

ICTR-99-50-T  
24-8-2004  
(16137 — 16131)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

16137  
smhgs

Or: ENG

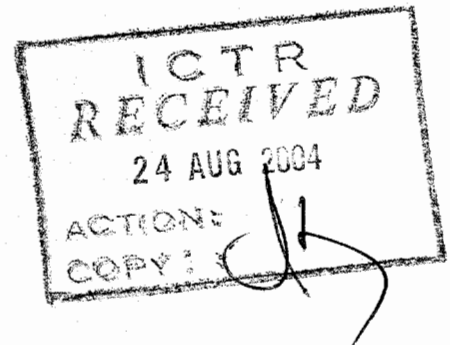
**TRIAL CHAMBER II**

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 24 August 2004

**The PROSECUTOR**  
v.  
**Casimir BIZIMUNGU**  
**Justin MUGENZI**  
**Jérôme-Clément BICAMUMPAKA**  
**Prosper MUGIRANEZA**  
*Case No. ICTR-99-50-T*



**DECISION ON PROSPER MUGIRANEZA'S MOTION TO VARY  
RESTRICTIONS IN THE TRIAL CHAMBER'S DECISION OF 2 OCTOBER  
2003 RELATED TO ACCESS JEAN KAMBANDA**

**Office of the Prosecutor:**

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Elvis Bazawule  
Mr. Justus Bwonwonga  
Mr. Shyamlal Rajapaksa

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu  
Mr. Howard Morrison, Q.C. and Mr. Ben Gumpert for Justin Mugenzi  
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka  
Mr. Tom Moran for Prosper Mugiraneza

16136

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Trial Chamber”);

**BEING SEIZED** of “Prosper Mugiraneza’s Motion to Vary Restrictions in the Trial Chamber’s Decision of 2 October 2003 Related to Access Jean Kambanda” filed on 12 December 2003, (the “Motion”);

**NOTING** the “Prosecutor’s Response to Prosper Mugiraneza’s Motion to Vary Restrictions in the Trial Chamber’s Decision of 2 October 2003 Related to Access Jean Kambanda” filed on 26 January 2004, (the “Response”);

**NOTING** “Prosper Mugiraneza’s Reply to the Prosecutor’s Response to Prosper Mugiraneza’s Motion to Vary Restrictions in the Trial Chamber’s Decision of 2 October 2003 Related to Access Jean Kambanda” filed on 28 January 2004, (the “Reply”);

**HAVING RECEIVED:**

- (i) “Prosper Mugiraneza’s Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief” filed on 22 March 2004, (the “Renewed Motion”);
- (ii) “Prosper Mugiraneza’s Request for Ruling on His Motion to Vary Its Order of 2 October 2003 and Request that the Trial Chamber Strike Jean Kambanda from the “Prosecutor’s Witness List” filed on 20 May 2004, (the “Request”);
- (iii) the “Prosecutor’s Response to Prosper Mugiraneza’s Request for Ruling on His Motion to Vary Its Order of 2 October 2003 and Request that the Trial Chamber Strike Jean Kambanda from the “Prosecutor’s Witness List” filed on 26 May 2004, (the “Response to the Request”);

**TAKING INTO CONSIDERATION**

- (i) the “Decision on Prosper Mugiraneza’s Motion to Require the Registrar to Allow Access to a Witness” filed on 2 October 2003, (the “Decision”);
- (ii) the “Order for the Prosecutor to Indicate to the Trial Chamber Whether Jean Kambanda is a Prosecution Witness or Not” filed on 6 May 2004, (the “Order”);
- (iii) the “Prosecutor’s Response to the Trial Chamber’s Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber Whether or Not He Is Still a Prosecution Witness” filed on 14 May 2004, (the “Prosecutor’s Indication”);



## ARGUMENTS OF THE PARTIES

### *Defence Submissions*

16135

1. The Defence for Prosper Mugiraneza seeks to modify the Trial Chamber's Decision of 2 October 2003 stating that the Defence could interview Jean Kambanda "when a representative of the Prosecutor may be present." The Defence interprets the Decision as permitting the Prosecutor to demand that an OTP representative be present at any interview with Jean Kambanda and requests that the Trial Chamber permit such an interview without a representative of the Prosecutor present, if those are the conditions under which Jean Kambanda consents to an interview.

2. The Defence for Prosper Mugiraneza also seeks to have the Trial Chamber strike Jean Kambanda from the Prosecutor's witness list because of the Prosecutor's lack of compliance with the Presiding Judge's Request of 3 February 2004 and the Trial Chamber's Order of 6 May 2004 to inform the Trial Chamber whether Jean Kambanda is still a Prosecution Witness.

3. Based on the 3 December 2003 Letter from Jean Kambanda,<sup>1</sup> Defence Counsel for Prosper Mugiraneza submits that Jean Kambanda has agreed to meet with him, but only without a representative of the Prosecutor present. Therefore, the Defence argues, it is impossible for the Defence to interview Jean Kambanda under the conditions set out by the Trial Chamber in its Decision.

