

MICT-12-29
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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-12-29

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron
Judge Bakone Justice Moloto
Judge Christoph Flugge
Judge Burton Hall
Judge Liu Daqun

Registrar: Mr. John Hocking

Date Filed: 21 February 2016

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

Public w/Confidential Annexes

RESPONSE TO EXTREMELY URGENT MOTION
RELATING TO PROTECTED PROSECUTION WITNESSES

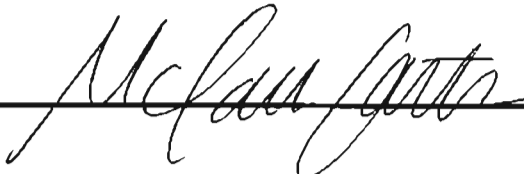
Office of the Prosecutor:

Mr. Hassan Jallow
Mr. Richard Karegyesa
Mr. Abubacar Tambadou
Ms. Sunkarie Ballah-Conteh

Augustin Ngirabatware:

Mr. Peter Robinson, *Pro Bono* Counsel

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No. MICT-12-29

1. Dr. Augustin Ngirabatware hereby files this response to the *Extremely Urgent Motion Relating to Protected Prosecution Witnesses* (17 February 2016). He further requests that the Appeals Chamber enter an order directing the prosecution to facilitate his counsel's interviews of those prosecution witnesses who consent.

2. The prosecution's motion is misleading and therefore a precise rendition of the facts is required at the outset.

Statement of Facts

3. On 6 May 2009, the ICTR Trial Chamber in Dr. Ngirabatware's case rendered its *Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others*. Paragraph (v) provided that:

The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS.

4. On 25 November 2015, counsel for Dr. Ngirabatware sent a letter to the Prosecutor of the Residual Mechanism requesting the prosecution to contact protected witnesses ANAE, ANAM, ANAN, and ANAT and determine if they consent to be interviewed by him.¹

5. On 30 December 2015, having received no response, counsel for Dr. Ngirabatware sent another letter to the Prosecutor.²

6. On 13 January 2016, having still received no response, counsel for Dr. Ngirabatware sent an e-mail to Prosecutor Jallow attaching the letters and requesting a response.³

7. On 14 January 2016, Prosecutor Jallow responded and indicated that the matter was being handled by the Officer-in-Charge of the Arusha branch of the Residual Mechanism, Richard Karegyesa.⁴ That same day, Mr. Karegyesa indicated that the WISP

¹ A copy of this letter is attached as Confidential Annex "A".

² A copy of this letter is attached as Confidential Annex "B".

³ A copy of this e-mail is attached as Confidential Annex "C".

⁴ A copy of this e-mail is attached as Confidential Annex "D".

had not yet contacted the witnesses, and that he would provide an update the following week.⁵

8. On 22 January 2016, Sunkarie Ballah-Conteh, OTP Trial Attorney, sent an e-mail to counsel for Dr. Ngirabatware indicating that Witnesses ANAN and ANAT had consented to be interviewed. She requested a proposed date for the interview.⁶ On 23 January 2016, counsel for Dr. Ngirabatware proposed the dates of 3 and 4 March 2016 for the interviews.⁷

9. On 28 January 2016, Ms. Ballah-Conteh sent an e-mail confirming that the witnesses would be available those days in Kigali for the interviews.⁸ That same day, counsel for Dr. Ngirabatware also confirmed his availability for the interviews.⁹

10. On 4 February 2016, Ms. Ballah-Conteh sent an e-mail requesting to know the parameters of the proposed interview “in relation to the new fact under investigation.”¹⁰ That same day, counsel for Dr. Ngirabatware declined to provide that information.¹¹

11. On 8 February 2016, Ms. Ballah-Conteh sent an e-mail reiterating her request “in order for us to be able to make an assessment of the need to object at any point during the interview.”¹² On that same day, counsel for Dr. Ngirabatware responded that he was investigating the “new fact” that the witnesses gave false testimony during the trial. He explained that the parameters of the interview would be to ask them whether they told the truth at the trial.¹³

12. On 10 February 2016, Mr. Karegyesa sent an e-mail to counsel for Dr. Ngirabatware stating that “in the absence of an indication as to the objective basis for the allegation that the witnesses gave false testimony during trial, there is no justification for revisiting matters settled on Appeal.”¹⁴ On that same day, counsel for Dr. Ngirabatware replied that under the protective measures decision, it was not necessary for the defence

⁵ A copy of this e-mail is attached as Confidential Annex “E”

⁶ A copy of this e-mail is attached as Confidential Annex “F”

