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Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

**IN THE APPEALS CHAMBER**

ICTR-99-50-AR73.6

Before:

Judge Fausto Pocar, Presiding Judge  
Judge Mohamed Shahabuddeen  
Judge Liu Daqun  
Judge Andréia Vaz  
Judge Wolfgang Schomburg

17 July 2007  
(1117/H - 1105/H)  
P.T.

Registrar:

Mr. Adama Dieng

Decision of:

16 July 2007

**THE PROSECUTOR**

v.

Casimir BIZIMUNGU  
Justin MUGENZI  
Jérôme-Clément BICAMUMPAKA  
Prosper MUGIRANEZA

Case No. ICTR-99-50-AR73.6

**CONFIDENTIAL**

ICTR Appeals Chamber

Date: 17 July 2007  
Action: P.T.

Copied To: concerned Judges  
Parties, SCS, LOS, ALOS, IS,  
Archives

*(Signature)*

**DECISION ON INTERLOCUTORY APPEAL  
RELATING TO THE TESTIMONY OF  
FORMER UNITED STATES AMBASSADOR ROBERT FLATEN**

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Mr. Tom Moran and Ms. Marie-Pierre Poulain for Prosper Mugiraneza

**United States Embassy, The Hague**

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: *Patrice Tchuidimabo*SIGNATURE: *(Signature)* DATE: *17/07/07*

*JM*

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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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seised of an interlocutory appeal filed confidentially by Casimir Bizimungu ("Appellant") on 29 May 2007<sup>1</sup> against 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" issued confidentially by Trial Chamber II on 26 April 2007 ("Impugned Decision"). The Prosecution responded on 8 June 2007.<sup>2</sup> The Appellant did not reply.

### I. BACKGROUND

2. On 20 January 2007, the Appellant filed a motion before Trial Chamber II ("Trial Chamber") requesting that the provisions of Rule 70 of the Rules of Procedure and Evidence of the Tribunal ("Rule 70" and "Rules", respectively) apply to the testimony of Robert Flaten, Ambassador of the Government of the United States of America ("U.S. Government") to Rwanda between 1990 and 1993.<sup>3</sup> At the behest of the U.S. Government, the Appellant requested that the order stipulate that:

(a) Two representatives of the U.S. Government may be present in court during the Witness's testimony for the purpose of monitoring the examination of the Witness and to address the Trial Chamber (should) they object to any question put to the Witness;

(b) The scope of direct examination shall be limited to that authorised by the U.S. Government and cross-examination of the Witness shall be confined to the scope of direct examination;

(c) In order to protect the security interests of the U.S. Government, inquiry into matters affecting the credibility of the Witness will be permitted pursuant to Rule 90, provided that the answers are not deemed liable to reveal confidential information provided under Rule 70;

(d) The discretion of the Trial Chamber to question a witness in order to ascertain the truth under Rule 90 and to permit enquiry into additional matters pursuant to Rule 90 shall be conducted in conformity with Rule 70.<sup>4</sup>

On 24 January 2007, the Prosecution responded that it did not object to the conditions requested by the Appellant.<sup>5</sup>

<sup>1</sup> Appel interlocutoire de Casimir Bizimungu contre la Décision rendue par la Chambre de première instance II, le 26 avril 2007, ayant pour effet d'empêcher l'Ambassadeur américain Robert Flaten de témoigner au procès de Casimir Bizimungu, confidentiel, 29 May 2007 ("Interlocutory Appeal").

<sup>2</sup> Prosecutor's Response to Dr. Bizimungu's Motion Titled "Appel interlocutoire de Casimir Bizimungu contre la Décision rendue par la Chambre de première instance II, le 26 avril 2007, ayant pour effet d'empêcher l'Ambassadeur américain Robert Flaten de témoigner au procès de Casimir Bizimungu", confidentiel, 8 June 2007 ("Response").

