place through the VWU, which will make sure that the calling party is informed of the other party's wish and, provided that consent is given, will make all the necessary arrangements as regards the logistics and timing of the interview".¹⁸ Likewise, Judge Fernandez, sitting in the *Blé Goudé* case, was "of the view that the *VWU is the only appropriate channel through which the investigating party may initiate the procedure to contact the other party's witness benefiting from the ICCPP*". She therefore held that "should a party wish to interview an ICCPP witness of the other party, it shall contact the VWU which will make the necessary arrangements for the interview to take place".¹⁹

16. Based on the foregoing, the ADC-ICTY submits that the WISP is the neutral interlocutor which can establish if a protected witness consents to be contacted by the opposing party in the proceedings. The ADC-ICTY agrees with Kamuhanda's assertion that "[t]he 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".²⁰ In fact, the danger of influence or the appearance of influence has been recognised by the Chambers of the ICC in the *Blé Goudé* case where the Single Judge recalled "that the party calling the witness or relying on his or her statement 'is prohibited from trying to influence the witness's decision as to whether or not to agree to be interviewed' by counsel of another party".²¹ To avoid any such possibility of influence, then, would significantly advance the fairness of the proceedings while, at the same time, promote

¹⁷ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-258, Decision on the 'Prosecution's Request for an order regulating defence use of an inadvertently disclosed witness statement and lifting of redactions' and on the 'Prosecution's Application for non-disclosure order and order on regulation of contact with witnesses', 29 June 2011, pp. 6-7.

¹⁸ *Ibid.*, p. 7.

¹⁹ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-67, Second decision on issues related to disclosure of evidence, filed 6 May 2014, para. 18. The involvement of the Witness and Victims Support Section (WVSS) was also utilized in contacting witnesses of the opposing parties at the ICTR, see *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Emergency Motion for No Contact Order and 'Requete urgente de Matthieu Ndirumpatse aux fins d'Interdire au Procureur de Contacter Tourte Personne Figurant sur la liste de Temoins sans l'Accord Prelable de ses Conseils", 21 August 2008.

²⁰ *Prosecutor v. Kamuhanda*, MICT-13-33, Motion for Decision on Contact with Persons Benefitting from Protective Measures, 1 July 2015, para. 10.

²¹ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-67, Second decision on issues related to disclosure of evidence, filed 6 May 2014, para. 19.

limited and appropriately conducted contacts with those witnesses the Mechanism maintains a duty to protect.

III. RELIEF REQUESTED

17. For the foregoing reasons, the ADC-ICTY respectfully requests that the Single Judge take these *amicus curiae* submissions into consideration in rendering a decision.

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RESPECTFULLY SUBMITTED,



Colleen Rohan, President
Association of Defence Counsel (ADC-ICTY)

Dated this 10th day of September 2015
in The Hague, The Netherlands