⁷ A copy of this e-mail is attached as Confidential Annex “G”

⁸ A copy of this e-mail is attached as Confidential Annex “H”

⁹ A copy of this e-mail is attached as Confidential Annex “I”

¹⁰ A copy of this e-mail is attached as Confidential Annex “J”

¹¹ A copy of this e-mail is attached as Confidential Annex “K”

¹² A copy of this e-mail is attached as Confidential Annex “L”

¹³ A copy of this e-mail is attached as Confidential Annex “M”

¹⁴ A copy of this e-mail is attached as Confidential Annex “N”

to convince the prosecution of the necessity for the interview.¹⁵

13. On 15 February 2016, Mr. Karegyesa sent an e-mail to counsel for Dr. Ngirabatware contending, for the first time, that the protective measures decision did not govern the interview of Witnesses ANAN and ANAT because “neither your client nor yourself constitute the Defence”, and indicating that the prosecution was calling off the scheduled interviews.¹⁶

14. On the same day, counsel for Dr. Ngirabatware responded that the prosecution could not have it both ways. If the protective measures did not apply, then he was free to simply contact the witnesses and interview them. If the protective measures applied, then the prosecution was required to facilitate the interviews. He advised that if the prosecution persisted in its position and cancelled the scheduled interviews, absent a judicial order to the contrary, he would proceed to interview the witnesses on his own.¹⁷

15. On 17 February 2016, the prosecution filed the instant motion.

Argument

16. It is well established that a party is always free to interview a witness of the other party regardless of the stage of the proceedings and without seeking judicial approval.¹⁸ This flows from the universally accepted principle that a witness is not the property of either party.¹⁹

17. An exception to this principle exists when the witness benefits from protective measures. In such situations, Trial Chambers at the ICTR have regulated the contact between the defence and protected prosecution witnesses in two ways.

18. In a few cases, the Trial Chambers have included a provision, such as in the *Kamuhanda* case, requiring judicial approval of such interviews:

- (i) Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any

¹⁵ A copy of this e-mail is attached as Confidential Annex “O”

¹⁶ A copy of this e-mail is attached as Confidential Annex “P”

¹⁷ A copy of this e-mail is attached as Confidential Annex “Q”

¹⁸ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 Nov 2006) para. 13

¹⁹ *Prosecutor v Mrskic*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Witnesses of the Opposite Party* (30 July 2003), at p. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 7; paras. 8, 13;; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) para. 3

relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of (sic) guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview.²⁰

19. In the majority of cases, the ICTR Trial Chambers have included a provision, such as in Dr. Ngirabatware's case, that does not require judicial approval for such interviews, but requires the defence to contact the witnesses through the prosecution or the Victims and Witnesses Support Section.

20. Because the protective measures decision in Dr. Ngirabatware's case does not contain a requirement of judicial approval, the prosecution's argument that leave of a Chamber is required before Dr. Ngirabatware can interview a protected prosecution witness is without merit.

21. In order to avoid its duty to facilitate the requested interviews under the protective measures decision, the prosecution has made the belated claim, three months after the interview of the prosecution witnesses had been requested, and more than a month after the witnesses had consented, that Dr. Ngirabatware and his counsel are not "the Defence" and thus not subject to the protective measures decision.²¹

22. The prosecution has never before taken the position that it now takes in this case. In the recent litigation over protective measures in the *Kamuhanda* case, the prosecution argued that the pre-trial protective measures decision applied to the defence of a person who had been convicted and ought not to be modified.²² It went on to observe that "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 varied or augmented in accordance with the provision in the Rules."²³

²⁰ *Prosecutor v. Kamuhanda*, No. ICTR-99-50-1, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (7 July 2000), para (i)

²¹ *Motion* at para. 11

²² *Prosecutor v. Kamuhanda*, No. MICT-13-33, *Prosecutor's Submission on Motion for Contact with Persons benefitting from Protective Measures* (23 July 2015) at para. 9

²³ *Prosecutor v. Kamuhanda*, No. MICT-13-33, *Prosecutor's Consolidated Response to ADAD-ICTR and ADC-ICTY Amicus Briefs* (21 September 2015) at para. 9 The protective measures decision in the *Kamuhanda* case also referred to the "accused". *Prosecutor v. Kamuhanda*, No. ICTR-99-50-1, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (7 July 2000) at (i)

23. The narrow interpretation of the protective measures decision now taken by the prosecution in this case flies in the face of Rule 86(F)(i), which provides that protective measures continue to have effect *mutatis mutandis* unless and until they are rescinded, varied, or augmented.²⁴

24. Therefore, the words “the Defence” in the protective measures decision does not have the restrictive meaning given to it by the prosecution, but includes Dr. Ngirabatware and his counsel throughout all stages of his case, including post-conviction review.

