



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: 20 November 2006

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

Case No. ICTR-99-50-T

**DECISION ON PROSECUTION MOTION FOR FULL COMPLIANCE WITH RULE
73 *ter* AND VARIATION OF CHAMBER'S DECISION OF 27 JUNE 2005
*Rules 69, 73(A), 73ter(B), and 75(I) 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

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**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

BEING SEIZED of the “Prosecutor’s Motion for Full Compliance with Rule 73*ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu’s Motion for the Protection of Defence Witnesses Dated 27 June 2005, Pursuant to Rules 69, 73(A), 73*ter*(B), and 75(I)”, filed on 25 May 2006 (the “Motion”);

CONSIDERING the “Réponse Confidentielle de Casimir Bizimungu à la Requête du Procureur Intitulée: Prosecutor’s Motion for Full Compliance with Rule 73*ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu’s Motion for the Protection of Defence Witnesses Dated 27 June 2005 Pursuant to Rules 69, 73(A), 73*ter*(B), and 75(I)”, filed on 30 May 2005 (the “Response”);

NOTING Prosper Mugiraneza’s Memorandum on Prosecutor’s Motion for Full Compliance with Rule 73*ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu’s Motion for the Protection of Defence Witnesses Dated 27 June 2005 Pursuant to Rules 69, 73*ter*(B), and 75(I)”, filed on 13 June 2006 (the “Memorandum”), and the Corrigendum thereto, filed on 1 September 2006 (the “Corrigendum”);

NOTING ALSO the oral submissions made by the Parties, concerning the Motion, during the proceedings in this case of 21 August 2006;

NOW DECIDES the matter solely on the basis of the briefs of the parties, pursuant to Rule 73 (A).

INTRODUCTION

1. In its Motion, the Prosecution seeks two types of relief relating to the witnesses to be called to testify in Casimir Bizimungu’s defence. Firstly, the Prosecution seeks an order which will compel the Bizimungu Defence to furnish the Prosecution with full witness statements for its witnesses. Secondly, the Prosecution seeks an order varying Order (h)¹ of the Trial Chamber’s Decision on Casimir Bizimungu’s Motion for Protection of Defence Witnesses, of 27 June 2005, so as to require Casimir Bizimungu to provide the Prosecution with the personal particulars of his witnesses.²

¹ Order (h) states: “The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on the file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place, and in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.”

² The Prosecution seeks the Order to be varied so as to require the provision of the following details with respect to Casimir Bizimungu’s witnesses: (1) date and place of birth; (2) name of parents; (3) religion; (4) ethnicity; (5) occupation in 1994; (6) address in 1994; (7) current address.

2. Although the Bizimungu Defence filed a Response on 30 May 2005 which opposed the Motion in principle, it subsequently disclosed to the Prosecution, and filed with the Chamber, the following materials:³
 - (i) Witness statements and will say statements for alibi witnesses (seven witnesses in total), including the witnesses' full names, addresses and telephone numbers; and
 - (ii) Witness statements and will say statements for the witnesses it intended to call to testify during the trial session which took place between August and October 2006, including:
 - each witness' full name,
 - the name of his or her father and mother,
 - the witness' date and place of birth,
 - the witness' religion,
 - the witness' address in 1994,
 - the witness' occupation in 1994, and,
 - in relation to Rwandan witnesses, the witness' ethnicity.
3. On 13 June 2006, the Defence for Prosper Mugiraneza filed a Memorandum in relation to the Motion, submitting that the Motion was without merit and should be denied.
4. During the proceedings in this case of 21 August 2006, the Defence for Casimir Bizimungu requested that the Prosecution withdraw its Motion in light of the disclosure of the materials outlined in paragraph two, above. The Prosecution declined to withdraw the Motion.⁴
5. The Chamber notes that the relief sought by the Prosecution specifically relates to the Accused Casimir Bizimungu. This is made clear by the fact that the Prosecution specifically seeks to vary Order (h) of this Chamber's Decision on protective measures for Casimir Bizimungu's witnesses. The Motion does not seek any general relief. Accordingly, the Chamber considers the merits of the Motion solely on the basis of the Prosecution's brief, as required by Rule 73(A) of the Rules – that is, specifically with regard to the Accused Casimir Bizimungu.

Preliminary matter – Request for 'Confidential Status' to be assigned to Annexure

6. In its Response, the Defence seeks an order from the Chamber that the Annexure to the Prosecution Motion, which contains samples of witness testimony summaries previously disclosed to the Prosecution, be assigned confidential status, and removed from the public record. The basis for the Defence request is that the material concerned is extracted from the Defence's Pre-trial Brief, which was assigned confidential status. The Chamber has reviewed the material in question and notes that it contains brief and general summaries of the witness' testimony, and a reference to the witness' pseudonym. Due to the nature of the material concerned, the Chamber considers that assigning confidential status to this material is not required in order to safeguard the privacy and security of the witnesses concerned. The Chamber notes

³ Refer to filings of 9 June 2006.

⁴ T., 21 August 2006, pp. 4-5.

that there are different considerations in assigning confidential status to an entire Pre-trial Brief, which do not necessarily concern the particular pages which have been extracted from it. The Defence's application therefore falls to be rejected.

