



UNITED NATIONS
NATIONS UNIES

ICTR-90-50-T
11-09-2006
(23363-23367)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

23367
R

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 11 September 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON CASIMIR BIZIMUNGU'S MOTION FOR PERMISSION TO
CONVEY PROTECTED INFORMATION TO DEFENCE EXPERTS**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa
Mr. Olivier de Shutter
Mr. William Muubiru

Counsel for the Defence:

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

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“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 the “Requête de Casimir Bizimungu Aux Fins d’Obtenir la Permission de Communiquer des Informations Aux Experts de la Défense”, filed on 5 May 2006 (the “Motion”);

CONSIDERING the Prosecutor’s “Request for Leave to Respond Out of Time to Dr. Casimir Bizimungu’s Motion to Convey Protected Information to Defence Experts,” filed on 22 August 2006 (the “Response”);

NOTING Casimir Bizimungu’s “Réponse à la Requête du Procureur qui Demande d’Être Relevé d’un Défaut de Trois Mois et Demi et qui Conteste la Requête de Casimir Bizimungu aux Fins d’Obtenir la Permission de Divulguer des Informations à ses Experts,” filed on 24 August 2006 (the “Reply”);

NOW DECIDES the matter solely on the basis of the briefs of the parties, pursuant to Rule 73 (A).

INTRODUCTION

1. The Defence Motion concerns the ambit of protective measures ordered with respect to Prosecution witnesses in the Decision of this Chamber of 22 September 2000.¹ Firstly, the Defence seeks to clarify whether or not it is permitted to communicate certain information² falling within the scope of those protective measures orders to expert witnesses it proposes to call. Secondly, and relying upon Rule 54 of the Rules, if the Chamber is of the view that the communication of information falling within the scope of those orders, to proposed Defence experts, is prohibited by its Decision of 22 September 2000, the Defence seeks an order permitting it to communicate the said information to proposed expert witnesses. In support of its Motion, the Defence proposes to have each prospective expert witness swear an affidavit containing a confidentiality clause, which it would file with the Registry, prior to disclosing any protected information to him or her. Annexed to the Motion is a sample of that affidavit.
2. On 22 August 2006 – some three months out of time – the Prosecution filed a Response, seeking the Chamber’s leave for its submissions to be considered out of time, and opposing the Defence Motion. The Defence replied to the Prosecution Response, submitting that the Prosecution should not be granted leave to respond out of time, and rebutting the substance of the Prosecution’s arguments.
3. As a preliminary matter, therefore, the Chamber must determine whether or not to grant the Prosecution leave to respond out of time. The Chamber will then go on to consider the merits of the Defence Motion.

¹ *Prosecutor v. Casimir Bizimungu*, Case No. ICTR-99-50-T, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses (TC), 22 September 2000.

² The information forming the subject matter of the Defence application includes extracts of testimony taken in closed session and evidence and testimony filed under seal. See Defence Motion, paras. 5 and 7.



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DELIBERATIONS

Preliminary Issue – Filing of Prosecution Response Out of Time

4. The Prosecution submits that its omission to respond within the time frame stipulated by the Rules (5 days) was due to inadvertence. It submits that the Chamber has inherent jurisdiction to consider a response filed out of time and, furthermore, that in light of the issue under consideration in this case, it is in the interests of justice for it to do so.
5. The Defence submits that the Prosecution has not advanced sufficient grounds for its failure to respond to the Defence Motion for a period in excess of three months. In the Defence's view, simple oversight is insufficient to justify such a long delay. The Defence notes that the Motion was sent, by email, to eight members of the Prosecution's team, and submits that any grant, by this Chamber, of an extension of time, in circumstances where there has been such a long delay, is an undesirable precedent to set.
6. Rule 73 of the Rules requires a responding party to file a response within five days of receipt of the Motion. The Chamber does, however, have an inherent jurisdiction to consider submissions filed outside that time limit. Whilst the length of the delay and the reasons advanced for that delay are relevant considerations to an exercise of its inherent jurisdiction, the Chamber considers that these factors are not uniquely determinative of the case at hand. This Tribunal is vested with unique powers and responsibilities with regard to the protection of victims and witnesses – notably, by Article 21 of the Statute, and by Rules 69 and 75 of the Rules, which provisions must be read in the context of fundamental guarantees to the Accused. Although the Chamber is concerned at the length of the Prosecution's delay in responding to the Defence Motion, and its oversight with respect to a Motion seeking to clarify or vary the protective measures in place for its witnesses, the Chamber considers it to be in the interests of justice to consider the Prosecution's submissions on such an important issue. The Chamber therefore grants the Prosecution leave to respond out of time, and accordingly considers all of the submissions before it with respect to this issue.

