



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

23514  
Khr

OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr. Adama Dieng

**Date:** 11 December 2006

ICTR-99-50-T  
11-12-2006  
(23514-23510)

JUDICIAL RECORDS/ARCHIVES  
RECEIVED  
2006 DEC 11 P 12:12

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

Case No. ICTR-99-50-T

**DECISION ON CASIMIR BIZIMUNGU'S VERY URGENT MOTION FOR AN  
ORDER APPLYING RULE 70 TO SPECIFIC INFORMATION TO BE PROVIDED  
TO THE DEFENSE BY THE UNITED STATES GOVERNMENT**

**Office of the Prosecutor:**

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Justus Bwonwonga  
Mr. Elvis Bazawule  
Mr. Shyamlal Rajapaksa  
Mr. William Mubiru  
Mr. Olivier De Schutter

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent, Lead Counsel  
Ms. Alexandra Marcil, Co-Counsel  
Ms. Andrea Valdivia, Legal Assistant

ref

23513

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 "Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defense by the United States Government", filed on 2 November 2006 (the "Motion");

**CONSIDERING** the "Prosecutor's Response to Dr. Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government", filed on 9 November 2006 (the "Response");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20 of the Statute and Rule 70 of the Rules;

**HEREBY DECIDES** the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

#### SUBMISSIONS

1. The Defence requests the Trial Chamber to issue an order for the provisions of Rule 70 to apply *mutatis mutandis* to any information to be provided to the Defence by the United States Government (the "U.S.") in response to the request by the Defence.
2. The Defence submits that the U.S. is prepared to provide information in response to the request upon the condition of confidentiality and only if the Trial Chamber issues an order expressly providing that the provisions of Rule 70 would apply to any information so provided. The U.S. further requires that the Defence sign an agreement equivalent to that which applies when information is provided by the U.S. to the Office of the Prosecutor.
3. The Defence quotes the Appeals Chamber in submitting that the purpose of Rule 70 "is to encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected."<sup>1</sup> While the protection of Rule 70 applies to information provided in confidence to the

<sup>1</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-AR108bis & AR73.3. Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, at par. 19.



23512

Prosecutor, the Defence submits that, in the interests of justice, the same rule should apply to the Defence.

4. The Prosecutor submits that since the provisions of Rule 70 relate only to the Prosecutor and not the Defence, it is not open to the Defence to bring an application under that Rule. In response, the Defence argues that if the Prosecutor's assertion is true, it restricts the right of the Accused to adequate facilities to prepare his defence and the principle of equality of arms between the parties. The Defence believes that the information being sought from the U.S. contains material relevant to the preparation and presentation of the defence of the Accused.
5. The Prosecutor argues that the Defence application must fail because the Chamber has not been apprised as to the relevance and probative value of the information being sought, as required by Rule 89. The Prosecutor submits that the Chamber is being asked to consider the Motion based only upon the Defence's assessment of the nature and essence of the proposed evidence.
6. In response, the Defence argues that Rule 89 relates to the admissibility of evidence at trial, and not to the current situation. The Defence contends that it is not, at this stage, required to disclose the nature and character of the information being sought from the U.S Government which information the latter seems willing to share with Casimir Bizimungu. The U.S. position is that information shared with either party before international tribunals should be subject to the same protection of confidentiality.

#### DELIBERATIONS

7. Rule 70 of the Rules of Procedure and Evidence reads as follows:

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional



23511

evidence itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.


(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

8. The language of Rule 70, as it stands within the ICTR Rules of Procedure and Evidence, does not envisage a Defence request for similar protection. The Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia, however, expressly provides that the provisions of Rule 70 "shall apply *mutatis mutandis* to specific information in the possession of the accused" so that a Trial Chamber may, upon an application by the Defence, afford it with the type of protection provided for by Rule 70.
9. The Chamber notes the Prosecutor's objections to the present application, which are based on the provisions of Rule 89(B) and (C). Rule 89(B) stipulates that

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will *best favour a fair determination of the matter* before it and are *consonant with the spirit of the Statute and the general principles of law*.

10. The Chamber takes the view that although the language of although the ICTR Rule 70 is limited to applications by the Prosecutor, broadening the ambit of that Rule to include applications by the Defence would serve to foster equality of arms between the Parties, is consistent with the Rule's rationale, and is, therefore, "consonant with the spirit of the Statue".
11. At this stage of the proceedings, the Chamber is not required to make an assessment as to relevance and probative value of the information being sought. The Defence is in the process of seeking information in the possession of the U.S., which it believes is material to the presentation of its case. The U.S. is prepared to provide the requested information, but only on condition that it is afforded the protection of confidentiality guaranteed by Rule 70. Once the information has been obtained, it is still open to the Defence to decide on whether or not it wishes to present as evidence any testimony, document or other material so provided to it. Should the Defence elect to present such evidence, it would be open to the Prosecutor to challenge it. Although any challenge by the Prosecutor would be subject to the limitations stipulated paragraphs (C) and (D) of Rule 70, sub-rule(F) clearly preserves the Chamber's power to apply the terms of Rule



89(C) and exclude any evidence which it finds to be irrelevant or lacking in probative value.

23510

**FOR THE FOREGOING REASONS, THE CHAMBER**

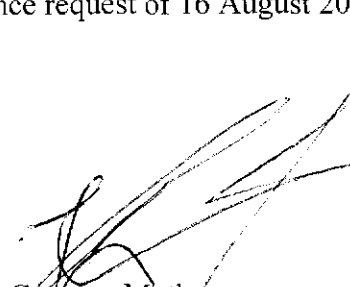
**GRANTS** the Motion; and

**ORDERS** that the provisions of Rule 70 shall apply *mutatis mutandis* to the specific information obtained by the Defence for Casimir Bizimungu from the Government of the United States in response to the Defence request of 16 August 2006.

Arusha, 11 December 2006



Khalida Rachid Khan  
Presiding Judge



Lee Gathiga Muthoga  
Judge



Emile Francis Short  
Judge

[Seal of the Tribunal]

