



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:** 19 March 2008

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

**Case No. ICTR-99-50-T**

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**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S APPLICATION FOR  
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S DECISION ON  
BICAMUMPAKA'S REQUEST FOR A SUBPOENA OF 12 FEBRUARY 2008**

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**Office of the Prosecutor:**

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Ms. Michelyne C. St. Laurent for **Casimir Bizimungu**  
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**  
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicomupaka**  
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

## INTRODUCTION

1. On 12 February 2008, the Trial Chamber rendered a decision, refusing to issue a subpoena for the appearance of Defence Witness for Jérôme-Clément Bicamumpaka, Witness LF-1.<sup>1</sup> The Defence for Mr. Bicamumpaka now seeks certification to appeal that Decision, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (the “Rules”).<sup>2</sup>
2. In the Impugned Decision, the Chamber denied the Defence motion,<sup>3</sup> finding that it would not be in the interests of justice to consider the merits of the motion, which had been filed outside the time limit.<sup>4</sup>
3. The Prosecution has not responded to the Defence Motion.<sup>5</sup>

## DISCUSSION

4. Rule 73 (B) of the Rules states that leave to file an interlocutory appeal of a decision may be granted if the issue involved “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and where “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.<sup>6</sup>
5. The Trial Chamber recalls that in deciding whether to grant leave to appeal, it need not consider the merits of the challenged decision. Rather, a Chamber’s inquiry under Rule 73 (B) will involve only a consideration of whether the criteria outlined in the Rule have been satisfied.<sup>7</sup>
6. The Defence submits, *inter alia*, that certification should be granted on the grounds that the Impugned Decision: (i) is erroneous in fact, in construing the Defence intention to file any outstanding motion for subpoena by 1 February 2008 as an order; and mistaken in law, for considering issues extraneous to those to be decided upon in issuing a subpoena and

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<sup>1</sup> *Prosecutor v. Bizimungu et al.*, Case No. 99-50-T, Decision on Jérôme-Clément Bicamumpaka’s Request for a Subpoena, 12 February 2008 (“Impugned Decision”).

<sup>2</sup> *Prosecutor v. Bizimungu et al.*, Case No. 99-50-T, Bicamumpaka’s Motion Requesting Certification to Appeal the Decision on Jérôme-Clément Bicamumpaka’s Request for a Subpoena, Transmitted 13 February 2008, dated 19 February 2008 (“Defence Motion”).

<sup>3</sup> *Prosecutor v. Bizimungu et al.*, Case No. 99-50-T, Confidential Request for Subpoena, filed 5 February 2008.

<sup>4</sup> Impugned Decision, 12 February 2008, para. 10.

<sup>5</sup> Rule 73 (E) of the Rules stipulates that a responding party must file any reply within five (5) days of receipt of the motion.

<sup>6</sup> *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu’s Request for Certification to Appeal the Decision on Casimir Bizimungu’s Motion in Reconsideration of the Trial Chamber’s Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, para.6, (“Decision on Casimir Bizimungu’s Request”); *See also, Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para.4.

<sup>7</sup> Decision on Casimir Bizimungu’s Request, para.7; *see also e.g., Prosecutor v. Bizimungu et al.*, Decision on Bicamumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 ‘Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material’ (TC), 4 February 2005, para.28 (“Decision on Bicamumpaka’s Request for Certification”); *see also, Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para.4.

in failing to take into account the interests of justice;<sup>8</sup> (ii) raises an issue affecting the fairness of the proceedings, in that it bars Mr. Bicomupaka from exercising his right to adduce potentially important evidence at trial, as well as his statutory right to present a defence, pursuant to Article 20 (4) of the Statute;<sup>9</sup> and (iii) raises an issue that, after immediate resolution by the Appeals Chamber, will materially advance the proceedings by avoiding unnecessary complications arising post-judgment which can be decided upon immediately, while the presentation of the defence for Prosper Mugiraneza is still ongoing.<sup>10</sup>

*Preliminary matters*

7. With respect to the Defence arguments that the Impugned Decision is erroneous in fact, and mistaken in law,<sup>11</sup> the Chamber recalls its Decision of 4 February 2005 in which it said:

“[C]onsiderations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber.”<sup>12</sup>

The Chamber finds the Defence argument that the Chamber had erred in law is impugning the merits of the challenged decision, and is a ground for reconsideration rather than a basis upon which the Chamber might certify its Decision.

