



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

UNITED NATIONS
NATIONS UNIES

OR:
ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 7 February 2008

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

Case No. ICTR-99-50-T

**DECISION ON DEFENDANT BICAMUMPAKA'S MOTION FOR
RECONSIDERATION OF ORAL DECISION REGARDING VIOLATION OF
PROSECUTOR'S OBLIGATIONS PURSUANT TO RULE 66 (B) OF THE
RULES OF PROCEDURE AND EVIDENCE, DATED 11 OCTOBER 2007**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Alao Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa
Mr. Olivier De Schutter
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. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

INTRODUCTION

1. The Defence for Mr. Bicomumpaka seeks reconsideration of the Chamber's Oral Decision of 11 October 2007.¹ The Defence submits that this Decision was mistaken in law and allowed the Prosecution to benefit from violating its obligations, under Rule 66 (B), to allow inspection of certain documents, including immigration documents of defence witnesses.²

2. On 1 October 2007, the Defence for Mr. Bicomumpaka requested that the Prosecution allow it to inspect, pursuant to Rule 66 (B) and the relevant jurisprudence, certain Prosecution documents relating to all defence witnesses.³ Specifically, the Defence requested inspection of the following categories of documents:

- i. Any statements made by the witnesses to any representative of the Prosecutor;
- ii. Any document related to immigration proceedings concerning the witness which are in possession of the Prosecutor;
- iii. Any documents originating in Rwanda, including but not limited to proceedings in the Rwandan ordinary courts or Gacaca courts that are in the possession of the Prosecutor.⁴

The Prosecution did not respond to the Defence request which was repeated again via email, on 9 October 2007.⁵

3. On 11 October 2007, during cross-examination of Witness CE-1, the Prosecution sought to question the witness regarding immigration records that it had not given the Defence an opportunity to inspect. The Chamber rejected the Defence objections that the Prosecution had violated its Rule 66(B) obligations, allowed examination on the document, and admitted it into evidence as Exhibit P.178.⁶

¹ T. 11 October 2007, pp. 70-74 (ICS)

² Bicomumpaka Motion for Reconsideration of Oral Decision Regarding Violation of Prosecutor's Obligations Pursuant to Rule 66(B) of the Rules of Procedure and Evidence, Dated 11 October 2007. ("Defence Motion")

³ Annex 1 to Defence Motion, Email Correspondence to Prosecutor (cc: Chambers) from Defence for Mr. Bicomumpaka, dated 1 October 2007.

⁴ Annex 1 to Defence Motion, Email Correspondence to Prosecutor (cc: Chambers) from Defence for Mr. Bicomumpaka, dated 1 October 2007.

⁵ Annex 2 to Defence Motion, Email Correspondence to Prosecutor (cc: Chambers) from Defence for Mr. Bicomumpaka, dated 9 October 2007.

⁶ T. 11 October 2007, pp. 70-74 (ICS)

DISCUSSION

Law of Reconsideration

4. Though reconsideration is not expressly provided for in the Statute or Rules, the Trial Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the decision, or where the decision was erroneous and has caused prejudice or injustice to a party.⁷

Law of Inspection under Rule 66 (B)

5. In a decision dated 5 November 2007, the Chamber discussed the law of inspection under Rule 66 (B), as interpreted by the Appeals Chamber. In that decision, the Chamber stated that the Appeals Chamber interpreted this provision in the context of a Defence request to inspect documents concerning, and statements given by, its own witnesses that the Prosecution has obtained from national immigration authorities. It noted that the Appeals Chamber defined two categories of immigration documents: (i) those that the Prosecution “intends to use as exhibits”, which are automatically subject to inspection; and (ii) those not intended for use as exhibits, but which are otherwise “material to the preparation of the Defence” and, therefore, subject to inspection. The precise scope of the second category was remitted to the Trial Chamber for further consideration in light of the following definition of materiality:

In accord with the plain meaning of Rule 66(B) of the Rules, the test for materiality ... is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence. Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence. The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses. The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard.

The Chamber noted the Appeals Chamber’s ruling that its “plain reading of Rule 66(B)” created an obligation to disclose only in response to a “sufficiently specific request by the defence.” The Chamber in particular noted the Appeals Chamber’s ruling that “immigration-related material, admittedly in the possession of the Prosecution” was sufficiently specific. In addition the Chamber made particular reference to the timing of inspection and the Appeals Chamber’s statement that where the requested materials were

⁷ 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 (TC), 26 April 2007, para. 7 (citations omitted).

intended to assist the defence in selecting its witnesses, disclosure at the time of cross-examination would not be sufficient.⁸

The Oral Decision of 11 October 2007 and the Defence Request for Reconsideration

6. The Defence argues that the Oral Decision of 11 October 2007 was incorrect in law. It submits that the decision allowed the Prosecution to avoid the obligation to allow inspection of a document for which inspection had been requested and that was material to the preparation of the Defence case.⁹ According to the Defence, the scenario before the Chamber was indistinguishable from that before the Appeals Chamber in the *Bagosora et al* matter.¹⁰

7. The Chamber has reconsidered the circumstances under which it rendered the Oral Decision of 11 October 2007. The Defence requested the right to inspect any immigration records of its witnesses in the possession of the prosecution before Witness CE-1 began his testimony. The Defence objected to the use of the immigration documents at the time the Prosecution sought to introduce them.¹¹ Pursuant to the jurisprudence of the Appeals Chamber, such records are material to the preparation of the Defence, and thus subject to inspection pursuant to Rule 66 (B).¹²

8. The Chamber finds its Oral Decision of 11 October 2007 was erroneous. The Prosecution had an obligation to allow inspection of Witness CE-1's immigration statement so that the Defence could consider it in determining whether to call CE-1 as a Witness.

Exclusion of Exhibit P.178 and all testimony relating to it

9. The Defence moves to exclude the immigration document put to Witness CE-1 under cross-examination and all testimony relating to that document. The Defence submits that the inability to inspect the document prior to its use during cross-examination and subsequent admission into evidence seriously prejudiced the Defence's ability to review the document with a view to selecting its witnesses appropriately.

10. The Chamber notes that because the Defence was not given the opportunity to review the immigration documents prior to calling Witness CE-1, the Defence's decision to call the Witness was made without the benefit of knowledge of certain facts which may have been relevant to the process of witness selection. The Chamber does not have sufficient information to assess whether the Defence would still have called Witness CE-

⁸ Decision on Bicamumpaka Motion to Inspect Documents Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence (TC), 5 November 2007, paras. 4-6.

⁹ Defence Motion, para 5.

¹⁰ Defence Motion, para 6.

¹¹ T. 11 October 2007, pp. 70-74 (ICS)

¹² *Prosecutor v. Bagosora et al.*, Case No. ICTR – 98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, para. 9.

1, but, in the Chamber's view, exclusion is appropriate to ensure that the Prosecution will comply with its obligations under Rule 66 (B) in the future.

FOR THESE REASONS, the Chamber

GRANTS the Defence Motion in part;

ORDERS that Exhibit P.178 and all testimony related thereto be excluded from the evidence in these proceedings.

Arusha, 7 February 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]