Regarding the provision of full witness statements by the Bizimungu Defence

7. The Prosecution Motion firstly seeks an order requiring the Defence to provide full witness statements for its witnesses. The Motion does not specify in respect of which witnesses full statements are sought, therefore the Chamber considers that the Motion is seeking the provision of full witness statements for all witnesses to be called in Casimir Bizimungu's defence. On 9 June 2006, the Bizimungu Defence provided either full witness statements, signed by each witness, or detailed will-say statements in respect of each witness who was to testify during the August to October trial session. The Chamber is therefore of the view that the provision of this material by the Defence has rendered the first part of the Prosecution's Motion moot, as regards the witnesses in relation to whom the 9 June 2006 disclosure was made.
8. In relation to the provision of full witness statements, therefore, the issue which remains to be resolved is whether the Chamber should order the Bizimungu Defence to disclose full witness statements for its remaining witnesses (ie. in relation to whom disclosure was not made on 9 June 2006).
9. In support of its request for an order requiring the provision of full witness statements, the Prosecution has relied upon Rule 73ter of the Rules, seeking that the Defence be ordered to "comply strictly with the provisions of Rule 73ter (B)".⁵ Rule 73ter, entitled "Pre-Defence Conference", empowers the Chamber to hold a conference prior to the commencement, by the Defence, of its case.⁶ Rule 73ter (B) bestows a *discretionary* power upon the Chamber to make certain orders with respect to the management of the Defence case during such a conference and before the commencement of the Defence case (emphasis added). Rule 73ter (B) also empowers the Chamber to order the Defence to provide copies of the written statements of each witness whom the Defence intends to call. Again, pursuant to the Rule, the Chamber is empowered to exercise that discretion during the Pre-Defence Conference.
10. On 31 October 2005, this Chamber in fact held a Pre-Defence Conference in accordance with the provisions of Rule 73ter.⁷ During that conference, the Chamber specifically considered whether or not it should grant the Prosecution's request to order the Defence (of each of the Accused) to provide full witness statements of the witnesses whom it intended to call, as provided for by Rule 73ter (B) of the Rules. After considering the submissions of both the Prosecution and Defence on this point, the Chamber declined to exercise its discretion in favour of the Prosecution's request.
11. The Chamber considers that the Prosecution's Motion amounts to an attempt to seek reconsideration of this Chamber's Rule 73ter rulings of 31 October 2005. The grounds advanced for the relief sought – that since the Defence for Justin Mugenzi provided full witness statements to the Prosecution, the Bizimungu Defence should also be required to do so; and that the provision of full witness statements by the

⁵ See Prosecution Motion, p. 9.

⁶ See Rule 73ter (A).

⁷ T., 31 October 2005 (closed session).

Bizimungu Defence will assist the Prosecution in preparing its case – were known to the Chamber on 31 October 2005. Furthermore, in deciding whether or not to exercise its discretion in favour of ordering the Defence to provide full witness statements to the Prosecution, the Chamber considered whether it was in the interests of justice to do so. The Chamber therefore does not consider that a new fact has been discovered that was not known to the Chamber on 31 October 2005, or that there has been a material change in circumstances since that date, or that there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in injustice thereby warranting the exceptional remedy of reconsideration.⁸ Accordingly, the Chamber declines to order that the Bizimungu Defence provide full witness statements of its remaining witnesses.

Regarding the request for variation of Order (h) of Chamber's Decision of 27 June 2005

12. Two matters remain to be considered regarding the Prosecution's request for a variation of Order (h) of 27 June 2005. The first matter is whether, with regard to Rule 75(I) of the Rules, the Prosecution has provided sufficient grounds for any change being made to the 21 day time stipulation in Order (h), such that a variation reducing, or disposing with, this time limit is warranted. The second matter is whether Order (h) should be varied so as to require the Defence to provide personal particulars of each of its witnesses, either forthwith, or on a date to be specified.
13. As regards the first matter – whether there are grounds for interfering with the 21 day time stipulation for the provision of personal information, in Order (h) – presently, the Defence is under no obligation to disclose identifying data to the Prosecutor sooner than 21 days before the witness is due to testify at trial. The Prosecution submits that this Order should be varied “in the interests of justice, judicial economy, fairness... and to enable the Prosecutor to have adequate information and time to conduct background investigation on the witnesses”.⁹
14. The Chamber finds that the Prosecution has failed to adduce sufficient grounds to warrant an interference with the 21 day time stipulation in Order (h). In deciding whether or not to grant protective measures in respect of Casimir Bizimungu's witnesses, and in deciding the exact form such measures should take, the Chamber took into account a number of relevant matters, including its various powers and duties under the Statute and the Rules, as well as the material advanced in support of the application. The time stipulation in Order (h) was fixed after careful consideration of what was required to safeguard the privacy and security of the witnesses. Insufficient reasons have been advanced to merit an interference with this time stipulation.
15. As regards the second matter - whether Order (h) should be varied so as to require the Defence to provide full personal particulars of each of its witnesses - the Chamber considers that this part of the Prosecution Motion has been rendered moot, except in relation to that part of the Prosecution's request which seeks the disclosure of the current residential address for each of Casimir Bizimungu's witnesses. The Prosecution has advanced no reason as a basis for its request for the provision of

⁸ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Reconsideration of Special Protective Measures for Witness “T”, 6 March 2006, para. 3.

⁹ Motion, para. 14.

Bizimungu witnesses' current residential address. The Chamber is of the view that revealing the current address of Defence witnesses has the potential to compromise the witnesses' privacy, safety and security, due to the potential for intimidation and coercion. It therefore declines to order the provision of Casimir Bizimungu's witnesses' current residential addresses to the Prosecution. Finally the Chamber notes that, having regard to its disinclination to interfere with the 21 day time stipulation in Order (h), the Defence will continue to be required to provide identifying information of its witnesses – other than the witness' current residential address – no sooner than 21 days before the witness is scheduled to testify at trial.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Prosecution Motion in its entirety; and

DENIES the Defence request for an order that the Annexure to the Prosecution Motion be filed confidentially.

Arusha, 20 November 2006

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]