



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 23 January 2008

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

Case No. ICTR-99-50-T

**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S REQUEST
FOR A SUBPOENA**

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. George William Mugwanya
Mr. Shyamlal Rajapaksa

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. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

INTRODUCTION

1. On 12 September 2007, this Chamber granted a motion brought by the Bicomumpaka Defence for the assistance of the Kingdom of Belgium in facilitating a meeting between the Bicomumpaka Defence and Mr. Johan Swinnen, former Ambassador of the Kingdom of Belgium to Rwanda.¹ The Defence sought to meet with Mr. Swinnen in order to ascertain whether to call him to testify on Mr. Bicomumpaka's behalf. The Kingdom of Belgium subsequently facilitated the meeting, which took place in Brussels on 9 November 2007, and the Defence now wishes to call Mr. Swinnen to testify.
2. The Defence now requests the Trial Chamber to issue a subpoena to compel the appearance of Mr. Swinnen, pursuant to Rule 54 of the Rules of Procedure and Evidence (the Rules).² According to the Defence Motion, and supported by a letter from the Registry contained in an annexure thereto, Belgian domestic law requires that the Chamber issue a subpoena for the appearance of Mr. Swinnen in order for his attendance to be facilitated.
3. The Prosecution filed a Response to the Defence Motion on 16 January 2007.³ The Response was not filed within the required time limit, nor did the Prosecution advance any explanation for its failure to comply with the time limit. The Response will therefore not be considered by the Trial Chamber.

DISCUSSION

4. Rule 54 of the Rules bestows a discretionary power upon the Chamber to issue a subpoena where "necessary for the purposes of an investigation or for the preparation or conduct of the trial."
5. According to the jurisprudence of the *ad hoc* Tribunals, subpoenas may only be issued to a prospective witness where (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness's testimony is necessary and appropriate for the conduct and fairness of the trial.⁴ To satisfy these requirements:

¹ *Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Decision on Mr. Bicomumpaka's Request for Order for Cooperation of the Kingdom of Belgium", dated 12 September 2007.

² Request for Subpoena", filed 17 December 2007 ("Defence Motion"), para.14. The Defence Motion annexes one document in support of the request for subpoena (Annex A) which is a letter dated 30 November 2007 from the Registry of the Tribunal to Defence Counsel Philippe Larochelle.

³ Prosecutor's Response to Mr. Jerome-Clement Bicomumpaka's Request for a Subpoena", filed 16 January 2008.

⁴ *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003 ("*Krstic* Appeal Decision"), para. 10; *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004 ("*Halilovic* Decision"), para. 7; *Bizimungu et al*, Decision on Jerome-Clement Bicomumpaka's Request for a Subpoena (TC), dated 26 September 2008, para.4; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Issuance of Subpoena to Witness T (TC), 8 February 2006, para. 4; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena (TC), 11 September 2006, para. 5; *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 3; *Bagosora et al.*, Decision on Request for Subpoena of Ami R. Mpungwe (TC), 19 October 2006, para. 2.

“the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused.”⁵

6. In considering whether the prospective testimony will materially assist the applicant, “it is not enough that the information requested may be ‘helpful or convenient’ for one of the parties: it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial.”⁶ In this regard, the Chamber shall consider the specificity with which the prospective testimony is identified and whether the information can be obtained by other means.⁷

Whether reasonable attempts have been made to obtain the voluntary cooperation of the witness

7. Annex A to the Defence Motion is a letter dated 30 November 2007 from Mr. Roland Amoussouga of the Registry of the Tribunal to Defence Counsel Larochelle. In the letter, Mr. Amoussouga confirms - following discussions with the relevant Belgian authorities - that Belgian law requires that the Defence for Bicomumpaka bring a motion before the Trial Chamber for an order compelling the attendance of Ambassador Swinnen. Furthermore, the letter states that the Belgian judicial authorities will take the necessary measures to ensure the attendance of Mr. Swinnen as soon as they receive such an order.

8. The Trial Chamber considers that any attempts to obtain the voluntary cooperation of Mr. Swinnen would be futile since Belgian law requires an order from the Trial Chamber as a prerequisite to facilitate the attendance of Mr. Swinnen. Accordingly, this criterion has been met.

