



ICTR-99-50-T

8-12-2004

(19454 19451)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19454 smukg

Or: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 8 December 2004

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

JUDICIAL RECORDS/ARCHIVES
ICTR
2004 DEC -8 P 4: 29

DECISION ON PROSPER MUGIRANEZA'S MOTION PURSUANT TO RULE 68 FOR EXCULPATORY EVIDENCE OR IN THE ALTERNATIVE, MOTION FOR SUBPOENA TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Office of the Prosecutor:

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

Counsel for the Defence:

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

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 Reply to the Prosecutor's Response to Trial Chamber's Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence or in the Alternative, Motion for Subpoena to the United States of America" filed on 10 August 2004, (the "Motion");

NOTING the Confidential "Prosecutor's Response to Trial Chamber's Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence" filed on 28 July 2004, (the "Response");

PROCEDURAL HISTORY

1. On 26 February 2004, the Defence for Prosper Mugiraneza filed a Motion moving the Trial Chamber to order the Prosecution to disclose information related to "Witness CD", who, according to the Defence, is in possession of exculpatory material.¹ According to the Defence, the Prosecution had already disclosed an "investigator's summary of an interview conducted on or about 23 September 1994 in Kibungo Prefecture with CD".² The Defence submits that, in making this disclosure, the Prosecution neither mentioned the name or other identifying information of Witness CD, nor did the Prosecution specify the identity of the investigator who conducted the interview or the circumstances leading to it.

2. In its Response dated 25 March 2004,³ the Prosecution submitted that it did not possess the documents requested by the Defence.

3. On 25 May 2004, the Trial Chamber granted the Defence Motion and ordered the Prosecution "to take all necessary measures to obtain the requested information and to thereafter disclose to the Defence all information related to "Witness CD"". ⁴

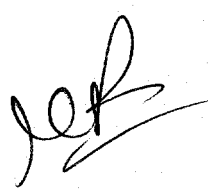
4. Following that Decision, the Prosecution filed a confidential Response stating that, after investigating the matter, it was unable to provide the Defence with either the identity of "Witness CD" or the identity of the person who interviewed him. In support of this assertion, the Prosecution attached an Affidavit by a Commander of Investigations in the Office of the Prosecutor, who stated that that the only information in his possession is

¹ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 26 February 2004.

² *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 26 February 2004, para. 2.

³ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 25 March 2004.

⁴ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence [TC], 25 May 2004.



19452

that the statement of "Witness CD" was received by the Office of the Prosecutor on 24 June 1998 from a source described as "USDOS", and labeled "Privileged Criminal Investigative Material Protected Against Disclosure".

5. The Prosecution therefore submits that it has done everything to comply with the directions given in the Decision, dated 25 May 2004, in accordance with Rule 68 of the Rules.

ARGUMENTS OF THE PARTIES

Defence Submissions

6. The Defence contends that the Prosecution is trying to avoid complying with the Trial Chamber's Order of 25 May 2004. According to the Defence, the acronym "USDOS" is a standard abbreviation for "United States Department of State". It submits that the Prosecution should request from the United States Department of State the identifying information of "Witness CD".

7. Alternatively, the Defence moves the Trial Chamber to issue a summons or subpoena to the Government of the United States of America, in order to obtain the necessary information, including the identifying information of "Witness CD" as well as the name of the investigator who received the statement.

DELIBERATIONS

8. Rule 68(A) of the Rules reads as follows:

The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

9. The Trial Chamber recalls the Decision on Motion of Accused Bicomumpaka for Disclosure of Exculpatory Evidence of 23 April 2004, where it stated that:

The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly



19451

in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.⁵

10. The Trial Chamber considers that the Defence has not shown in what way the Prosecutor would be in a better position than the Defence to obtain the material sought. Neither has it demonstrated any attempt made to obtain the material by its own endeavours. Recourse by the Defence to the efforts of the Prosecution cannot be had simply as a matter of convenience. The criteria set out above must be satisfied. Where, as it seems here, both Parties are equally placed to obtain the requested material, it is the Party seeking the information that should first attempt to secure it.

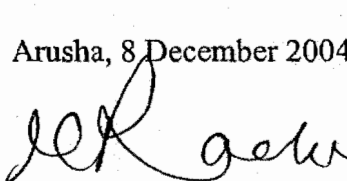
11. The Prosecution has provided sufficient information to convince the Trial Chamber that, in view of the available information, it has made a reasonable effort to obtain the material as requested. To require more at this stage would place an unreasonable burden on the Prosecution. The Defence is, of course, at liberty to investigate the matter further, using its own resources, should it choose to do so.

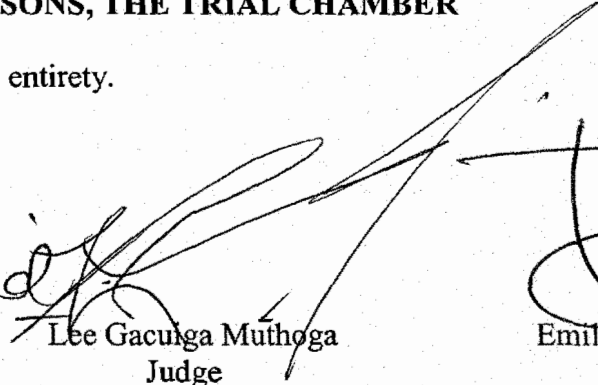
12. The request contained in the Motion for a subpoena served on the United States of America is premature. Based on the limited information available, the Trial Chamber cannot be certain that "USDOS" can only mean the Department of State of the Government of the United States of America. Neither is the Trial Chamber convinced that the Defence has made all possible efforts to obtain this information, before resorting to the Trial Chamber with its alternative application, which is premature and incomplete.

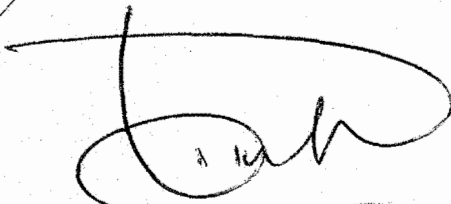
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 8 December 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Emile Francis Short
Judge



⁵ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion of Accused Bicomumpaka for Disclosure of Exculpatory Evidence [TC], 23 April 2004, para. 9.