

MICT-13-33  
27-08-2016  
(1339 - 1336)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33-AR80.1

THE APPEALS CHAMBER

Before: Judge Prisca Matimba Nyambe  
Judge Gberdao Gustave Kam  
Judge Seymour Panton

Registrar: Mr. John Hocking

Date Filed: 27 August 2016

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

*Public*

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REPLY BRIEF: APPEAL OF DECISION DECLINING TO RESCIND  
PROTECTIVE MEASURES FOR A DECEASED WITNESS

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Office of the Prosecutor:

Mr. Serge Brammertz  
Mr. Richard Karegyesa  
Mr. Abubacarr Tambadou  
Ms. Sunkarie Ballah-Conteh

Jean de dieu Kamuhanda:

Mr. Peter Robinson, Counsel

Received by the Registry  
Mechanism for International Criminal Tribunals  
27/08/2016 10:53

*Thucipopo*

1. Jean de dieu Kamuhanda has appealed from the *Decision on Motion to Rescind Protective Measures for Defence Witness ALM* (29 March 2016) (the “Impugned Decision”), contending that the Single Judge erred when holding that family members of a deceased witness cannot validly consent to rescission of, or waive, protective measures.

2. On 25 August 2016, there was filed the *Prosecution Response to Kamuhanda’s Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness*. Mr. Kamuhanda now replies.

3. The prosecution’s contention that the ICTY Chamber’s decision in *Milosevic* was based upon a provision of the ICTY Rules “identical” to that of the MICT,<sup>1</sup> ignores the fact that the MICT Rules added Rule 85 (J). That sub Rule provides:

A victim or witness may waive in whole or in part protective measures granted pursuant to this Rule after being advised by a Trial Chamber or the Victims and Witnesses Section of the consequences thereof. The waiver must be made before a Trial Chamber or in a written statement signed by the victim or witness and an officer of the Victims and Witnesses Section.

4. The addition of this sub Rule, as well as Rule 155, demonstrates that the MICT, an institution charged with management of the ICTY and ICTR archives long after the closure of those institutions, envisions a greater access for the public to records of those institutions. Indeed, the Appeals Chamber has already held that all proceedings before the Mechanism shall be public unless there are exceptional reasons for keeping them confidential.<sup>2</sup> Interpreting Rules 86(I) and (J) to allow for a waiver of or consent to rescission of protective measures by the heirs of a deceased witness would be most consonant with those goals.

5. The Prosecution’s argument that consent by the deceased witness's immediate family places a witness's extended family members at risk<sup>3</sup> is without merit. Using that logic, it would be impossible to rescind or waive protective measures. When a witness who is alive consents to rescission of protective measures, or waives them, s/he can also

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<sup>1</sup> *Response*, para. 7

<sup>2</sup> *Prosecutor v Karadzic*, No. MICT-13-55-A, *Decision on a Motion for Redacted Versions of Decisions Issued Under Rule 75(H) of the ICTY Rules* (18 July 2016) at p. 3. See also *Prosecutor v Lukic*, No. MICT-14-67-R.1, *Decision on Sreten Lukic’s Application for Review* (8 July 2015) at para. 8; *Prosecutor v Kamuhanda*, No. MICT-12-33-R86.1, *Decision on a Motion to Reclassify a Submission by the Registry* (5 February 2016), p. 2; *Prosecutor v Oric*, No. MICT-14-79, *Decision on an Application for Leave to Appeal the Single Judge’s Decision of 10 December 2015* (17 February 2016) at para. 8;

<sup>3</sup> *Response*, para. 11

be said to place family members, immediate and extended, at risk. Therefore, there is no reason to believe that the heirs of a deceased witness cannot also give the same consent or waiver given by a live witness.

6. The Prosecution also contends that allowing rescission or waiver on behalf of a deceased witness would be complicated to administer.<sup>4</sup> Not so. The Single Judge can determine on a case-by-case basis if the consent or waiver by the deceased witness' heirs is appropriate, based upon information it receives from the WISP. In the instant case, the Single Judge denied the motion summarily without any effort to have the WISP determine the position of the heirs of Witness ALM by imposing a blanket rule against consent or waiver in the case of deceased witnesses.

7. The Prosecution's *Response* fails to address the anomaly that under this blanket rule, it is more difficult to rescind or waive protective measures for deceased witnesses than for live ones, even though deceased witnesses are least in need of protective measures. It also fails to address the implications of the blanket rule in making it more difficult to share information with national authorities and the public.

8. On 12 August 2016, the MICT issued its *Access Policy for Records held by the Mechanism for International Criminal Tribunals*. That policy recognized that the mandate of the MICT includes facilitating the accessibility of records of the ICTY, ICTR, and MICT.<sup>5</sup> It is provided that "the overall approach to the provision of access to the records and information managed by the Mechanism is based on the principle that the work of the Mechanism shall be open and transparent, except where the nature of the records and information concerned is deemed classified."<sup>6</sup>

9. The blanket rule against consent or waiver by the heirs of a deceased witness imposed by the Single Judge frustrates, rather than promotes, the facilitation of access to the records of these institutions and contradicts the goal of openness and transparency.

10. For all of these reasons, it is respectfully requested that the Impugned Decision be reversed and the Single Judge be ordered to consider the views of the family members of Witness ALM before deciding on the rescission or waiver of protective measures.

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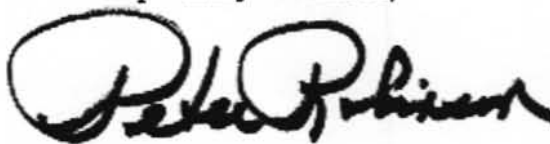
<sup>4</sup> *Response*, para. 12

<sup>5</sup> Article 2

<sup>6</sup> Article 7, para. 1

Word count: 921

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive, flowing style with large, rounded letters.

PETER ROBINSON  
Counsel for Jean de dieu Kamuhanda



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Date Created/ Daté du :	27 August 2016	Date transmitted/ Transmis le :	27 August 2016
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ Anglais	<input type="checkbox"/> French/ Français	<input type="checkbox"/> Kinyarwanda
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Rev: April 2014/Rév. : Avril 2014