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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

ICTR-99-50-T
12-12-2006
(23655-23651)

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

Registrar: Mr. Adama Dieng

Date: 12 December 2006

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

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
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DECISION ON CASIMIR BIZIMUNGU'S MOTION IN RESPECT OF A
CONDITION IN THE SPECIAL SERVICES AGREEMENT FOR EXPERT
WITNESSES

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 Mubiru

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**

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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 “Casimir Bizimungu’s Motion in Support of Justin Mugenzi’s Motion for a Review of the Registry’s Decision to Include a Condition in Respect of Payment Within the Proposed Special Services Agreement to be Offered to Mr. Herman Cohen”, filed on 8 July 2006 (the “Motion”);

CONSIDERING

- (i) Justin Mugenzi’s Motion for a Review of the Registry’s Decision to Include a Condition in Respect of Payment Within the Proposed Special Services Agreement to be Offered to Mr. Herman Cohen, filed on 6 July 2006 (the “Mugenzi Motion”);
- (ii) Justin Mugenzi’s Notice of Withdrawal of Motions Dated 29 March and 4 July 2006 Concerning Witness Herman Cohen, filed 17 August 2006;
- (iii) The Registrar’s Submission in Respect of Casimir Bizimungu’s Motion in Relation to the Remuneration of Proposed Expert Witnesses, filed 23 August 2006 (the “Registrar’s Submissions”);

NOTING that the Prosecution filed no Response;

NOW DECIDES the Motion:

INTRODUCTION

1. The Defence for Casimir Bizimungu moves the Chamber to order the Registrar to reconsider his decision to make offer of payment to its potential expert witnesses conditional upon their being eventually qualified as expert witnesses by the Chamber.
2. The same request was originally made by the Defence for Justin Mugenzi. The Defence for Casimir Bizimungu then joined with the Defence for Justin Mugenzi, adopting its submissions in their entirety, and requesting the same relief. The Defence for Justin Mugenzi subsequently withdrew its Motion; however the Defence for Casimir Bizimungu did not. The Registrar then filed submissions under Rule 33(B) of the Rules.

DISCUSSION

3. In his submissions, the Registrar clarifies that “[it] is standard procedure for the Registrar to attach a condition to the effect that remuneration will be based on the determination by the Chamber of the expertise of the proposed expert witness. This was based on a policy decision adopted in April 2005 following a Decision by the President dated 18 April 2005”¹

¹ The Registrar’s Submissions, paragraph 6.



4. In that case, and following a voir dire hearing, the Trial Chamber in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.* ruled that a proposed expert brought by the Defence, Mr. Edmond Babin, did not in fact qualify as an expert witness. Nonetheless, the Trial Chamber allowed him to testify before the Tribunal as a factual witness. Following his testimony, a disagreement ensued between the Defence and the Registry over payment, with the Registry claiming that he should not be paid for his services as an expert witness, since he had not testified as such. The Defence claimed that there was nothing in the contract that made payment conditional upon the Chamber's qualification of the witness as an expert. The matter was raised before the President of the Tribunal, who, acting in exercise of his authority to review decisions of the Registrar under Rules 19 and 33 (A) of the Rules, ruled that the Accused did not have a "protective right or interest in the case that warrant[ed] a review of the Registrar's decision", and that the issues raised in the Motion did not threaten the interests of justice.² Despite this jurisdictional ruling, the President recommended that the Registrar reconsider his decision in this particular case "in fairness to [Mr. Babin]", since the contract has not stated that his payment was conditional upon his qualification as an expert by the Tribunal, however recommended that in future "there is need for the Registry to clarify its position with regard to proposed expert witnesses who are not accepted as such by the Trial Chamber". The President further suggested that the Registrar's position could be conveyed in future contracts with proposed expert witnesses.³ Having reviewed the Decision of the President, this Chamber finds that the Decision does not amount to a policy ruling regarding the correctness of conditional payment clauses in all contracts for potential expert witnesses.
5. The Defence submits that the conditional payment offered by the Registrar for its expert witnesses violates its rights under Article 20 (4) (e) of the Statute, which provides the Accused with the right "[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." The Defence further submits that conditional payment violates the principle of equality of arms. The Chamber recalls that the Appeals Chamber has held that the principle of equality of arms is an aspect of the right to a fair trial. At a minimum, a fair trial must entitle the accused to adequate time and facilities for his or her defence, under conditions that do not place him or her at a substantive disadvantage as regards his or her opponent.⁴ This right does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of financial or personal resources.⁵
6. According to Rule 94 bis, the Party calling the expert witness must file the expert's statement with the opposing party as soon as possible and with the Chamber not later than twenty-one days before the expert is expected to testify.⁶ Within fourteen days, the opposing party is expected to notify the Chamber whether or not it accepts the witness' qualification as an expert, whether it accepts the expert witness statement,

² The Decision of the President, paragraph 11.

³ Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, Case No. ICTR-97-21-T, *Decision on the Appeal of the Registrar's Decision of 13 April 2005 with regard to Mr Edmond Babin*, Decision of the President, 18 April 2005 (the "Decision of the President"), paragraph 12.

⁴ Prosecutor v. Kordic et al., Case No. IT-95-14/2-A, *Judgement* (AC), 17 December 2004, paragraph 175.

⁵ *Ibid.*, paragraph 176.

⁶ Rule 94 bis (A) of the Rules of Procedure and Evidence.



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and whether it wishes to cross-examine the expert.⁷ Thus, inherent in the procedure laid down in the Rules is the risk that commissioned work by a potential expert will be challenged by the opposing party, and ultimately rejected by the Chamber.

7. Where an Accused is found to be indigent, the expenses of the Defence are borne by the Tribunal, including payment for the services of an expert witness. The Chamber understands that the purpose of the conditional payment term in the contract for services offered to the expert witness is aimed at managing the Tribunal's budgetary limitations and accounting obligations.⁸ The Defence submits that such a condition may discourage potential expert witnesses from agreeing to prepare a report or to testify for the Defence.
8. In the Chamber's opinion, it is not acceptable as a general policy to request potential expert witnesses to gamble on whether or not the Tribunal will pay them for their work. The Chamber finds that imposing such a risk on the witnesses themselves may lead to indigent Accused persons failing to secure the services of well-qualified experts, and ultimately depriving the Chamber of useful expert testimony relevant to the case. Such a situation may lead to a violation of the Accused's right to a fair trial by denying the Accused adequate facilities to prepare his or her defence. Thus, in order to protect the rights of the Accused, the Chamber directs the Registrar to reconsider his general policy regarding the terms the Registry offers to potential Defence expert witnesses in this case.
9. Nonetheless, the Chamber recognises that the Tribunal's resources are finite, and the Registrar must ensure that they are used fairly and efficiently. Whilst the Chamber does not find acceptable as a general policy the imposition of conditional payment clauses for potential expert witnesses, the Chamber considers that such a clause may be permissible in exceptional cases where the Registrar is of the opinion that there is no likelihood that the potential expert witness will be qualified as an expert by the Chamber. In such an exceptional case, a contractual provision stating that payment in full or in part for the services of the proposed expert witness will be conditional upon eventual qualification by the Chamber, would not compromise the Accused's rights, as provided for under the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion, in the following terms only:

DIRECTS the Registrar to reconsider his general policy regarding the terms the Registry offers to potential Defence expert witnesses in this case, in light of the Chamber's findings above.

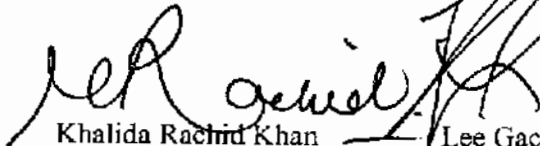
⁷ Rule 94 *bis* (B) of the Rules of Procedure and Evidence.

⁸ The Registrar's Submissions, paragraph 10.

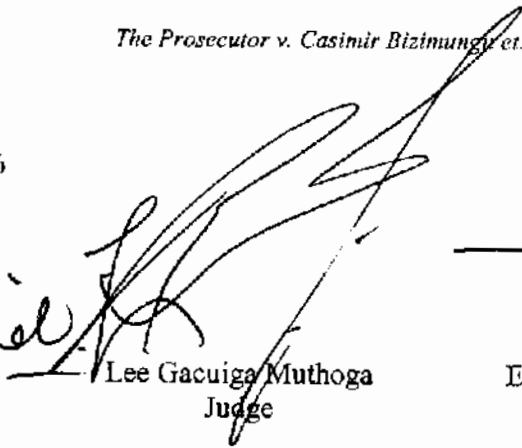


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Arusha, 12 December 2006



Khalida Raahid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge

[Seal of the Tribunal]

