



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

1149/H

ICTR-99-50-AR73.7

22 May 2008

{1149/H - 1144/H}

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 22 May 2008

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THE PROSECUTOR

v.

Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-AR73.7

ICTR Appeals Chamber

Date: 22 May 2008

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DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S INTERLOCUTORY APPEAL CONCERNING A REQUEST FOR A SUBPOENA

Counsel for the Appellant:

Mr. Michel Croteau and Mr. Philippe Larochelle for Mr. Jérôme-Clément Bicamumpaka

Counsel for the Co-Accused

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Dr. Casimir Bizimungu

Mr. Ben Gumpert and Mr. Jonathan Kirk for Mr. Justin Mugenzi

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

Counsel for the Prosecution:

Mr. Hassan Bubacar Jallow

Mr. Paul Ng'arua

Mr. Ibukunolu Babajide

Mr. Justus Bwonwonga

Mr. Elvis Bazawule

Mr. Shyamlal Rajapaksa

Mr. Olivier De Schutter

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "Bicamumpaka's Interlocutory Appeal of the Decision on Jérôme-Clément Bicamumpaka's Request for a Subpoena, dated 12 February 2008", filed on 27 March 2008 ("Appeal" and "Appellant", respectively). The Prosecution filed its Response on 2 April 2008,¹ and the Appellant filed his Reply on 7 April 2008.²

A. Background

2. This is an appeal against the "Decision on Jérôme-Clément Bicamumpaka's Request for a Subpoena" issued by Trial Chamber III on 12 February 2008 ("Impugned Decision"). The Impugned Decision denied the Appellant's "Confidential Request for Subpoena" of 5 February 2008 ("Request")³ on grounds that it was filed four days after the deadline ordered by the Trial Chamber at a status conference held on 28 January 2008 ("Status Conference")⁴ and that it would not be in the interests of justice to consider the Request on its merits.⁵ The Trial Chamber also took into account the fact that the Defence should have acted in a timely manner to ascertain the willingness of Witness LF-1 to testify, as well as in filing any request for a subpoena.⁶ Furthermore, the Trial Chamber considered that trial time had been lost due to the failure of the Defence to plan its case well in advance of the trial schedule.⁷ The Trial Chamber also noted its obligation to ensure that all the accused in this case be tried without undue delay.⁸

3. On 19 March 2008, the Trial Chamber granted the Appellant certification to appeal the Impugned Decision.⁹ It noted that the loss of the testimony of a potentially important witness could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as it was satisfied that the witness for whom the subpoena had been requested, was potentially

¹ "Prosecutor's Response to Mr. Jérôme-Clément Bicamumpaka's Interlocutory Appeal of the Decision on Jérôme-Clément Bicamumpaka's Request for a Subpoena, Dated 12 February 2008", 2 April 2008 ("Response").

² Bicamumpaka's Request for Dismissal of Prosecutor's Submissions and Corrigendum to Interlocutory Appeal, 4 April 2008 ("Reply").

³ See Impugned Decision, fn. 2.

⁴ See Impugned Decision, paras. 1, 2.

⁵ See Impugned Decision, paras. 4-10.

⁶ Impugned Decision, para. 7.

⁷ Impugned Decision, para. 8.

⁸ Impugned Decision, para. 9.

⁹ "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", 19 March 2008 ("Decision Granting Certification").

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important to the Appellant's defence.¹⁰ Accordingly, the Appellant filed the present Appeal challenging the Impugned Decision.

B. Submissions

4. The Appellant contends that the Trial Chamber committed an error of law by treating an indication from the Defence of its "intent and capacity" to file the Request on a specific date as an order and then treating a violation of this "order" as a reason to deny him the right to call a highly relevant material witness.¹¹ He argues that an ambiguous oral exchange cannot be the sole reason for excluding exculpatory evidence.¹² The Appellant claims that the Request was not untimely and asserts that the Impugned Decision penalised him for seeking to comply with Rule 54 of the Rules of Procedure and Evidence of the Tribunal ("Rules") by making all reasonable efforts to ensure that the witness appears voluntarily.¹³

5. The Appellant submits that the Trial Chamber inappropriately considered extraneous factors in the Impugned Decision, and thus erred in law and in the application of the principles guiding the "reasonable exercise of its discretion".¹⁴ In this regard, the Appellant avers that the failure of the Defence to produce witnesses was an inappropriate consideration by the Trial Chamber when ruling on the Request.¹⁵

6. The Appellant contends that the Impugned Decision was unreasonable and contrary to the interests of justice,¹⁶ as there are no relevant factors that would support a denial of the Request without considering its merits.¹⁷ He asserts that the Trial Chamber unreasonably exercised its discretion when it concluded in the Impugned Decision that the interests of justice do not allow for the merits of the Request to be considered.¹⁸ The Appellant argues that the interests of justice warrant a consideration of the Request on its merits, and the issuance of a subpoena.¹⁹

7. The Prosecution responds that it "does not object to the appeal in principle".²⁰

¹⁰ Decision Granting Certification, para. 11.

¹¹ Motion, para. 11.

¹² Motion, para. 11.

