THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. Olufemi Elias

Date Filed: 12 July 2017

THE PROSECUTOR

v.

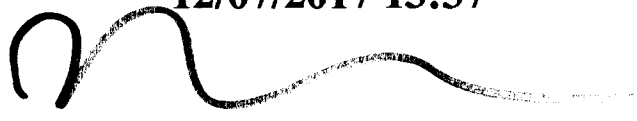
JEAN DE DIEU KAMUHANDA

Public

REPLY BRIEF: APPEAL OF DECISION ON INTERVIEW OF PROSECUTION WITNESS GEK

Office of the Prosecutor:
Richard Karegyesa
Sunkarie Ballah-Conteh

Jean de dieu Kamuhanda:
Peter Robinson



1. Jean de dieu Kamuhanda has appealed from the *Decision on Motion for Authorisation to Interview Witness GEK* (27 June 2017), contending that the Single Judge erred when denying the defence request to interview Witness GEK because her lack of consent to the interview was tainted by the warnings given by the Witness Protection and Support Unit ("WISP") that the witness might suffer "moral and material prejudice" if she consented to be interviewed by defence counsel.

2. On 10 July 2017, the Prosecution filed its *Response*.[1] Mr. Kamuhanda now replies.

3. The Prosecution first contends that Mr. Kamuhanda should have appealed from the *Order for Submissions* (8 June 2017) when the Single Judge rejected his request that the offending language be deleted from the WISP's consent form.[2] Indeed, Mr. Kamuhanda's counsel considered appealing that decision. However, he decided that the issue was not ripe for appellate review, as it remained possible that Witness GEK would consent to be interviewed notwithstanding the discouraging language presented to her by the WISP.

4. Mr. Kamuhanda considers that his counsel's judgement to await a final decision on the *Motion to Interview Witness GEK* rather than to appeal from the interim *Order for Submissions* was an appropriate one. However, if the Appeals Chamber believes otherwise, he respectfully requests that the appeal nonetheless be considered so that he is not unduly penalized for a judgement of his counsel.

5. Turning to the merits, the Prosecution fails to present a single justification for the WISP to include language that suggests that the witness may suffer moral or material prejudice by agreeing to an interview with defence counsel. The Prosecution also fails to point to any valid reason why WISP would need to seek a waiver from the witness in favor of itself or the Mechanism. The lack of necessity for such advice and waiver is made plain by the fact, uncontested by the Prosecution, that this advice is not given to witnesses from any other international court or Tribunal, including the WISP's own Hague branch.[3]

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[1] *Prosecution Response to Kamuhanda's Appeal of Decision on Interview of Prosecution Witness GEK* (10 July 2017)
[2] *Response*, paras. 8, 10
[3] *Appeal Brief*, para. 14

6. Instead, the Prosecution's arguments focus on Mr. Kamuhanda's failure to establish that the contested paragraph would be likely to have a negative impact on the witness.[4] That impact can be discerned by reading the language itself, and weighing the negative connotations of that language against the complete lack of justification or need for such a warning. It can also be discerned in the response of Witness GEK to the request for interview. Witness GEK cited her security as the reason why she did not want to meet with defence counsel, suggesting that the "moral or material damage" language may well have caused her to believe that her security would be compromised by meeting with defence counsel.[5]

7. The fact that the WISP includes the same language when the Prosecution requests to interview protected defence witnesses[6] is of no moment. There are far fewer Defence witnesses than Prosecution witnesses at the Mechanism. The Defence has also has a greater need to interview witnesses of the opposing party than the Prosecution since almost all of the Mechanism cases are completed and only the Defence has an interest in re-opening them, or the statutory authority to do so.[7] The WISP's discouraging language thus has a disproportionate impact on the Defence, and particularly on someone like Mr. Kamuhanda, a wrongfully convicted person seeking to prove his innocence.

8. The Prosecution further claims that "witnesses have, on numerous occasions consented to being interviewed by the adverse party on the basis of WISP consent forms using the contested language", citing the *Ngirabatware* case.[8] The Prosecution's citation provides no means for the Appeals Chamber to check the record in that case. However, that record does show that two witnesses in the *Ngirabatware* case initially declined to be interviewed because they were confused by the advice received by WISP.[9]

9. The Prosecution further claims that "in another application in this case, where a Single Judge ordered the WISP to verify that a witness had indeed understood the advice

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[4] *Response,* paras 13-14.; *Order for Submissions,* p. 4
[5] *Annex to Registrar's Submission Pursuant to Order of 8 June 2017* (21 June 2017)(confidential)
[6] *Response*, para. 13
[7] Article 24 prohibits the Prosecution from seeking review of a judgement more than one year after it is rendered.
[8] *Id,* and fn. 17
[9] *Prosecutor v Ngirabatware*, MICT-12-29, *Prosecution Consolidated Response to Motion for Assignment of Counsel and Reply to Response to Extremely Urgent Motion Relating to Protected Prosecution Witnesses* (26 February 2016), Annexes 2 and 3 (confidential).

given to him/her in the WISP consent form in order to confirm that the advice did or did not have an impact on his/her decision not to consent to an interview, it was in fact shown that the WISP consent form had not dissuaded the witness from consenting to an interview by the Kamuhanda defence."[10] However, when the witness was asked, at the direction of the Single Judge:

> "I understood that the request of Mr. Kamuhanda's counsel does not expose me to any danger as Mr. Kamuhanda's counsel is bound to protect the confidentiality of any information likely to identify me"

the witness checked the box "no".[11]

10. Therefore, a plain reading of the language used by the WISP and an examination of its application indicates that the Single Judge made a discernable error when he concluded that the language would not likely have a negative impact upon the witness and when he failed to consider the lack of utility for the warning.

11. When President Meron was appointed to a new term as President of the Mechanism, he pledged that the Mechanism would uphold "its abiding commitment to due process and fair trials."[12] Gabrielle McIntyre, Chief of the MICT President's cabinet, has written: "at the end of the day, the Residual Mechanism's Judges bear the responsibility of ensuring that proceedings before it meet the highest standards of international due process and fairness."[13]

12. The Single Judge made a discernable error of law when he allowed the WISP to engage in a practice that falls far short of that standard. The Appeals Chamber is respectfully requested to reverse the Impugned Decision.

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[10] *Response*, para. 14
[11] *Annex to Registrar's Submission pursuant to Interim Order of 13 September 2016* (27 September 2016)(confidential)
[12] http://www.unmict.org/en/news/judge-theodor-meron-appointed-new-term-president-mechanism
[13] G. McIntyre, *The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,* 3 Goettingen Journal of International Law 923, 983 (2011)

Word count: 1169

Respectfully submitted,

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Date Created/ *Daté du* :	**12 July 2017**	**Date transmitted/ *Transmis le* :** **12 July 2017**	**No. of Pages/ *Nombre de pages* :**	**5**
Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
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