



Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 21 September 2015

Original: English

THE APPEALS CHAMBER

Before: Judge Vagn Joensen

Registrar: Mr. John Hocking

The Prosecutor

v.

Jean de Dieu Kamuhanda

**PROSECUTION CONSOLIDATED RESPONSE TO ADAD-ICTR
AND ADC-ICTY AMICUS BRIEFS**

Office of the Prosecutor

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21/09/2015 14:42

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I. INTRODUCTION

1. By decision of 13 August 2015, the Single Judge granted leave to the ADAD-ICTR and the ADC-ICTY, to file *amicus curiae* briefs in the matter raised by Jean De Dieu Kamuhanda in his “Motion for Decision on Contact with Persons Benefitting from Protective Measures”, dated 1 July 2015.¹ In his decision, the Single Judge directed ADAD-ICTR and ADC-ICTY to limit their submissions to following three key issues:

- a) Does the conclusion of Kamuhanda’s trial and appeal constitute a change in circumstances which warrants a reconsideration of the modalities for access for Kamuhanda’s Counsel to interview Prosecution witnesses;
- b) 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 on relation to a particular witness to be approved by a Judge; and
- c) 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.

2. On 28 August 2015, the ADAD-ICTR filed its amicus brief on the matter. The ADC-ICTY filed its brief on 11 September 2015. Both ADAD-ICTR and ADC-ICTY submit in their briefs that the original proceedings have been terminated by a “final judgement” which constitutes a change in circumstance warranting reconsideration of the decision on protective measures in the Kamuhanda case.² The ADC cites the ICC case of *the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, to support its position, while ADAD cites the *Prosecutor v Karemera et al.*, in support.

3. The Prosecutor hereby makes his submissions regarding the amicus briefs.

¹*The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Decision on ADAD-ICTR and ADC-ICTY for Leave to Submit Amicus Curiae Observations and Decision on Application for Leave to Reply, 13 August 2015.

²*Prosecutor v. Jean De Dieu 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”).

II. SUBMISSIONS

A. The conclusion of Kamuhanda's appeal does not constitute a change in circumstances warranting a reconsideration of the modalities for access for Kamuhanda's Counsel to interview Prosecution witnesses.

4. According to the established jurisprudence of the Tribunal, a Chamber has the inherent discretionary power to reconsider its own decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy of reconsideration.³

5. The Prosecutor submits that it is implicit in the jurisprudence of the Tribunals that only the Chamber that issued the impugned decision has the inherent power to reconsider that decision provided the criteria is met. As such, the Single Judge lacks jurisdiction to reconsider the protective measures order issued by the Trial Chamber. It bears noting that the cases cited by the ADAD and the ADC, in support of their briefs are all cases in which a Trial Chamber reconsidered its own decision.

6. In addition, the Single Judge's recent holding that "decisions taken by an ICTR Trial or Appeals Chamber while properly seized of the matter and prior to the 1 July 2012 transfer date retain their validity before the Mechanism" reinforces the Prosecutor's position that the Single Judge lacks jurisdiction to reconsider the decision on protective measures in the *Kamuhanda* case.⁴

7. The Prosecutor notes that reconsideration of the decision of a Trial or Appeals Chamber is different from the variation of protective measures in response to a specific and justified request made pursuant to Rule 86. The variation of protective measures has always been in respect of their application to a witness

³*The Prosecutor v. Ntagerura et al.*, Appeal Judgment, para.55; *Nzabonimana v. the Prosecutor*, Case No. ICTR-98-44D-AR7bis, Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 decision and on Motion for Leave to Appeal the President's Decision Dated 5 May 2010, 20 September 2010, para. 13.

⁴*The Prosecutor v. Jean De Dieu Kamuhanda*, Case No., MICT-13-33, Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK, 16 September 2015, para.10.

vis a vis an applicant and have never varied the underlying decision on protective measures issued by a Trial Chamber.

