

MICT-13-33  
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UNITED  
NATIONS



Mechanism for International Criminal Tribunals

Case No. MICT-13-33

Date: 25 June 2015

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

Decision of: 25 June 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

*PUBLIC*

DECISION ON REQUEST FOR ACCESS

The Office of the Prosecutor

Hassan Bubacar Jallow  
Richard Karegyesa  
Sunkarie Ballah-Conteh

Counsel for Jean de Dieu Kamuhanda

Peter Robinson

Received by the Registry  
Mechanism for International Criminal Tribunals  
25/06/2015 17:02

A handwritten signature in black ink, appearing to read "McCullough".

Handwritten initials in black ink, possibly "M." or "J.".

## INTRODUCTION

1. On 30 March 2015, Jean de Dieu Kamuhanda (“Kamuhanda”) filed a motion with the Mechanism for International Criminal Tribunals (“Mechanism”) in which he requested that Mr. Peter Robinson be given access to the entirety of his *inter partes* case file for the purpose of seeking review of his convictions before the International Criminal Tribunal for Rwanda (“ICTR”).<sup>1</sup> Kamuhanda submits that a variation of the protective measures issued in the ICTR case is not required under the circumstances.<sup>2</sup>

2. On 8 April 2015, the Prosecution filed its response submitting that the requested access to Kamuhanda’s ICTR case file requires a variation of the protective measures pursuant to Rule 86(F) of the Mechanism Rules of Procedure and Evidence.<sup>3</sup> The Prosecution further submits that it does not oppose a variation of the protective measures in the case, provided that Mr. Robinson furnish the power of attorney appointing him as Counsel for Kamuhanda, and also upon confirmation that Mr. Robinson is on the Mechanism’s list of counsel and that he has signed an undertaking with the Mechanism agreeing to respect the confidentiality of disclosures.<sup>4</sup>

3. On 8 April 2015, I was designated as Mechanism Single Judge to rule on the motion.<sup>5</sup>

4. On 20 May 2015, I invited the Registrar to make submissions on the present matter.<sup>6</sup>

5. On 11 June 2015, the Registrar confirmed that Kamuhanda and Mr. Robinson had both submitted the requisite documents referenced in paragraph 2 of this Decision and that Mr. Robinson is on the Mechanism’s list of counsel.<sup>7</sup>

## DELIBERATIONS

### *Whether a Variation of Protective Measures is Necessary*

6. The Rules addressing witness protection represent a balance between protecting the identity or whereabouts of victims and witnesses or of persons related to or associated with them (“protected information”) and the fairness of the criminal proceedings by restricting access to the

<sup>1</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Request for Access, 30 March 2015, paras. 7, 20.

<sup>2</sup> *Id.*, paras. 10-13.

<sup>3</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Prosecutor’s Response to Kamuhanda’s Request for Access, 8 April 2015, paras. 3-5.

<sup>4</sup> *Id.*, para. 6.

<sup>5</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Order Assigning a Single Judge to Consider an Application, 8 April 2015.

<sup>6</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Order for Submissions, 20 May 2015.

<sup>7</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Registrar’s Rule 31(B) Submission Following the “Order for Submissions” of May 2015, 11 June 2015, para. 5; *See also The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Confidential Annexes to the Registrar’s Rule 31(B) Submission Following the “Order for Submissions” of 20 May 2015, 11 June 2015.



protected information to the Parties and those assisting them in the legal proceedings. Pursuant to Rule 86(F), the protective measures apply both in the proceedings where they have been ordered (“first proceedings” which are the pre-trial, trial and appeals proceedings in the same case) and other proceedings (“second proceedings”, which include review proceedings).

7. Disclosure of the protected information shall, pursuant to Rule 75(C), be made in the first proceedings “to allow adequate time for preparation of the Prosecution and the Defence”. Thus, the Prosecution and the Defence, which include the Accused and his/her Counsel, are privy to the protected information.

