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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, presiding
Judge Asoka de Zoysa Gunawardana
Judge Arlette Ramaroson

Registrar: Mr. Adama Dieng

Date: 2 October 2003

The PROSECUTOR

v.

**Casimir BIZIMUNGU
Justin MUGENZI
Jerome BICAMUMPAKA
Prosper MUGIRANEZA**

Case No. ICTR-99-50-I

ADJUDICATED
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**DECISION ON PROSPER MUGIRANEZA'S MOTION TO REQUIRE THE
REGISTRAR TO ALLOW ACCESS TO A WITNESS**

Office of the Prosecutor

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Counsel for the Accused

Michelyne St.Laurent, for Casimir Bizimungu
Howard Morrison and Ben Gumpert, for Justin Mugenzi
Pierre Gaudreau, for Jerome Bicamumpaka
Tom Moran, for Prosper Mugiraneza

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"), **5930**
SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Asoka de Zoysa Gunawardana, and Judge Arlette Ramaroson (the "Chamber");

BEING SEIZED of:

- i. "Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 28 February 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED:

- ii. The "Registrar's Response to the Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 18 March 2003 (the "Registrar's Response");
- iii. The "Prosecutor's Response to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to A Witness, Jean Kambanda" filed on 19 March 2003 (the "Prosecution Response");
- iv. "Prosper Mugiraneza's Reply to the Registrar's Response to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 19 March 2003 ("Mugiraneza's Response to the Registrar");
- v. "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 25 March 2003 ("Mugiraneza's Response to the Prosecution");
- vi. The "Addendum to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 16 July 2003 (the "Addendum");
- vii. The "Prosecutor's Supplemental Response to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 23 July 2003 (the "Prosecution Response to the Addendum");
- viii. "Prosper Mugiraneza's Reply to the Prosecutor's Supplemental Response to Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 28 July 2003 (the "Defence Supplemental Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20(4)(e), and Article 21 of the Statute which read:

Article 20 (4)(e)

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

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Article 21

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

NOW CONSIDERS the matter solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Initial Submissions

The Defence Motion and the Registrar's Response

1. The Defence requests the Chamber to require the Registrar to allow access to a potential witness, Jean Kambanda, the former Prime Minister of the Interim Government of Rwanda, who is serving a life sentence after pleading guilty before the Tribunal. The Defence further specifies the conditions under which they wish to interview Mr. Kambanda.
2. The Defence states that in December 2002, the Lead Prosecutor acting for the Prosecution in this trial (at that time Marks Moore, Senior Trial Attorney) informed Defence Counsel that Mr. Kambanda would testify for the Prosecution in the trial of this case. Defence Counsel contacted Mr. Kambanda through an intermediary, who was instructed to inform Mr. Kambanda that the Defence Counsel wanted to talk to him. The Defence maintains that Mr. Kambanda is willing to be interviewed by Defence Counsel. Since Mr. Kambanda was at that time detained in The Hague with cooperation from the ICTY Registry, so that the Prosecution could interview him, the Defence contacted the acting chief of the ICTY Office of Legal Assistance and Detention (OLAD) asking for an interview to be arranged. The Defence claims to have received an email from OLAD stating that it could not interview Mr. Kambanda because the ICTR Registry sent a memorandum to the ICTY Registry denying permission for the interview.
3. The Registrar denies that he ever sent a memorandum to the ICTY blocking the interview as the Defence has alleged. Rather, the Registrar expressed some reservations on the difficulty in executing a Decision of the Tribunal,¹ which in his opinion was likely to create a judicial precedent that the Parties would be tempted to rely on for remedies other than those provided in Rule 90bis.
4. The Defence submits that in order to provide effective counsel, the Defence should be able to interview witnesses for the Prosecution, so long as those witnesses are willing to be interviewed, and consent to having the interview recorded. Furthermore, the Defence submits that it would be unethical for an attorney to deprive their opponent access to evidence, including instructing a fact witness not to talk to the opposing counsel.

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Ex Parte Motion for the Transfer of a Detained Witness Pursuant to Rule 90 bis (TC), 4 November 2002

5. In relation to the duties of the Prosecution, the Defence submits that the Prosecution has the additional duty to inform Defence Counsel of exculpatory evidence and should not restrict the Defence's ability to gather and present such evidence, as the denial of this deprives the accused of his right to effective counsel. In relation to the duties of the Registry, the Defence submits that it is a denial of fundamental fairness for a neutral arm of the Tribunal, such as the Chambers or the Registry, to deprive the Defence the ability to interview a willing potential witness.

