

MICT-13-42
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UNITED
NATIONS



Mechanism for International Criminal Tribunals

Case No. MICT-13-42

Date: 15 May 2013

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

Jean-Baptiste GATETE

PUBLIC REDACTED VERSION

**DECISION IN RESPECT TO THE APPLICATION FOR
VARIATION OF PROTECTIVE MEASURES**

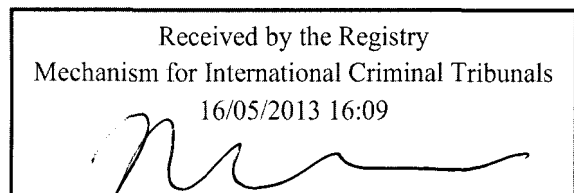
Rule 86 of the Rules of Procedure and Evidence

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Teresa Berrigan

**5th Criminal Division, Higher Regional
Court [Oberlandesgericht] of Frankfurt am
Main, Germany**

Hon. Thomas Sagebiel, Presiding Judge



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INTRODUCTION

1. In an application dated 15 April 2013, Presiding Judge Sagebiel of the 5th Criminal Division of the Higher Regional Court of Frankfurt am Main (“German Court”), requested variation of the protective measures granted to Prosecution Witnesses BBM, BUY, BVS and BBJ (the “Witnesses”) in the case of *The Prosecutor v. Jean-Baptiste Gatete* (the “Application”).¹ The Application arises from the case against Mr. Onesphore Rwabukombe, who is currently being prosecuted in Germany for genocide in relation to events allegedly committed in Rwanda in 1994. On the same day, I was assigned by the President of the Mechanism as Single Judge to rule on the Application.² The Prosecution supports the Application.³

2. On 15 July 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) issued a decision dismissing an application with respect to the same protected witnesses (“ICTR Decision” and “ICTR Application” respectively) on the basis that the Witnesses refused to consent to the variation of their protective measures when contacted by the ICTR Witness and Victims Support Section (“WVSS”).⁴

DELIBERATIONS

Preliminary Matter

3. This decision does not contain information that reveals the identity of protected witnesses. However, the last part of the decision discusses a matter which should not be made public in the interest of the Witnesses. I, therefore, consider that the decision shall be filed confidentially and a public redacted version will be filed thereafter.

The Application for Variation of Protective Measures

Applicable Law

¹ Application Under Rule 86 (H) (I) of the MICT Rules of Procedure and Evidence, Confidential, 11 April 2013 (“MICT Application”).

² *Prosecutor v. Jean-Baptiste Gatete*, Case No. MICT-13-42, Order Assigning a Single Judge to Consider an Application Pursuant to Rule 86 (H), Confidential and *Ex Parte*, 15 April 2013.

³ *Prosecutor v. Jean-Baptiste Gatete*, Case No. MICT-13-42, Prosecutor’s Observations Regarding “Application Under Rule 86 (H) & (I) of the MICT Rules of Procedure and Evidence”, Confidential, 23 April 2013 (“Prosecutor’s Observations”).

⁴ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Prosecution’s Urgent *Ex Parte* Motion to Vary Protective Measures for Witnesses, Confidential, 7 June 2011 (“ICTR Application”); *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Decision on Prosecution’s Motion for Variation of Protective Measures Relating to German Proceedings (AC), Confidential, 15 July 2011 (“Decision of 15 July 2011”).



4. Rule 86 of the Mechanism Rules of Procedure and Evidence (“Rules”) applies to the continued protection of witnesses in proceedings before the ICTR, allowing for the protection orders to be augmented, varied or rescinded. Rule 86 (H) provides that “a judge or bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the [International Criminal Tribunal for the former Yugoslavia (“ICTY”)], the ICTR, or the Mechanism may seek to rescind, vary, or augment protective measures ordered in proceedings before the ICTY, the ICTR, or the Mechanism.” The request with respect to Onesphore Rwabukombe has come from the Presiding Judge of the German Court where Mr. Rwabukombe’s case is pending and is therefore properly submitted for consideration under the auspices of Rule 86 (H).⁵

5. In determining an application under Rule 86 (H), the Single Judge or Chamber appointed shall ensure through the Witness Support and Protection section of the Mechanism (“WISP”) that the protected victims or witnesses have given consent to the rescission, variation, or augmentation of their protective measures.⁶ However, when there is a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, Rule 86 (I) permits the Single Judge to “order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.”

Consultation of the Witnesses

6. The Witnesses were approached by WVSS regarding the variation of their protective measures in July 2011 following an order by the ICTR Appeals Chamber in relation to the ICTR Application.⁷ Prior to this consultation by WVSS, the ICTR Prosecution had obtained the signed consent of the Witnesses for the disclosure to German *authorities* of closed session transcripts and other confidential materials from the *Gatete* case.⁸ Considering that the first consent was obtained by the Prosecution and the Court could not be sure that it had been given with full knowledge of all who may receive the information, the Appeals Chamber ordered that WVSS should contact the Witnesses and inquire whether they consented to the protected information also being disclosed to the *parties* in

⁵ MICT Application.