¹³ Motion, para. 12.

¹⁴ Motion, para. 14.

¹⁵ Motion, para. 14.

¹⁶ Motion, paras. 18-23.

¹⁷ Motion, paras. 18, 22.

¹⁸ Motion, para. 23.

¹⁹ Motion, para. 23.

²⁰ Response, para. 2.

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C. Standard of Review

8. The Impugned Decision denied a request for a subpoena on the basis that it was filed outside the time limit ordered by the Trial Chamber.²¹ Since this matter relates to the general conduct of trial proceedings, the Impugned Decision is a discretionary one, to which the Appeals Chamber must accord deference.²² Where such a decision is appealed, the issue is whether the Trial Chamber correctly exercised its discretion and not whether the decision was correct, in the sense that the Appeals Chamber agrees with it.²³ Consequently, the Appeal Chamber will only reverse an impugned decision where it is demonstrated that the Trial Chamber committed a discernible error in rendering the Impugned Decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable so as to constitute an abuse of the Trial Chamber's discretion.²⁴

D. Discussion

9. The Appeals Chamber notes that the Trial Chamber held that "it would not be in the interests of justice to consider the merits" of the Request, as it was "filed outside the time limit" set by the Trial Chamber.²⁵ The Trial Chamber considered that the Appellant failed to comply with its order to file the Request by 1 February 2008.²⁶ The Appellant contends that there was no such order.

10. Generally, an order issued by a Trial Chamber is a command, direction or instruction given to the parties in relation to a subsidiary, collateral or preliminary matter which arises from the proceedings before it.²⁷ An order must be clear, explicit and unambiguous. It may be issued orally or in writing. In the present case, the Impugned Decision states that at the Status Conference, the Trial Chamber "ordered" the Appellant "to file an outstanding application for [a] subpoena by

²¹ Impugned Decision, paras. 1, 2.

²² *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("Karemera et al. Decision of 23 January 2008"), para. 7 referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("Karemera et al. Decision of 5 October 2007"); *The Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("Ndayambaje et al. Decision of 21 August 2007").

²³ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

²⁴ *Karemera et al.* Decision of 23 January 2008, para. 7 referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.

²⁵ Impugned Decision, paras. 1, 10.

²⁶ Impugned Decision, paras. 2, 4.

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Friday, 1 February 2008"²⁸ The transcripts of the Status Conference reveal that in going through his list of witnesses, the Appellant's counsel stated: "For Witness LP-1, this witness is unwilling to come and we will probably seek a subpoena, as we are really keen on having him coming to testify for our Defence."²⁹ Towards the close of the Status Conference, the Presiding Judge stated: "And, Mr. Larochelle, you have also requested for filing subpoena of -- for some of the witnesses. So, can you do that by Friday?"³⁰ The Appellant's Counsel replied: "Yes".³¹ The Presiding Judge then stated "Okay" and moved on to another matter.³² In the view of the Appeals Chamber, this exchange does not constitute an order, since the Presiding Judge did not clearly direct or instruct the Appellant's counsel to do anything. Rather than an order, this exchange suggests an enquiry as to when counsel could take certain action, with the Presiding Judge then noting the answer. From this exchange, counsel would not necessarily understand that the Trial Chamber directed or instructed him to file a request for a subpoena of a certain witness by the day discussed. Therefore, the Trial Chamber committed a discernible error in holding that it had ordered the Appellant to file the Request by 1 February 2008, and that the Request was therefore filed "outside the time limit".³³

11. The Appeals Chamber notes that the exchange between the Presiding Judge and Appellant's counsel did not provide a definitive time by which the Request should have been filed. The Appeals Chamber therefore considers that in determining whether the Request should have been granted or denied based on timeliness, the Trial Chamber would need to consider whether it was filed within a reasonable time. Since the Appellant filed the Request four days after the date indicated by his counsel at the Status Conference, the Appeals Chamber concludes that the Request was filed within a reasonable time.

²⁷ Black's Law Dictionary, Eighth Edition, pp. 1129-1130, referring to Henry Campbell Black, *A Treatise on the Law of Judgments* S1 at 5 (2d ed. 1902).

²⁸ Impugned Decision, para. 1. The purpose of a status conference is to organize exchanges between the parties so as to ensure expeditious trial proceedings (*see* Rule 65bis (A) of the Rules).

²⁹ Status Conference, T 28 January 2008 p. 3.

³⁰ Status Conference, T. 28 January 2008 p. 11.

³¹ Status Conference, T. 28 January 2008 p. 11.

³² Status Conference, T. 28 January 2008 p. 11.

³³ Impugned Decision, paras. 1, 10.

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E. Disposition

12. For the aforementioned reasons, the Appeals Chamber **GRANTS** the appeal filed by Jérôme-Clément Bicomumpaka and **DIRECTS** the Trial Chamber to consider the merits of the "Confidential Request for Subpoena" which was filed on 5 February 2008.

Done in English and French, the English text being authoritative.

Dated this the 22 day of May 2008,
at The Hague,
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Fausto Pocar", is written over a horizontal line.

Judge Fausto Pocar,
Presiding



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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