25. The term “the Defence” is defined in Rule 2 of the Rules of Procedure and Evidence as “the accused or the accused as represented by his Counsel”. “The accused” is defined in Rule 2 as “a person indicted by the ICTY, the ICTR, or the Mechanism in accordance with Article 1 of the Statute.” Dr. Ngirabatware is such a person. Rule 2 does not contain a separate or different term for a person who has been convicted. Therefore, the prosecution’s reliance on Rule 2 does not assist its argument.²⁵

26. The prosecution has likewise misinterpreted section (iv) of the protective measures decision in Dr. Ngirabatware’s case. That section provides that:

No person shall be allowed to make audio or video recordings, broadcast, sketches, or take photographs of any protected witness and/or his or her family in relation to their testimony at the Tribunal, without leave of the Chamber.

27. First, this provision applies to all persons, not simply the defence. Therefore, as interpreted by the prosecution, it would also prohibit the prosecution from recording any interviews with protected witnesses without leave of the Chamber.

28. Second, the prosecution’s interpretation ignores the words “at the Tribunal”. Read for its plain meaning, the provision prohibits the recording and photographing of a witness or his/her family while the witness is at the Tribunal giving testimony. It does not relate to contacts with a witness for the purpose of conducting interviews by either party.

29. Therefore, paragraph (iv) of the protective measures decision does not provide an independent requirement for Dr. Ngirabatware to obtain leave of the Chamber to

²⁴ ICTR Rule 75(F)(i) is to the same effect.

²⁵ *Motion* at para. 11

interview a witness should he wish to record the interview.

30. Dr. Ngirabatware would also be free to interview a prosecution witness under the protective measures decision without recording that interview. Rule 41, cited by the prosecution,²⁶ requires that its own, or a MICT *amicus curiae* prosecutor's, questioning of a suspect be recorded, but does not apply to interviews conducted by other entities, such as the defence.²⁷ The defence does not have the authority or obligation to label someone as a suspect and interrogate them as such.

31. Therefore, the prosecution's refusal to abide by the protective measures decision and to facilitate the interviews with Witnesses ANAN and ANAT is unjustified.

32. If the Appeals Chamber were to nevertheless determine that judicial approval was required for the interviews of Witnesses ANAN and ANAT, Dr. Ngirabatware has a legitimate forensic purpose for conducting those interviews and a good faith basis for believing that the interviews will advance his case for review.²⁸ Indeed, it would be a massive injustice to block his access to those witnesses and prevent him from establishing the new facts that the witnesses can now provide.

33. Dr. Ngirabatware's counsel had hoped to conduct these interviews on 3 and 4 March 2016. However, the Appeals Chamber has recently ordered him to re-file his *Motion for Assignment of Counsel* and set a briefing schedule that would extend past those dates.²⁹ Dr. Ngirabatware agrees not to interview the witnesses until the Appeals Chamber decides this motion. Thus, the urgent relief sought by the prosecution's motion is unnecessary. However, Dr. Ngirabatware has been waiting three months to interview these witnesses and he would appreciate an expeditious resolution of the prosecution's motion and his *Motion for Assignment of Counsel* (19 February 2016) so that the interviews can take place as soon as possible.

²⁶ *Motion* at para. 10

²⁷ *Prosecutor v Boskoski & Tarkulovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents...* (7 December 2007) at paras. 15, 33. MICT Rule 41 differs from its ICTR and ICTY equivalent (Rule 43) in that it does not specify that the questioning must be by the Prosecutor. However, this was likely to extend the requirement to MICT *amicus curiae* prosecutors and investigators, given that the MICT can only bring new charges for contempt or false statement, rather than to impose an obligation on the defence.

²⁸ Dr. Ngirabatware hereby incorporates by reference Confidential Annex "A" to his *Motion for Assignment of Counsel* (19 February 2016), which sets forth the factual information that led him to request the interviews with Witnesses ANAN and ANAT.

²⁹ *Order to Re-file Motion for Assignment of Counsel* (17 February 2016)

34. Every day of delay is another day that an innocent man spends in prison.

35. Therefore, for any and all of the reasons stated above, the Appeals Chamber is respectfully requested to dismiss the prosecution's motion and order the prosecution to facilitate the interviews as required by the protective measures decision without further delay.

Word count: 2532

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 Augustin Ngirabatware



**TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE
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