



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: Adama Dieng

Date: 1 May 2008

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

Case No. ICTR-99-50-T

**DECISION ON CASIMIR BIZIMUNGU'S MOTION TO VARY WITNESS LIST;
AND TO ADMIT EVIDENCE OF WITNESS IN WRITTEN FORM
IN LIEU OF ORAL TESTIMONY**

Rules 73, 73 *ter* (E), and 92 *bis* 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 Schutter

Counsel for the Defence:

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 Bicomumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. The Trial Chamber in this case is currently hearing the defence case for the fourth co-Accused, Prosper Mugiraneza, having already heard the defence cases for Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Casimir Bizimungu, subject to certain outstanding matters.¹

2. On 12 June 2007, the Defence for Casimir Bizimungu closed its case subject to two remaining matters: first, the Trial Chamber was to hear the testimony of one remaining witness – United States Ambassador Robert Flatten - who ultimately testified on 20 February 2008; and second, the Trial Chamber was to decide upon the application currently before it.

3. By Motion dated 14 June 2007,² the Defence for Casimir Bizimungu seeks two forms of relief: first, to add a witness to its witness list; and, second, to have the written statement of that witness' evidence admitted into evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence (the "Rules"), in lieu of the witness testifying orally before the Chamber.³

4. The Prosecution opposes that part of the Defence Motion which seeks variation of the witness list on the basis that Casimir Bizimungu's case is closed, and that the application is therefore out of time.⁴ It further opposes the admission of the witness' statement pursuant to Rule 92*bis* of the Rules on the basis that the written statement addresses matters which go to the heart of Casimir Bizimungu's alibi defence.⁵

5. On 25 June 2007, the Defence filed a Reply to the Prosecutor's Response.⁶

BACKGROUND

6. In the Defence's Alibi Notice, filed in March 2006, the Bizimungu Defence notified the Chamber and the Parties that it would seek to admit copies of Casimir Bizimungu's passports into evidence instead of the originals because the originals had been stolen.⁷

¹ The Defence case for Jérôme-Clément Bicamumpaka has been closed subject to certain pending matters.

² *Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Requête du Dr. Casimir Bizimungu Visant à Obtenir la Permission d'ajouter un Témoin sur la Liste et de Déposer la Déclaration de ce Témoin en Vertu de l'article 92*bis* du Règlement de Procédure et de Preuve (Confidentielle)", filed by the Defence for Casimir Bizimungu on 14 June 2007 ("Defence Motion").

³ Defence Motion, para. 5.

⁴ *Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Prosecutor's Response to Dr. Casimir Bizimungu's Motion Seeking the Addition of a Witness to his Witness List and to File the Statement of the Witness Pursuant to Rule 92*bis*", filed on 19 June 2007 ("Prosecution Response").

⁵ Prosecution Response, para. 5: "This is central and germane to his answer to every allegation in his Indictment. Consequently, this matter goes to the proof or disproof of matters he is charged with. Therefore, Rule 92*bis* cannot assist the Defendant in such a matter that goes to the central point of his defence of alibi."

⁶ *Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Dr. Casimir Bizimungu's Reply to the Prosecutor's Response to the Motion Seeking Addition of a Witness to the List and to File the Statement Pursuant to Rule 92*bis*", filed on 25 June 2007 ("Defence Reply").

⁷ *Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Avis d'Alibi Amendé de Casimir Bizimungu", 6 March 2006, para. 35.

7. On 13 February 2007, the Bizimungu Defence called Witness WDE to testify on behalf of Casimir Bizimungu.⁸ As evidenced by the Witness' will-say materials, it was anticipated that the Witness would testify, *inter alia*, to the events surrounding the alleged theft of Casimir Bizimungu's passports, in September 2004, while Bizimungu's Lead Counsel, Ms. Michelyne St-Laurent, and her husband, Mr. Gilles St-Laurent, were at a train station in Brussels, Belgium.

8. At the commencement of the Witness' testimony, the Prosecutor objected to the Witness testifying to the events surrounding the alleged theft of the passports. The Prosecution submitted that the Defence must instead adduce direct evidence of the theft, either through the testimony of Lead Counsel for Casimir Bizimungu, or of her husband, Mr. Gilles St-Laurent.