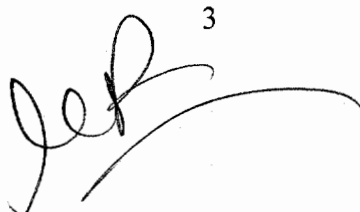
4. The Defence for Prosper Mugiraneza gives two reasons why it should be permitted to interview Jean Kambanda under the conditions stipulated by him in his Letter.

- a. The Defence for Prosper Mugiraneza states that "no party has a property interest in a witness."<sup>2</sup> The Defence submits that the Rules of Procedure and Evidence of the Tribunal (the "Rules") do not prevent a party from interviewing any willing witness, absent a protection order. Thus, the Defence argues that meeting with Jean Kambanda should be possible as Jean Kambanda is not a protected witness, is in the constructive custody of the Registrar, and is willing to meet with the Defence under the conditions specified in his Letter.
- b. The Defence for Prosper Mugiraneza argues that denying the Defence of the right to interview Jean Kambanda, when he consented to the interview, would deprive Prosper Mugiraneza of his right to a fair trial, his right to present a defence, and his right to effective assistance of Counsel.

---

<sup>1</sup> Letter from Jean Kambanda to Monsieur Jean-Pelé Fomété, Conseiller Juridique de la Section de l'Administration des Chambres, 3 December 2003, (the "Letter"), attached to the Motion.

<sup>2</sup> *The Prosecutor v. Casimir Bizimungu, et al.*, "Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief," 24 March 2004, para. 4.

3  


16-134

5. The Defence for Prosper Mugiraneza challenges the assertion that Jean Kambanda will appear as a Prosecution witness. According to the Defence, if Jean Kambanda is not a Prosecution witness, a representative of the Prosecutor is not needed in a Defence interview of Jean Kambanda in order to protect the Trial Chamber's concerns over the integrity and transparency of the proceedings. Further, the Defence submits that if Jean Kambanda will not appear as a Prosecution Witness, the Prosecutor should have no interest in whether or not the Defence interviews him.

6. Alternatively, the Defence for Prosper Mugiraneza submits that even if Jean Kambanda does appear voluntarily as a Prosecution witness, it should be allowed to interview Jean Kambanda because he possesses exculpatory information and remains a potential Defence witness. The Defence argues that the Prosecutor is contesting the Defence's access to Jean Kambanda as one of many attempts to deny the Defence access to exculpatory information, and this attempt would be considered improper in other jurisdictions.

7. The Defence submits that it should be entitled to a presumption of ethical conduct that permits them to interview Jean Kambanda without a representative of the Prosecutor present. However, the Defence for Prosper Mugiraneza states that although it considers such measures unnecessary, in order to ensure the lack of improper influence on Jean Kambanda, it will accept "reasonable conditions"<sup>3</sup> on an interview with Jean Kambanda, other than the required presence of a representative of the Prosecutor.

8. The measures suggested by the Defence for Prosper Mugiraneza include recording the interview, permitting the presence of a neutral party such as a member of the Registry or of Chambers, permitting an official translator to report improper actions to the Trial Chamber, or ordering a recording of the interview to be filed under seal with the Trial Chamber or other neutral party.

9. The Defence for Prosper Mugiraneza submits that the Prosecutor's Response to the Trial Chamber Order<sup>4</sup> was not sufficient as it relied on statements from Jean Kambanda's Counsel, not Jean Kambanda himself. The Defence argues that the Prosecutor has intentionally delayed compliance to deny the Defence access to Jean Kambanda and questions whether the administrative arrangements noted by the Prosecutor are needed for Jean Kambanda to appear in court, since he is already a prisoner in the Registrar's custody.

#### *Prosecutor's Submissions*

10. The Prosecutor admits that Jean Kambanda's Letter stated that he was willing to meet with the Defence for Prosper Mugiraneza without any representative of the Prosecutor present.

---

<sup>3</sup> Renewed Motion, para. 5.

<sup>4</sup> *Prosecutor v. Casimir Bizimungu et al.* "Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber on Whether or Not He is Still a Prosecution Witness", 12 May 2004.



4

16133

11. However, in response to the Trial Chamber's Order, the Prosecutor submits that Jean Kambanda is a Prosecution Witness and has reconfirmed his willingness to testify through his attorney's contact with Prosecutor Hassan Bubacar Jallow. The Prosecutor previously submitted that the Defence arguments on this matter were based only on inference from Jean Kambanda's letter, and no clear showing of Jean Kambanda's refusal to appear as a Prosecution Witness. The Prosecutor submitted that unless the Defence could make a stronger argument, it lacked a legal basis to request the Trial Chamber to vary its Decision.

12. The Prosecutor argues that by contacting Jean Kambanda through his lawyer, rather than directly, he has complied with the terms of the Trial Chamber's Order. The Prosecutor submits that any information from Jean Kambanda's lawyer should be considered from Jean Kambanda.

13. The Prosecutor also submits that the Prosecutor of the Tribunal, Mr. Jallow, has prioritized the arrangements for Jean Kambanda's testimony, and he expects they will be finalized soon. The Prosecutor asserts that such arrangements require "meticulous administrative arrangements"<sup>5</sup> and must take into account not only transportation, but also, among other things, Jean Kambanda's concerns about legal counsel and security.