8. Moreover, even assuming, *arguendo*, that the close of Kamuhanda's case amounts to a change in circumstances, it certainly cannot be said to be a material change that warrants reconsideration of the decision on protective measures. The close of the *Kamuhanda* case is not a change that affects the premise of the decision on protective measures, such that an injustice would otherwise occur without reconsideration.

9. Protective measures are granted as an exception to the principle of public hearings,⁵ where there exists a "real likelihood that the person may be in danger or at risk".⁶ The provisions draw upon the Chamber's unique understanding of the particular threats posed to specific witnesses.⁷ The purpose of protective measures may continue to exist even after the close of a case, hence the provision that such measures shall continue to have effect *mutatis mutandis* unless and until they are rescinded, varied or augmented in accordance with the provisions in the Rules.⁸ Reconsideration of the existing protective measures regime in Kamuhanda would undermine the purpose of the order.

10. Further still, the cases cited by both the ADAD and the ADC are inapposite and clearly distinguishable from the current situation. In its decision on reconsideration in the *Karemera* case cited by the ADAD, the Chamber did not simply conclude that the close of the Prosecution's case amounted to a change of circumstance warranting reconsideration, but rather ascertained the purpose behind the measures granted in its decision of 10 December 2004, revised on 30 October 2006,⁹ and assessed whether or not that purpose continued to exist after the close of the Prosecution case.¹⁰

⁵*The Prosecutor v. Bagosora*, Case No. ICTR-98-41-A, Order Rescinding Protective Measures, 14 October 2010, para.9.

⁶*Semanza v. the Prosecutor*, Case No. ICTR-97-20-A, Decision on Motion for Protective Measures, 15 March 2004, p.3.

⁷*The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 and Case No. ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para.3.

⁸ The Rules of Procedure and Evidence, MICT Rule 86(F), ICTR Rule 75(F)

⁹*The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 and Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006.

¹⁰*The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Reconsideration of Protective Measures Orders, 15 October 2009, paras.5, 6, 11

11. In the *Katanga* case cited by the ADC, there were explicit provisions stipulating that contact between the party which called the witness and the witness would be prohibited only until all evidence has been presented in the case. It therefore stands to reason that the prohibition on contact was lifted following the completion of the substantive hearing, in accordance with the decision.¹¹ Moreover, the application in *Katanga* was in relation to contact between a witness and the calling party, after the witness had testified and before the end of the proceedings; it did not relate to contact by an adverse party. The concern there was the integrity of the proceedings rather than matters of witness protection as is the case in the extant application.¹²

B. Access to interview a Prosecution witness requires justification and judicial approval.

12. The Prosecutor acknowledges that according to the jurisprudence, witnesses to a crime are the property of neither the Prosecutor nor the Defence. Both sides have an equal right to interview them.¹³ However, the right to interview a witness is not and should not be without its limitations. Hence the application of protective measures during and beyond the trial and appeal phases of a case.

13. The Prosecutor submits that in order to preserve the integrity of the protective measures regime put in place by the Trial Chamber, the purpose of which includes protecting witnesses and victims from harassment, coercion and intimidation, judicial approval following justification should be required prior to meeting with witnesses of the opposing party after a case has closed. There should be a legitimate purpose for access to protected witnesses post appeal. A judicial body, not Kamuhanda's Counsel, is best suited to make this determination. Judicial oversight post appeal will serve to ensure that a request to interview a protected witness is sufficiently justified.

14. To decide otherwise would be to allow opposing counsel unfettered access to witnesses after the conclusion of a case, including in circumstances where their inquiry is not likely to advance their case materially. It is specifically to avoid this

¹¹*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, 8 February 2012, paras. 6-9.

¹²*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, 8 February 2012.

¹³*The Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with potential witnesses of the Opposite Party, 30 July 2003.

type of “fishing expedition” that the ICTR, ICTY and the MICT Rules make judicial approval a requirement to obtaining confidential material from another case.¹⁴

15. The Prosecutor reiterates his position that judicial oversight is particularly important and necessary in concluded cases. Protected victims and 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.¹⁵ To require anything less than judicial authorisation for access to protected witnesses post appeal would seriously erode the principle of finality in criminal proceedings.