9. The Prosecution's objection on these issues was overruled, so that the Witness was permitted to testify on the subject matter of the will-say statement in question. However, the Chamber observed that Witness WDE could not testify to the actual theft of the passports, but rather to the circumstances surrounding the theft, and to the reporting thereof.⁹ The Chamber also noted that the question of the weight, if any, which could be afforded to the testimony would be determined at a later date.¹⁰ The Witness testified to these matters on 13 February 2007, and the original police report - allegedly made contemporaneously with the alleged theft - was tendered into evidence through Witness WDE.¹¹

10. At the close of the Defence case, on 12 June 2007, Ms. St-Laurent again reminded the Chamber that a motion would be filed in relation to this issue, requesting to add Mr. Gilles St-Laurent to Casimir Bizimungu's witness list, and for the admission of his testimony pursuant to Rule 92 *bis* of the Rules.¹² The said motion was duly filed two days later.

DELIBERATIONS

11. The Chamber is tasked to deliberate upon two issues: firstly, whether the Defence request to add a witness to its list should be granted; and secondly, if so, whether that witness' statement satisfies the criteria for admission pursuant to Rule 92 *bis* of the Rules. Only if the Chamber deems it appropriate to grant the Defence leave to add the witness to its list need it determine the appropriate means for receiving that witness' evidence.

Request to add Mr. Gilles St. Laurent to Witness List

12. Rule 73 *ter* (E) of the Rules permits the Defence to move the Trial Chamber for leave to vary its witness list, after the commencement of its case, if it considers it to be in the interests of justice.¹³

⁸ See T. 13 February 2007, pp. 2-37.

⁹ See T. 13 February 2007, p. 4.

¹⁰ *Ibid.*

¹¹ Exhibit 1D 148.

¹² See T. 12 June 2007, pp. 44-45.

¹³ Rule 73*ter* (E) of the Rules: "After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

13. Trial Chambers have allowed either party to vary its witness list upon a showing of good cause and where the requested variance is in the interests of justice.¹⁴ Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and allegations in the Indictment; the complexity of the case; prejudice to the opposing party; justifications for the late addition of witnesses; and delays in the proceedings.¹⁵

14. The Chamber considers that the testimony of Mr. Gilles St-Laurent is material and may be of probative value in relation to the alleged theft of Casimir Bizimungu's original passports. Other than Ms. St-Laurent, no person besides Mr. St-Laurent is in a position to provide a first hand account of the alleged theft of the said passport, as evidenced by the original police reports. Furthermore, permitting the Defence to add Mr. St-Laurent to its witness list is unlikely to cause any significant delay in the proceedings, since the proceedings are still on-going, and his testimony relates to one distinct matter. Noting the history of this matter; that the original police report is already in evidence; and that Witness WDE has already testified to the circumstances surrounding the alleged theft of the passports and reporting thereof, the Chamber considers that no prejudice will be suffered by the Prosecution by the late addition of Mr. St-Laurent to the witness list.

15. The Chamber therefore considers, in accordance with Rule 73 *ter* (E) of the Rules, that it is in the interests of justice to permit the Defence to add Mr. Gilles St-Laurent to Casimir Bizimungu's witness list.

Request to Admit Statement of Mr. Gilles St-Laurent into Evidence in Lieu of Oral Testimony

16. Rule 92 *bis* (A) of the Rules bestows a discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement, *in lieu* of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.¹⁶

17. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which noted that the term is a plain expression and

¹⁴ *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 13.

¹⁵ *Prosecutor v. Bagosora et al.*, Decision On Bagosora Motion To Present Additional Witnesses And Vary Its Witness List, 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4.

¹⁶ Rule 92*bis* of the Rules, entitled "Proof of Facts Other than by Oral Evidence", provides that

[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

It outlines a number of factors (in the form of non-exhaustive lists) in favour of, and against, admitting evidence in the form of a written statement.

Sub-Rule (B) mandates certain formal requirements which must be satisfied before a written statement might be admissible under the Rule.

Sub-Rule (E) states that the Trial Chamber must decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.¹⁷

18. Once a Chamber is satisfied that the threshold requirement of Rule 92 *bis* – that the material sought to be admitted goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment – has been met, and it is satisfied that the written statement adheres to certain formal requirements as mandated by Rule 92 *bis* (B), its discretion to admit the statement is enlivened. In the exercise of this discretion, a Chamber is guided by the criteria for and against admission, set out in Rule 92 *bis* (A) (i) and (ii), respectively, which are non-exhaustive lists.

19. Finally, after making a determination that a written statement is admissible in written form, sub-Rule 92 *bis* (E) bestows a further discretionary power upon the Chamber to admit the witness' evidence in whole or in part, and/or to require the witness to appear for cross-examination. The principal criterion for determining whether a witness should appear for cross-examination under Rule 92 *bis* (E) is the overriding obligation of a Chamber to ensure a fair trial under Articles 20 and 21 of the Statute. In that regard, among the matters for consideration are whether the statement goes to proof of a critical element of the case against the accused.¹⁸ Cross-examination shall be granted if the statement touches upon a critical element of the case, or goes to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.¹⁹

20. In order for a statement to be admissible under Rule 92*bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.²⁰ Furthermore, the exercise of a Chamber's discretion under Rule 92 *bis* must be governed by the right of the Accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.