<sup>3</sup> Prosecutor v. Casimir Bizimungu et al., Case No ICTR-99-50-T, Motion for an Order Applying Rule 70 of the Rules of Procedure and Evidence to Specific Information to be Provided by the United States Government, confidential, 20 January 2007.

<sup>4</sup> Idem, para. 4.

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3. Also on 24 January 2007, the Trial Chamber heard the arguments of the parties on the issue in closed session. Ruling on the Appellant's motion, the Trial Chamber ordered that Rule 70 apply *mutatis mutandis* to Ambassador Flaten's testimony and granted conditions (a), (c) and (d).<sup>6</sup> It denied condition (b) ("Condition B") on the ground that, "[w]ithout having received any indication as to the scope of the examination of the topics that have been authorised by the US government, [it was] not comfortable with granting [Condition B] at [that] time."<sup>7</sup> The Trial Chamber explained in subsequent decisions that its reasons for denying Condition B were "(i) that it must retain the authority to resolve any disputes as to the proper scope of questioning that may arise during the Witness's testimony, and (ii) that without having received any indication of the scope of the testimony authorized by the U.S. Government, the Chamber could not grant the condition."<sup>8</sup>

4. On 29 and 30 January 2007, the Appellant filed confidentially two new motions requesting the Trial Chamber to grant Condition B, in which he argued that he was now in a position to provide the Trial Chamber with the scope of Ambassador Flaten's examination-in-chief authorised by the U.S. Government.<sup>9</sup> The Trial Chamber denied the motions on 8 February 2007, finding that the scope of examination authorised by the U.S. Government remained unclear and that "the [Oral Decision of 24 January 2007] maintains the proper balance between protecting the legitimate confidentiality concerns of the U.S. Government and the Chamber's authority over the proceedings."<sup>10</sup>

<sup>5</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, Prosecutor's Urgent Response to Dr. Casimir Bizimungu's Motion for an Order Applying Rule 70 of the Rules of Procedure and Evidence to Specific Information to be Provided by the United States Government, confidential, 24 January 2007 ("Prosecution Response of 24 January 2007"), paras. 5-6. The Prosecution however requested that in the event a representative of the U.S. Government wished to make any recommendations to Ambassador Flaten, the Trial Chamber should require the U.S. Government's representative to provide the grounds for intervening and should allow all parties to comment.

<sup>6</sup> T. 24 January 2007, p. 47 (closed session). See also T. 24 January 2007, p. 45 (closed session), recalling the Trial Chamber's Decision on Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government, 11 December 2006, in which the Trial Chamber stated that "although the ICTR Rule 70 is limited to applications by the Prosecutor, broadening the ambit of that Rule to include applications by the Defence would serve to foster equality of arms between the parties".

<sup>7</sup> T. 24 January 2007, pp. 46-47 (closed session) ("Oral Decision of 24 January 2007").

<sup>8</sup> See *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, Decision on Casimir Bizimungu's Motions in Relation to Condition (B) Requested by the Government of the United States of America, confidential, 8 February 2007 ("Decision of 8 February 2007"), para. 7. See also Impugned Decision, para. 2; *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, 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. 2.

<sup>9</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, Casimir Bizimungu's Motion in Relation to Condition (B) Requested by the United States Government, confidential, 29 January 2007, p. 2; *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, Casimir Bizimungu's Motion in Relation to Condition B Requested by the United States Government, confidential, 30 January 2007 ("Motion of 30 January 2007"), p. 2. See also *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, Prosecutor's Urgent Response to Dr. Casimir Bizimungu's Motion in Relation to Condition (B) Requested by the United States Government, confidential, 31 January 2007 ("Prosecution Response of 31 January 2007"), whereby the Prosecution opposed the motions on the ground that the scope of the testimony remained unclear. It also submitted that the witness's 'will say' statement was an inadmissible "mixture of factual allegations and opinion evidence" (p. 4).