8. With respect to second proceedings, Rule 86(F)(ii) and the corresponding Rules of the ICTR and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) mandate that protected information be disclosed to the Defence in other criminal proceedings before the same Tribunal and/or its successor, the Mechanism, where it relates to witnesses whose evidence the Prosecution is obligated to disclose to the Defence. Furthermore, protected information may be used in second proceedings before the Tribunal or the Mechanism, such as review proceedings, where its use does not entail disclosure to persons not already privy to the information from the first proceedings, or, pursuant to Rule 86(C) if the initial protection order specifically allows it.

9. In other situations, disclosure or further disclosure of protected information for use in second proceedings requires a rescission or variation of the protective measures, and, pursuant to Rule 86(I), the Chamber seized with such a request “shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent”. However, a Chamber or Single Judge may, *proprio motu*, grant a request without consent “on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result”.

10. In the present case, Mr. Robinson was not counsel for Kamuhanda during his first proceedings before the ICTR (“new counsel”) and is, therefore, not already privy to the protected information. Furthermore, Kamuhanda is not a “suspect or an accused” as defined in Rule 2(A), but rather a convicted person and, as such, the Rules do not provide for him to be assisted by counsel as a right.

11. Whereas a court order may for other reasons be required to give new counsel access to protected information for use in second proceedings, which I will discuss below, I consider that a variation of witness protection orders pursuant to Rule 86 is not required under these circumstances.

12. First, I note that Rule 86 does not regulate the conduct between an Accused and his/her Defence Counsel who has been authorised to appear before the Mechanism. Indeed, this conduct is governed by Rule 42, the Code of Professional Conduct of Defence Counsel (“Code”) and written undertakings to respect the confidentiality of confidential disclosures. Moreover, the Code not only defines the duties and obligations of defence counsel appearing before the



Mechanism, but also specifically outlines the disciplinary regime for violations of the Mechanism Statute and Rules, the Code or any other applicable law.<sup>8</sup>

13. Second, the review bench may at an advanced stage of review proceedings and under extraordinary circumstances order the Registrar to assign counsel to assist the convicted person<sup>9</sup>, which entails that counsel is given access to protected information without rescission or variation of the protective measures pursuant to Rule 86.

14. Third, where new counsel has been approved to appear before the Mechanism and the conditions for giving him/her access to protected information are otherwise fulfilled, such access is unlikely to impact on the effectiveness of the protective measures wherefore the consultation of witnesses may only cause unnecessary worry on their part.<sup>10</sup> Furthermore, it would be untenable, in a situation where the Rules do not provide for the assistance of legal counsel as a right, to determine that to proceed without such assistance would amount to a compelling showing of exigent circumstances or that a miscarriage of justice would otherwise result.

15. Fourth, in the *Milošević* case before the ICTY the Specially Appointed Chamber, in part, varied the protective measures to allow a new counsel to access protected information with a view to determine whether to file a request for review of the trial judgement.<sup>11</sup> I, however, find this case distinguishable from the present matter. In *Milošević*, the Chamber did not discuss whether there was a need to vary the protective measures because the applicant moved for such variation under ICTY Rule 75(G). Furthermore, the Chamber did not apply or discuss ICTY Rule 75(J), which is seemingly mandatory and is mirrored in Mechanism Rule 86(I) and instead referenced the language of Article 20(1) of the ICTY Statute, which is mirrored in Article 18(1) of the Mechanism Statute, when restricting access to certain material.

16. Thus, whereas I agree with the *Milošević* Decision that a request for access for a new counsel to protected information does not necessitate consultations of the protected victims or witnesses or a determination of exigent circumstances or risk of a miscarriage of justice, I do so because the matter in my opinion does not fall under Rule 86.