Whether the witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial

9. In its Decision of 12 September 2007 concerning the Defence application for State cooperation, referred to in paragraph one above, the Chamber was tasked to determine

⁵ *Halilovic* Decision, para. 6; *Bizimungu et al.*, Decision on Jerome-Clement Bicomumpaka’s Request for a Subpoena (TC), dated 26 September 2008, para.4; *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (TC), 11 December 2002, para. 31; *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005 (“*Milosevic* Decision”), para. 35; *Bagosora et al.*, Decision on Request for a Subpoena for Major Jacques Biot (TC), 14 July 2006, para. 2.

⁶ *Krstic* Appeal Decision, para. 11; *Bizimungu et al.*, Decision on Jerome-Clement Bicomumpaka’s Request for a Subpoena (TC), dated 26 September 2008, para.5, *Milosevic* Decision, para. 39; *Prosecutor v. Martić*, Case No. IT-95-11, Decision on the Prosecution’s Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena (TC), 16 September 2005, para. 12; *Bagosora et al.*, Decision on Request for a Subpoena for Major Jacques Biot (TC), 14 July 2006, para. 2.

⁷ *Bizimungu et al.*, Decision on Jerome-Clement Bicomumpaka’s Request for a Subpoena (TC), dated 26 September 2008, para.5, *Halilovic* Decision, para. 7; *Krstic* Appeal Decision, para. 10; *Milosevic* Decision, paras. 36, 40, *Bagosora et al.*, Decision on Request for a Subpoena for Major Jacques Biot (TC), 14 July 2006, para. 2.

whether the information sought was relevant to the proceedings. The Chamber found that the information sought was relevant to the presentation of Mr. Bicomumpaka's alibi defence.⁸ Considering its previous finding on this issue, as well as the submissions of the defence in relation to the application currently under consideration, which are of a similar nature,⁹ the Chamber maintains its view that the witness has information which can materially assist Mr. Bicomumpaka in respect of clearly identified issues relevant to the trial.

Whether the witness's testimony is necessary and appropriate for the conduct and fairness of the trial

10. The Defence submits that Mr. Swinnen has evidence to give concerning Mr. Bicomumpaka's alibi for the date of 9 April 1994 which may rebut the evidence of certain Prosecution witness(es); this submission is supported by the information contained in the Defence's Notice of Alibi. Furthermore, Mr. Bicomumpaka's right to a fair trial encompasses a number of minimum guarantees, notably his right to obtain the attendance and examination of witnesses on his behalf, as enshrined by Article 20(4)(e). Therefore, the Chamber considers that Mr. Swinnen's testimony is necessary and appropriate for the conduct and fairness of the trial.

Additional matter

11. In its Motion, the Defence suggests that the Chamber's order specify the date(s) on which Ambassador Swinnen should testify. For practical reasons, in particular considering that there may be matters outside the control of the Chamber in determining the soonest practicable date on which Mr. Swinnen can be available, the Chamber declines to specify the date(s) on which Mr. Swinnen is to testify in its order. The Chamber considers this to be a matter for the coordination of the Defence and the Witnesses and Victims Support Section ("WVSS"), in consultation with the Belgian authorities. The Chamber does note, however, that Mr. Bicomumpaka's Defence case is nearing its completion, and therefore urges all concerned persons to facilitate Mr. Swinnen's appearance before this Chamber as soon as practicable.

FOR THESE REASONS, the Chamber

GRANTS the Motion;

ORDERS the Registrar to prepare a subpoena in accordance with this Decision, addressed to Mr. Johan Swinnen, requiring his appearance before this Chamber to give testimony in the present case, and to communicate it, with a copy of the present Decision, to the Kingdom of Belgium; and

⁸ *Bizimungu et al*, Decision on Mr. Bicomumpaka's Request for Order for Cooperation of the Kingdom of Belgium (TC), dated 12 September 2007, para.4.

⁹ The Defence submits that Mr. Swinnen's testimony would be highly relevant and necessary regarding two issues: i) Mr. Bicomumpaka's whereabouts on 9 April 1994 around 15:00 hours; and ii) Mr. Bicomumpaka's will to "restore peace and security in the country, and to seek support from the international community".

DIRECTS the Registry to communicate the subpoena to Mr. Johan Swinnen through appropriate diplomatic channels, accompanied by a copy of this Decision.

Arusha, 23 January 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

For and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]