6. The Defence submits that Mr. Kambanda is a potential witness for the Defence, who is believed to possess exculpatory information, a fact that the Defence will have to interview the Witness in order to verify.

7. The Registrar notes that, in his opinion, Mr. Kambanda is a potential prosecution witness; therefore it is for the Prosecution to reply to the Defence Motion, and specify the requirements under which the Defence can interview Mr. Kambanda. The Registrar submits that there is no provision in the basic rules of the ICTR that authorises the Registrar to allow a party to have access to the potential witnesses of another party. Furthermore, in relation to the outcome of this Decision, the Registrar submits that he does not have a legal opinion to express.

8. The Defence reiterates that while Mr. Kambanda is a potential prosecution witness, he is also a potential defence witness who has expressed a desire to speak to the Defence. The Defence seeks equal treatment and submits that it is not the place of the Prosecution to either grant or deny the Defence access to a potential *defence* witness, as this would give the Prosecution control over the Defence's access to evidence. Furthermore, the Defence submits that, since in its opinion the Registry has control over access to Mr. Kambanda, directly - or indirectly by cooperation with the ICTY Registry - the Registry must either have directly or impliedly given authorisation for access by the Prosecution. The Defence emphasises the reasons why, as a neutral organ of the Tribunal, the Registry must have the trust of all those involved.

9. The Defence argues that the Registrar's view that access to Mr. Kambanda is governed by Rule 90*bis* is incorrect, as this rule concerns only the physical transfer of a detained person from national authorities to the Tribunal, and has nothing to do with access to a potential witness.

10. The Defence reiterates that it is not asking the Trial Chamber to compel Mr. Kambanda to submit to an interview, as it lacks the power to do so,² thus an interview with Mr. Kambanda would be voluntary and subject to the conditions Mr. Kambanda desires.

The Prosecution Response

11. The Prosecution argues that on the basis of the status quo of Mr. Kambanda as a prosecution witness, and the timing of the Defence motion, the Chamber should not allow the

² While the Trial Chamber has the authority under Rule 90(E) to compel a witness to testify by granting him immunity for his testimony, it has no power to order anyone to submit to an interview.



Defence access to an interview of Mr. Kambanda as it will prejudice on going investigations and may endanger other potential witnesses.³

12. The Prosecution relies on Article 15 of the Tribunal's Statute, which mandates it to investigate and prosecute crimes within the jurisdiction of this court. Under Rule 39 of the Tribunal's Rules of Procedure and Evidence, the Prosecution is empowered to question witnesses and take all measures to provide for the safety of potential witnesses and informants.

13. The Prosecution relies on the jurisprudence of this Tribunal and also that of the ICTY to restrict pre-trial interviews by either party of the other party's witnesses.⁴ On the basis of this jurisprudence the Prosecution argues that each party must be allowed to freely carry out pre-trial investigations without interruptions, and to ensure that potential witnesses are not placed in danger.

14. The Prosecution wishes to bring to the attention of the Trial Chamber that, in line with the dicta in *Kovacevic*,⁵ Mr. Kambanda's legal representatives have orally indicated to the Prosecution that Mr. Kambanda does not wish to speak to the Defence.

15. The Prosecution submits that the Tribunal's Rules of Detention extend to any person "otherwise detained on the authority of the Tribunal" even though such person may be *physically absent* from the Detention Unit at Arusha.⁶ The Prosecution argues that these Rules lay down the circumstances under which contact with detainees may be restricted. Under Rule 64 of the Rules of Detention, the Prosecution may request the Registrar to prohibit, regulate or set conditions for the contact between a detainee and any other person if there are reasonable grounds to believe that such contact could prejudice investigations.

16. The Prosecution submits that it is aware of its disclosure obligations, including a duty to disclose to the Defence any exculpatory material in its possession, in accordance with Rule 68. Furthermore, the Prosecution submits that the transcripts of the interviews conducted with Mr. Kambanda for the purpose of his trial have been disclosed to the Defence, and the Prosecution gives an assurance that it will disclose other such materials that may come into its possession.