*Whether a Court Order is Required for Other Reasons?*

17. Access for a new counsel to protected information presupposes that counsel's credentials accord to the requirements identified in Rule 42, which are for the Registrar to oversee without the need for confirmation by a court order. In this case, the Registrar has confirmed that these requirements are met as Kamuhanda filed a power of attorney with the Mechanism designating Mr. Robinson to represent him in this matter, Mr. Robinson is on the list of counsel maintained

<sup>8</sup> Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism, MICT/6, 14 November 2012, Articles 35-51.

<sup>9</sup> *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Review and Assignment of Counsel, 28 February 2011, paras. 38-39; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, 21 April 2009, paras. 51-52.

<sup>10</sup> See Rule 86(I).

<sup>11</sup> *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Motion Seeking Variation of Protective Measures Pursuant to Rule 75(G), 16 July 2012, paras. 2, 14-15.

by the Registry and he has filed a signed undertaking to respect the confidentiality of confidential disclosures.<sup>12</sup>

18. Furthermore, the applicant must indicate with sufficient specification the material to which access is sought and demonstrate that a factual nexus exists between the requested material and a matter that is sufficiently important and relevant to necessitate such access, which is a judicial matter.<sup>13</sup> In the present case, the request is sufficiently specified and meets the aforementioned requirements in all respects as Kamuhanda seeks access for his new counsel to his full case file with a view to preparing an application for a review of his judgement, which is a remedy provided for in the Rules.<sup>14</sup>

19. Finally, the material sought may, in certain situations, contain specifically sensitive information that requires restricted access pursuant to Article 18(1) of the Statute or other provisions, which is also a judicial matter.

20. In *Milošević*, the Chamber, referring to the submissions before it, restricted access to “other confidential material which pertains to protective measures of witnesses or the reasons therefore or which does not concern the confidential evidence as such”.<sup>15</sup>

21. In the present case, the submissions of the Parties differ from those in *Milošević* as Kamuhanda has specifically argued why his new counsel needs access to the full *inter partes* file without restrictions and the Prosecutor has not objected to this part of the submission.<sup>16</sup> I, therefore, conclude that no material of extraordinary sensitivity, which would necessitate restrictions pursuant to Article 18(1) of the Statute or other provisions, has been filed *in partes* in the present case.

#### FOR THE FOREGOING REASONS, I

- I. **GRANT** Jean de Dieu Kamuhanda’s Motion;
- II. **DIRECT** the Registry to provide Counsel with access to *inter partes* material in Jean de Dieu Kamuhanda’s ICTR case file; and

<sup>12</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Registrar’s Rule 31(B) Submission Following the “Order for Submissions” of May 2015, 11 June 2015, para. 5.

<sup>13</sup> *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Augustin Ngirabatware’s Motion for Disclosure of Confidential Material Relating to Witness DBN, 8 June 2010, paras. 10-12; *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, Decision on Augustin Bizimungu’s Motion for Disclosure of Closed Session Material of Defence Witness WZ4, 22 September 2008, para. 5.

<sup>14</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Request for Access, 30 March 2015, paras. 3, 7, 14-16, 20.

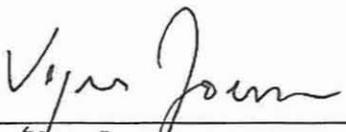
<sup>15</sup> *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Motion Seeking Variation of Protective Measures Pursuant to Rule 75(G), 16 July 2012, paras. 14-15.

<sup>16</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Request for Access, 30 March 2015, paras. 7, 14-15, 18, 20; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Prosecutor’s Response to Kamuhanda’s Request for Access, 8 April 2015, para. 6.

- III. **ORDER** that information released pursuant to this Decision shall be treated as confidential and that the information shall be used solely in this specific matter.

Done in English and French, the English being authoritative.

Done this 25<sup>th</sup> day of June 2015,  
At Arusha,  
Tanzania

  
\_\_\_\_\_  
Judge Vagn Joensen  
Single Judge

[Seal of the Mechanism]