¹⁷ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 22, cited in *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, fn. 28, in support of the Appeals Chamber's statement of principle, at paragraph 10 of its Decision, that the term "acts and conduct of the accused as charged in the indictment" does not refer to the acts and conduct of others for which the accused is charged in the indictment with responsibility.

¹⁸ *Prosecutor v. Limaj et al.*, Public Version of Case No. IT-03-66-T, Decision on Prosecution's Motion for Provisional Admission of Witness Statements under Rule 92*bis*, Dated 13 October 2004 (TC), 15 December 2004, para. 7; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 7; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Decision on Prosecutor's Motion for Admission of Additional Transcripts and Exhibits from other ICTY Proceedings (TC), 11 October 2001, p. 4; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D), 9 July 2001, para. 9; *Sikirica et al*, Case No. IT-95-8-PT, Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis* (TC), 23 May 2001, para. 4.

¹⁹ *Prosecutor v. Limaj et al.*, Public Version of Case No. IT-03-66-T, Decision on Prosecution's Motion for Provisional Admission of Witness Statements under Rule 92*bis*. Dated 13 October 2004 (TC), 15 December 2004, para. 7; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Rebuttal Evidence (TC), 2 April 2003, para. 8; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 24.

²⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

Whether the statement should be admitted in Lieu of Oral Testimony

21. Contrary to the Prosecution's submission, the Chamber finds that none of the material contained in Mr. St-Laurent's written statement, nor the material annexed thereto, goes to the acts and conduct of the Accused as charged in the Indictment, since the Witness' statement is about the alleged theft of Casimir Bizimungu's passports. The Chamber recalls, in this regard, the need to ascribe the words "acts and conduct of the accused" their plain and ordinary meaning. Furthermore, the formal requirements of Rule 92 *bis* (B) have been met. The written statement is relevant to the proceedings and it has the required probative value, such that the more general requirements of Rule 89 (C) are met.

22. The Chamber observes, therefore, that its discretion to admit, or not, has been enlivened in the circumstances of this case. Taking into account the non-exhaustive list of relevant matters to the exercise of its discretion, found in Rule 92 *bis* (A) (i) and (ii), the Chamber notes that the testimony of Mr. Gilles St-Laurent is of a cumulative nature in respect of the testimony of Witness WDE and Exhibit 1D-148.²¹ The Chamber further considers that none of the arguments against admitting the statement, set out in Rule 92 *bis* (A) (ii), are relevant. The Chamber, therefore, finds that a positive exercise of its discretion is warranted in the circumstances.

23. In relation to whether or not Mr. St-Laurent should be required to appear for cross-examination, the Chamber notes, firstly, that the matter of Casimir Bizimungu's whereabouts and movements prior to and during the 1994 genocide is crucial to the Prosecution's case against him, as well as to the Defence's alibi - a critical element of this case. Furthermore, whether the Accused's original passports were in fact stolen or otherwise disposed of, and whether the 'copies' of those passports are an accurate representation of the originals goes to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue. Therefore, the Chamber considers that allowing the Prosecution an opportunity to cross-examine Mr. St-Laurent on his evidence will ensure a fair trial under Articles 20 and 21 of the Statute.

24. The Chamber finds that the testimony of Mr. Gilles St-Laurent may be admitted into evidence through written statement, pursuant to Rule 92 *bis*, but that the Prosecution should have the opportunity to cross-examine the Witness on the matters contained therein, should it so wish.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion to add Mr. Gilles St-Laurent to its Witness List and **ORDERS** the Defence for Casimir Bizimungu, pursuant to Rule 73 *ter* (E) of the Rules, to file with the Registry a Revised Witness List reflecting this addition forthwith;

GRANTS the Defence Motion to admit the written statement of Mr. Gilles St-Laurent into evidence, in its entirety, in lieu of him testifying orally, pursuant to Rule 92 *bis* (A) of the Rules; and

²¹ Defence Motion, para. 20. Witness WDE testified on 13 February 2007 and Exhibit 1-D-148 is a police report regarding of theft of the passport, tendered into evidence during the testimony of Witness WDE, on 13 February 2007.

ORDERS the Defence for Casimir Bizimungu, in consultation with the Witnesses and Victims Support Section, to facilitate the attendance of Mr. Gilles St-Laurent before this Chamber for cross-examination as soon as practicable, subject to the Witness' availability, and to agreement by the Parties in this case.

Arusha, 1 May 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]