14. The Prosecutor states that if the Trial Chamber deems it necessary, he will make oral submissions in closed session to explain in detail the progress of these arrangements.

15. The Prosecutor states that he has left the Defence for Prosper Mugiraneza further time to carry out any interviews or other investigations because on 12 December 2002 he disclosed to the Defence interviews of Jean Kambanda, and anticipates calling Jean Kambanda to testify near the end of the case.

## DELIBERATIONS

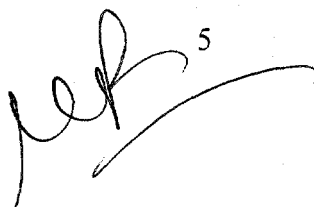
16. As a preliminary matter, the Trial Chamber considers that the Prosecutor has complied with the Trial Chamber's Order of 6 May 2004 by contacting Jean Kambanda through his lawyer and is satisfied that Jean Kambanda will appear as a Prosecution witness.

17. The Trial Chamber recalls its Decision that Prosper Mugiraneza's Defence team has the right to interview Jean Kambanda, with his consent. The Trial Chamber is of the view that this right exists whether or not Jean Kambanda is to testify for the Prosecution or for the Defence.

18. This Decision is consistent with the Appeals Chamber's finding that "[w]itnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them... [T]he mere fact that the person has agreed to testify for

---

<sup>5</sup> *Prosecutor v. Casimir Bizimungu, et al.*, "Prosecutor's Response to Prosper Mugiraneza's Request for Ruling on His Motion To Vary the Order of 2 October 2003 and Request that the Trial Chamber Strike Jean Kambanda from the Prosecutor's Witness List," 26 May 2004, para. 10.



the Defence does not preclude the Prosecutor from interviewing him provided of course that there is no interference with the course of justice.”<sup>6</sup>

19. The Trial Chamber permitted in its Decision of 2 October 2003 that a Prosecutor’s representative “may” and not shall<sup>7</sup> attend any Defence team’s interview of Jean Kambanda, in order to “protect the integrity of the proceedings”.<sup>8</sup> If the Prosecutor’s attendance would damage the Accused’s right to a fair trial,<sup>9</sup> such discretionary attendance must be abandoned in the interests of justice. Given that Jean Kambanda is not a protected witness, the Trial Chamber is of the view that any fair trial considerations are not subject to any special witness protection considerations.<sup>10</sup>

20. As it is clear from Jean Kambanda’s letter that he only consents to be interviewed by the Defence for Prosper Mugiraneza without a Prosecutor’s representative present, the Trial Chamber is of the view that insistence by the Chamber on such presence could render the interview impossible which in turn might prejudice Prosper Mugiraneza’s right to a fair trial. Such a requirement could deny the Accused access to exculpatory evidence<sup>11</sup> or prevent him from examining a witness against him as fully as those for him.<sup>12</sup>

21. The Trial Chamber therefore concludes that, in the particular circumstances of this application, the Defence may interview Jean Kambanda in the absence of a representative of the Prosecutor. However, as suggested by the Defence and in order to avoid any possible allegation of improper conduct against any party involved in this process, the Trial Chamber is of the view that this interview shall take place in the presence of a neutral and third party, namely a representative of the Registrar.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Defence request to have Jean Kambanda removed from the Prosecutor’s witness list.

**GRANTS** the Defence request to vary its Decision of 2 October 2003 in the following terms:

**ORDERS** that the Defence for Prosper Mugiraneza be allowed to interview Jean Kambanda without a representative of the Office of the Prosecutor being present.

<sup>6</sup> *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1, “Appeals Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party,” 30 July 2003.

<sup>7</sup> (Emphasis added).

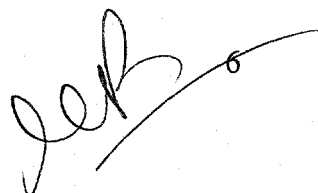
<sup>8</sup> Decision of 2 October 2003, para. 26.

<sup>9</sup> Article 20 of the Statute.

<sup>10</sup> Articles 20 and 21 of the Statute.

<sup>11</sup> Rule 68 of the Rules.

<sup>12</sup> Article 20 of the Statute.




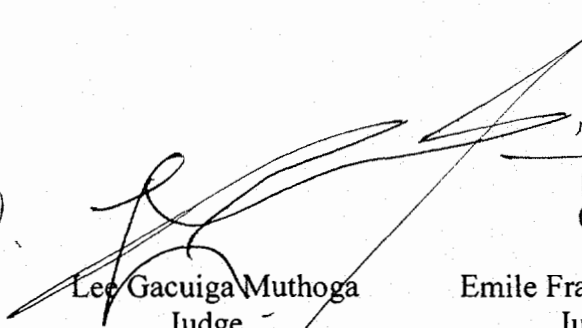
16131

**INSTRUCTS** the Registrar to make all necessary arrangements for the interview of Jean Kambanda by the Defence for Prosper Mugiraneza and to designate a representative who will attend the interview.

Arusha, 24 August 2004



Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge

Emile Francis Short  
Judge