⁶ See Rule 86 (I) of the Mechanism Rules of Procedure and Evidence

⁷ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Decision on Application for Variation of Protective Measures Relating to German Proceedings and Order Relating to Prosecution’s Motion for Variation of Protective Measures (AC), 17 June 2011, para. 13 (“Decision of 17 June 2011”); *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Registrar’s Submissions in Respect of Appeals Chamber “Decision on Application for Variation of Protective Measures Relating to German Proceedings and Order Relating to Prosecution’s Motion for Variation of Protective Measures, Confidential and Ex Parte, 8 July 2011.

⁸ ICTR Application, para. 5.

the German case.⁹ When advised by WVSS in July 2011 about the full consequences of the requested variation of their protective measures, the Witnesses refused to consent to the variation on the basis of security concerns and unwillingness to cooperate with a court other than the ICTR.¹⁰

7. The MICT Prosecutor proposes that the Witnesses be contacted anew having regard to the passage of time and because the Witnesses had previously consented to disclosure of their identities, before retracting such consent when asked a second time by WVSS.¹¹

8. Apart from the fact that the German Court has made no such request, I do not consider it appropriate that the Witnesses be consulted again for the following reasons. In relation to Rule 86 (I), I find that the consultation of the Witnesses performed by WVSS in 2011 is equivalent to any consultation I could order to be performed now by WISP. Moreover, the consultation process in relation to the ICTR Application did not reflect that the Witnesses were unsure as to whether to consent or not, but rather that they, prior to being advised by the WVSS, did not realise that the *parties* in the German case would have access to confidential material disclosed to the German *authorities*. Finally, I consider that repeatedly approaching protected witnesses on the same matter is likely to cause anxiety for the witnesses and should be avoided.

Variation without the consent of the Witnesses

9. In its Application, the German Court requests the disclosure of the Witnesses' personal details and addresses to allow an officer of the German Court to interrogate the Witnesses and the German Court to subpoena the Witnesses.¹² The German Court submits that the Witnesses, who survived the Kiziguro parish massacre and testified about the related events in the *Gatete* trial, "may be able to make a statement regarding [Onesphore Rwabukombe's] perpetration, so that the interrogation of these witnesses might prevent a miscarriage of justice."¹³

10. I observe that the standard under Rule 86 (I) is whether a miscarriage of justice "would otherwise result" if the requested variation is denied, not whether the requested variation "might prevent" a miscarriage of justice.

11. In the case at hand, the German Court already has access to the public transcripts of the Witnesses' testimony in the *Gatete* trial. I can only assume that these transcripts and the Witnesses'

⁹ Decision of 17 June 2011, para. 8-10.

¹⁰ Decision of 15 July 2011, para. 9.

¹¹ Prosecutor's Observations, para. 7.

¹² MICT Application, p. 2.

¹³ *Id.*

statements to the ICTR Office of the Prosecutor make no reference to Onesphore Rwabukombe, since both the German Court and the Prosecution who filed an application in support of the request by the German Court have not claimed that any such references exist. Thus, it is apparent that the German Court does not request access to confidential material in MICT's possession because it contains evidence of the involvement of Mr. Rwabukombe in the Kiziguro parish massacre, but rather that it requests permission for access to the Witnesses in order to obtain additional information with hopes that this will lead to evidence related to Mr. Rwabukombe.

12. Thus, it is uncertain whether the Witnesses have any information of value to the German case. In addition, the Witnesses have already refused to cooperate with the German Court if such cooperation would include disclosure of their identities to the parties in the German case. Furthermore, the Kiziguro parish massacre would have involved a number of potential witnesses, and the fact that protective measures have been granted to four of them does not prevent the German Court from carrying out its own investigations in order to find any and all witnesses who may have information about Mr. Rwabukombe's alleged involvement.

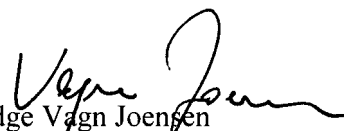
13. Finally, the obligation of the MICT under Article 28 (3) of its Statute to assist the German Court in its investigations must be balanced against MICT's obligation under Article 20 to honour the protective measures it has granted to vulnerable witnesses in exchange for their testimony. In the present case I find that the German Court has not shown that a miscarriage of justice would result from denying the requested disclosure of the Witnesses' identity.

[REDACTED]

FOR THE ABOVE REASONS, I

- I. DENY** the request for variation of the protective measures granted to Prosecution Witnesses BBM, BUY, BVS and BBJ.

Arusha, 15 May 2013, done in English.


Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]





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