Defence Reply to the Prosecutor

17. The Defence argues that the fallacy of the Prosecutor's response is that it presumes that once a party designates a witness, he or she cannot also be a witness for the opposing party. The Defence argues that this position is in conflict with Article 20(4)(d) of the Statute of the Tribunal, which guarantees the right to effective counsel, and also Article 20(4)(e), which guarantees the defence the right to obtain the attendance of witnesses under the "same

³ This point must be read in its context, and now having regard to the "further submission" of the Parties

⁴ See *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on the Defence Motion to Interview Prosecution's Witness or Alternatively to be Provided with a Bill of Particulars (TC), 12 March 2001;

⁵ *Prosecutor v. Milan Kovacevic*, Case No. IT-97-24-T, Decision on Prosecution Motion to Protect Victims and Witnesses (TC), 12 May 1998

⁶ Rules Covering the Detention of Persons Awaiting Trial or Appear Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted by the Tribunal at the Second Plenary Session on 9 January 1996, Rule 3.

conditions as the witnesses against him or her". The Defence also relies on Article 20(4)(b), which guarantees the defence adequate time and facilities to prepare a defence.

18. The Defence submits that the Prosecution has misinterpreted the three decisions that it relied on in its Response.⁷ It argues that the key relevant Decision is *Prosecutor v. Delalic et al.*,⁸ which states that the right to cross-examination, guaranteed by Article 21 of the ICTY Statute,⁹ is more than a "blind confrontation in the courtroom," but also includes prior out-of-court investigation. In this case, the Trial Chamber did not hold that the Defence had no right to conduct pre-trial interviews; rather it held that the Prosecution could not be forced to reveal the witness's current address. The Defence notes that in *Prosecutor v. Milan Kovacevic*¹⁰ the Chamber also held that prosecution witnesses could not be forced to submit to interviews by the Defence. The Defence interprets the Decisions in *Celibici*, *Kovacevic* and *Kajelijeli* as simply stating that witnesses for one party cannot be forced to submit to interviews by the opposing party.

19. The Defence reiterates that there is good cause to interview Mr. Kambanda based on the discovery provided by the Prosecutor, giving the Defence a good faith basis for believing that Mr. Kambanda could be called as a defence witness.¹¹ The Defence argues that denying the opportunity to interview a potential defence witness until the Prosecution has completed investigation directly affects the Accused's right to a speedy trial.

The Further Submission of the Parties

20. In the Addendum, the Defence represents to the Chamber that it has received information to the effect that Mr. Kambanda has now refused to testify for the Prosecution, and also that he has now been transferred from the Detention Centre at The Hague to another location. In its submission, this removes the main basis for the Prosecution's objection to the granting of the Defence Motion, because he is no longer a potential prosecution witness, and that investigations are no longer being carried out by interviewing Mr. Kambanda as he is no longer at The Hague.

21. The Prosecution replies to this charge by stating that "it remains the intention of the Prosecution to call Jean Kambanda as a prosecution witness". The Prosecution claims that Mr. Kambanda's legal representatives have indicated that he does not wish to talk to the Defence. It further claims that the Defence had plenty of opportunity to interview Mr. Kambanda before he was designated as a prosecution witness, and, in essence, now it is too late for the Defence to do so.

⁷ *Kajelijeli*, Decision on the Defence Motion to Interview the Prosecutor's Witnesses or Alternatively to be Provided with a Bill of Particulars (TC); *Kovacevic*, Decision on Prosecution Motion to Protect Victims and Witnesses (TC); and *Prosecutor v. Delalic*, Case No. IT-96-1-T, Decision on Defence Motion on the Discovery of Identity and Location of Witnesses (TC), 18 March 1997.

⁸ *Delalic*, Decision on Defence Motion on the Discovery of Identity and Location of Witnesses (TC)

⁹ This provision is identical to that in this Tribunal's Statute.

¹⁰ *Kovacevic*, Decision on Prosecution Motion to Protect Victims and Witnesses (TC)

¹¹ The Defence submits that if the Trial Chamber desires the Defence will file an *ex parte* analysis of Mr. Kambanda's statements related to Mugiraneza, and how the Defence believes them to be exculpatory.