Merits of Defence Motion

7. The relevant protective measures in place for Prosecution witnesses, as ordered by this Chamber in its Decision of 22 September 2000, are as follows:
 - The Defence and the Accused are prohibited from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team;
 - The Defence is required to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who would have access to any names, addresses, whereabouts and/or other identifying information of persons falling within the ambit of the orders; and



- Defence Counsel is required to advise the Chamber in writing of any changes in the composition of its team, and to ensure that any member leaving the Defence team remit all materials that could lead to the identification of persons falling within the ambit of its protective measures orders.
- 8. Firstly, the Chamber must determine whether or not a Defence expert witness falls within the scope of the term “other persons working on the immediate Defence team,” thereby being permitted to have access to information classified as protected within the ambit of its Decision of 22 September 2000. The Defence submits that this is not clear. The Prosecution submits that an expert witness is clearly not a person working on the Defence team, but rather a mere witness providing expert opinion.
- 9. The Chamber considers that the term “other persons working on the immediate Defence team” is in fact clear and should be strictly construed so as to permit disclosure of protected information to the Accused, his Counsel and those working in the preparation of the Defence case. Furthermore, the Chamber notes that the persons falling within the scope of this term are recorded with the Chamber in writing, and updated as required, in compliance with this Chamber’s Orders of 22 September 2000. The Chamber shares the Prosecution’s view that Defence expert witnesses are witnesses and not “other persons working on the immediate Defence team”. As such, no protected information can be communicated to them without variation of this Chamber’s orders of 22 September 2000. Therefore, the Chamber will now consider whether a variation of its protective measures orders, as provided for under Rule 75(I) of the Rules, is in the interests of justice.
- 10. The Defence submits that, in order to prepare its experts, it needs to discuss confidential and protected information with them, including evidence filed under seal and closed-session testimony of witnesses. No details have been provided concerning which protected information is sought to be conveyed to the Defence experts in question. The Prosecution strongly opposes the Defence Motion, submitting that the Defence has advanced insufficient grounds for a variation of the protective measures currently in place for its witnesses.
- 11. When making its original protective measures orders for Prosecution witnesses, the Chamber took a number of relevant matters into consideration, including its powers and responsibilities under the Statute and the Rules (notably Articles 20 and 21 of the Statute, and Rules 66, 69 and 75 of the Rules), the materials submitted by the Prosecution as a basis for the protective measures sought, and the salient jurisprudence of this Tribunal. In the Chamber’s view, the Defence’s need to communicate protected information to its experts does not warrant a variation of the protective measures currently in place for the concerned witnesses. Similarly, the fact that Prosecution experts – such as Dr. Alison Des Forges, and Dr. Binaifer Nowrojee – had access to prosecutorial materials in the preparation of their Reports does not assist the Defence in showing why its prospective experts should be afforded unfettered access to protected materials.
- 12. Finally, the Defence’s offer to have each of its experts swear an affidavit containing a confidentiality clause, a sample of which is annexed to its Motion, prior to disclosing confidential information to him or her, does not strengthen its case for the variation of the orders currently in place. The Chamber notes, however, that it is open to



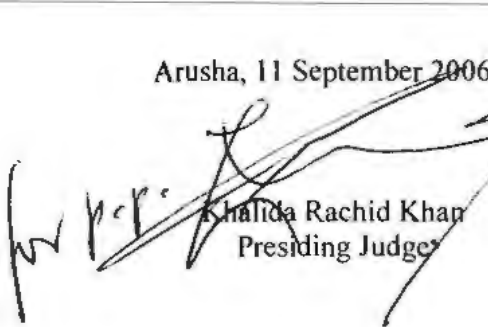
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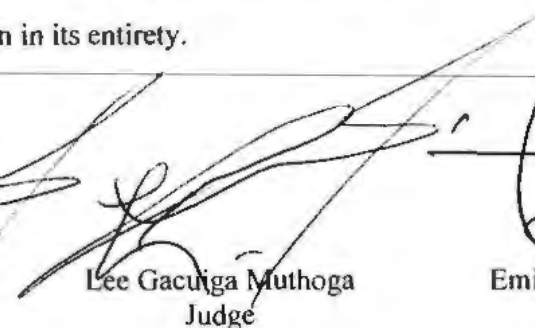
entertaining requests for disclosure of protected information on a case-by-case basis, for example, upon the provision of details concerning the information sought to be disclosed, the protected witness concerned, to whom the information is to be provided, and why it is necessary to provide such information to that individual.

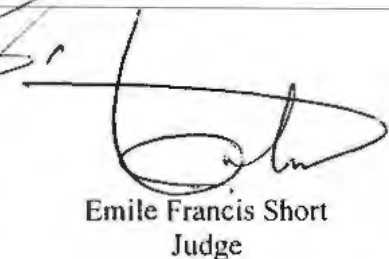
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 11 September 2006


Khalida Rachid Khan
Presiding Judge


Lee Gacuga Muthoga
Judge


Emile Francis Short
Judge