16. The ADAD argues that the Appeals Chamber recognises that the rights of the accused are the primary consideration *vis a vis* the need to protect victims and witnesses.¹⁶ However, presently, Kamuhanda has no proceedings before the Tribunal and as such, is no longer an accused.¹⁷ He therefore, cannot claim the same rights as an accused on trial.

C. Consultation of the witness as to the consent and the facilitation of the interview, if any, should be conducted by the Prosecution.

¹⁴ICTR Rule 75(G), ICTY Rule 75(G), MICT Rule 86(G).

¹⁵ 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 Ndirabatswe’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 Karemera 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 Ndirabatswe’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 Idelphonse 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.

¹⁶*The Prosecutor v Jean De Dieu Kamuhanda*, Case No.MICT-13-33, Amicus Brief of Association of Defence Lawyers of the ICTR (ADAD), 27 August 2015, para.15.

¹⁷*The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. ICTR-99-54A-A, 7 April 2006, para. 5.

17. As noted above, while the Single Judge can vary the protective measures in relation to a witness following a justified application, which would require WISP to obtain the consent of the witness pursuant to Rule 86(I) of the MICT Rules, the Single Judge cannot change the underlying decision as against all protected witnesses in this or other cases. Moreover, since Kamuhanda's motion is not filed pursuant to Rule 86 (I) the role of consulting with the witness for the purpose of obtaining consent remains with the Prosecutor as provided for in the decision on protective measures.¹⁸ In addition, 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.¹⁹ As observed by the Registrar in his submissions of 23 July 2015,²⁰ the Prosecutor is better placed than WISP to explain to its witnesses the reasons behind the proposed contact and to answer any subsequent questions.

18. It bears noting that the ICC case cited by the ADC in paragraph 12 of its submission reinforces the position that it is the Prosecutor who shall seek the consent of the witness in the event that the opposing party wishes to interview them. The protocol on the handling of confidential information during investigations and contact between a party and witnesses of the other parties, issued in the *Ntaganda* case provides that "[t]he party seeking to contact a witness of the other party will provide the calling party with notice within a reasonable time frame....[a]fter being notified, the party calling the witness shall seek the consent of the witness..."²¹ Only where the witness is part of the ICCP, a special witness protection programme, which provides, as a measure of last resort, extra protective

¹⁸ *Prosecutor v. Jean De Dieu Kamuhanda*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 7 July 2000.

¹⁹ *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-55-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, p.7; *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-55-T, Decision on Defence Urgent Motion for Witness Protection Measures, 9 February 2010, p.9; *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 Between a Party and Witnesses of the Opposing Party, 18 February 2013, para.38, and public Annex, para. 22; *The Prosecutor v. Ntaganda*, 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 Participant, Public Annex A, 12 December 2014, para. 35, P.8

²⁰ *The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Registrar's Rule 31(B) Submission Following the Order for Submissions of 8 July 2015, 23 July 2015, para.14

²¹ *The Prosecutor v. Ntaganda*, 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 Participant, Public Annex A, 12 December 2014, para. 35, P.8

measures over and above the normal procedural protective measures ordered by the Chamber, is the victims and witnesses unit of the ICC to facilitate the meeting.²²

19. ADAD argues that the practice of the Prosecutor contacting a witness for the purpose of obtaining consent has in the past resulted in the appearance of bias and witnesses actually being discouraged from giving their consent. The Prosecutor submits that there is a presumption of good faith on the part of the Prosecutor when carrying out his functions. Absent any empirical evidence to the contrary this submission is speculative and should be disregarded.

20. In addition, the Prosecutor proposes that once judicial authorisation has been obtained, requiring the presence of the Registry or the Prosecutor at any approved meeting would protect the integrity of any information gained in that meeting.

Dated at Arusha this 21st day of September 2015


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Word Count
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²²*The Prosecutor v. Ntaganda*, 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 Participant, Public Annex A, 12 December 2014, paras.35, 38 and 39. P.8.