22. The Defence draws the attention of the Chamber to vague wording in the Prosecution Response, specifically highlighting that the Prosecution does not deny that Mr. Kambanda has refused to be a witness for the Prosecution, nor that he has been transferred back to Mali to continue serving his sentence. The Defence does not dispute that the Prosecution still intends to call Mr. Kambanda as its Witness; however, it submits that it may be against his will. The Defence seeks now to be given the opportunity to attempt to interview Mr. Kambanda, and if he refuses to be interviewed then so be it.

23. The Defence challenges the Prosecution's assertion that the Defence had plenty of opportunity to interview Mr. Kambanda before he was named as a potential prosecution witness. It gives a chronology of events leading up to the time when Mr. Kambanda was nominated as a potential prosecution witness, demonstrating that in fact there was little opportunity for interviewing Mr. Kambanda, not plenty as the Prosecution claims.

HAVING DELIBERATED

24. The Chamber has considered all the submissions of the Parties, including the representations made by the Registrar. The Chamber is not convinced by the Prosecution argument that due process is protected by preventing the Defence from gaining access to Mr. Kambanda. The Chamber is not satisfied that the Prosecution's ongoing investigations will be hampered by allowing the Defence to interview Mr. Kambanda.

25. The Chamber notes that as of the date of this Decision, the Prosecution acting in this case have yet to file any details of potential witnesses with the Registry for the purpose of putting protective measures in place for prosecution witnesses or potential prosecution witnesses.¹² However, the Chamber accepts that Mr. Kambanda has been adequately nominated by one of the Parties (in this instance the Prosecution) as its potential Witness. This entails that a certain procedure should be followed by the other Party (in this instance the Defence) who wishes to interview that Witness.

26. The Chamber notes the Decision of Trial Chamber III of 29 September 2003 in the case of *Prosecutor v. Joseph Nzirorera* where a similar request was made by the Defence to interview potential prosecution witnesses who are also convicts of this Tribunal. The Chamber particularly notes a passage of *obiter dictum* in that Decision whereby it is stated that "any interview of that kind should take place in the presence of a representative of the opposing party to protect the integrity of the process".¹³ The Chamber approves of this reasoning, and also observes that such procedures are recommended in some national jurisdictions, where it is seen as proper to interview a witness in the presence of a party from the opposing side, in order to clearly avoid any allegations that may arise in relation to tampering with evidence.¹⁴ The Chamber feels that in this case such procedures are appropriate to protect the integrity of the

¹² Confidential memo from WVSS(P) to Trial Chamber II (at the request of the Chamber), 1 October 2003

¹³ *The Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-I, Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Mr. Kambanda, Georges Ruggiu and Omar Serushago (TC), 29 September 2003, para.5

¹⁴ *Guide to Professional Conduct*, Law Society of England and Wales, Principle 21.10



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proceedings, including the transparency of that integrity. Thus, a representative of the opposing side should be permitted to attend such interview.

27. In its submissions the Defence allows that any interview with Mr. Kambanda should be voluntary on his part. The Chamber finds that this should be so. Accordingly, the Registrar, prior to facilitating the interview must determine whether or not Mr. Kambanda is willing to be interviewed by the Defence. If he is not willing to be interviewed by the Defence, then that is the end of the matter.

FOR THE ABOVE REASONS, THE TRIBUNAL

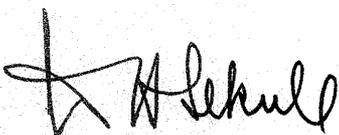
28. **GRANTS** the Defence Motion **in the following terms:**

- (a) The Parties shall arrange between themselves a suitable time for the Defence to interview Mr. Kambanda, when a representative of the Prosecution may be present. There must be no unreasonable delay in the facilitation of this interview.
- (b) The Registry shall facilitate the interview according to its established procedures, and also according to the laws and procedures of the host country.

However:

- (c) Before the interview can take place, the Registrar should satisfy himself that Mr. Kambanda is indeed willing to be interviewed by the Defence. Should he not be satisfied on this point, the interview shall not proceed, and the Registrar shall inform the Parties and the Chamber accordingly.

Arusha, 2 October 2003



William H. Sekule
Presiding Judge



Asoka de Zoysa Gunawardana
Judge



Arlette Ramarosan
Judge