8. With respect to the Defence allegation that the Chamber erred in fact, the Chamber considers that the aforementioned legal principle and finding are equally applicable. However, the Chamber also considers that regardless of whether the deadline for the filing of any outstanding subpoena constituted an order by the Chamber, the Defence clearly undertook to file any outstanding subpoena by Friday, 1 February 2008.<sup>13</sup>

9. The Chamber will now examine the Defence submissions in light of the criteria established under Rule 73 (B), turning first to the question of whether the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. If that criterion is satisfied, the Chamber will go on to consider whether an immediate resolution by the Appeals Chamber of that issue may materially advance the proceedings in this case.

*Whether the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*

10. In relation to this criterion, the Defence submits that in denying Mr. Bicomupaka the right to call Witness LF-1, the Impugned Decision violates his statutory right to prepare his defence, and to adduce important testimony.<sup>14</sup> In this regard, the Defence submits that

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<sup>8</sup> Defence Motion, para.1.

<sup>9</sup> Defence Motion, paras.2, 4, and 11.

<sup>10</sup> Defence Motion, paras.2, and 9.

<sup>11</sup> Defence Motion, para.1.

<sup>12</sup> Decision on Bicomupaka's Request for Certification, 4 February 2005, para.28

<sup>13</sup> T.28 January 2008., p.11.

<sup>14</sup> Defence Motion, para.4.

Witness LF-1 is a potentially important witness and that his proposed testimony is highly material to the allegations against Mr. Bicomupaka in the Indictment.<sup>15</sup>

11. The Chamber notes, in accordance with its previous jurisprudence, that the loss of a potentially important witness is a matter that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>16</sup> In light of the Defence submissions outlined in paragraph 6, the Chamber is satisfied that Witness LF-1 is potentially important to Mr. Bicomupaka's defence. In this respect, the Chamber particularly notes the Defence submission that the Witness's testimony is "neither cumulative nor marginal".<sup>17</sup>

12. The Chamber finds, therefore, that the first criterion of Rule 73 (B) has been fulfilled.

*Whether the immediate resolution of the matter by the Appeals Chamber will materially advance the proceedings*

13. In relation to this criterion, the Chamber notes, in line with its previous Decision upon which the Defence relies,<sup>18</sup> that the effect of the Impugned Decision is the loss of the testimony of Witness LF-1. If the Appeals Chamber reversed the Impugned Decision, such that the Trial Chamber was required to issue a subpoena for the Witness while evidence in this case was ongoing, the Trial Chamber would still be able to hear the evidence of Witness LF-1. To leave this issue for possible appeal after judgement may risk unnecessary complication, a risk which will be avoided by resolution of the matter at this stage.<sup>19</sup>

14. For these reasons, the Chamber considers that immediate resolution of this matter by the Appeals Chamber will materially advance the proceedings, and, thus, the second criterion of the Rule 73 (B) test is satisfied.

**FOR THESE REASONS**, the Chamber

**GRANTS** the Defence Motion, and hereby **CERTIFIES** for appeal, pursuant to Rule 73(B) of the Rules, its Decision on Jérôme-Clément Bicomupaka's Request for a Subpoena, dated 12 February 2008.

Arusha, 19 March 2008

Khalida Rachid Khan  
Presiding Judge

Lee Gacuiga Muthoga  
Judge

Emile Francis Short  
Judge

[Seal of the Tribunal]

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<sup>15</sup> Defence Motion, para.5.

<sup>16</sup> Decision on Casimir Bizimungu's Request, 22 May 2007, para.9. *See also*, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 *Ter* List (TC), 14 March 2007 ("*Milutinović* Decision").

<sup>17</sup> Defence Motion, paras.2, 5 and Annexure 1.

<sup>18</sup> Decision on Casimir Bizimungu's Request, 22 May 2007.

<sup>19</sup> Decision on Casimir Bizimungu's Request, 22 May 2007, para.13, *See also Milutinović* Decision, paras.15-16.