<sup>10</sup> Decision of 8 February 2007, paras. 6-7 and Disposition.

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5. On 4 April 2007, the Appellant filed a motion for reconsideration of the Decision of 8 February 2007, providing new information from the U.S. Government, which specified the authorised scope of the testimony.<sup>11</sup> On 26 April 2007, the Trial Chamber issued the Impugned Decision, denying the Appellant's motion on the basis that while the new information did clarify the subject matter of Ambassador Flaten's testimony, the Appellant did not address the Trial Chamber's concerns about retaining authority over the proceedings.<sup>12</sup> The Trial Chamber also found that there was no basis for reconsideration of its earlier ruling on the matter.<sup>13</sup> The Trial Chamber reiterated that the concerns of the U.S. Government had been adequately addressed by its prior rulings and recalled that it had granted additional protections.<sup>14</sup>

6. On 2 May 2007, the Appellant filed a request for certification of the Interlocutory Appeal before the Trial Chamber,<sup>15</sup> which was granted on 22 May 2007.<sup>16</sup> In the Interlocutory Appeal, the Appellant submits that the Trial Chamber erred in reaching its decision denying Condition B, and requests the Appeals Chamber to quash the Impugned Decision and order that Condition B be granted with respect to Ambassador Flaten's testimony.

## II. STANDARD OF REVIEW

7. It is well established in the jurisprudence of the Tribunal that Trial Chambers exercise discretion in relation to the general conduct of trial proceedings.<sup>17</sup> The Trial Chamber's decision in this case to deny the Appellant's request for reconsideration of its previous decision was a discretionary decision to which the Appeals Chamber accords deference. The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretionary

<sup>11</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, 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 (Rules 70 and 73(A) of the Rules of Procedure and Evidence), confidential, 4 April 2007 ("Motion for Reconsideration"). The response of the Prosecution was filed out of time and was consequently not considered by the Trial Chamber.

<sup>12</sup> Impugned Decision, paras. 10-11.

<sup>13</sup> Impugned Decision, para. 11.

<sup>14</sup> Impugned Decision, para. 12.

<sup>15</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, *Requête de Casimir Bizimungu visant à obtenir certification de la décision intitulée "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"*, 2 May 2007 ("Motion for Certification").

<sup>16</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No ICTR-99-50-T, 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 ("Certification Decision").

<sup>17</sup> See *The Prosecutor v. Edouard Karemera et al.*, Case No ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ("*Karemera et al.* Decision"), para. 3; *Protais Zigiranyirazo v. The Prosecutor*, Case No ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Decision"), para. 9; *The Prosecutor v. Théoneste 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, 25 September 2006 ("*Bagosora et al.* Decision"), para. 6. See also *Prosecutor v. Milan Milutinović et al.*, Case No IT-05-87-AR73.1, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65<sup>th</sup> Witness List, 20 April 2007 ("*Milutinović et al.* Decision"), para. 8.

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power by committing a discernible error.<sup>18</sup> The Appeals Chamber will only overturn the Impugned Decision if the Appellant demonstrates that the Trial Chamber based the exercise of its discretion on an incorrect interpretation of governing law, on a patently incorrect conclusion of fact, or that the exercise of its discretion was so unfair or unreasonable as to constitute an abuse thereof.<sup>19</sup>

### III. DISCUSSION

#### A. Whether the Trial Chamber erred in failing to provide reasons for departing from its previous decisions

8. The Appellant submits that the Trial Chamber erred in the exercise of its discretion as follows: (i) by failing to consider that during the hearing of 24 January 2007 it had stated the requirements for Condition B to be granted; (ii) by failing to take into consideration the directives it had issued to the Defence on that occasion; and (iii) by failing to provide reasons for departing from its Oral Decision of 24 January 2007.<sup>20</sup> Citing the transcript of the hearing held on 24 January 2007 and relying on the Oral Decision of 24 January 2007 as summarised in the Decision of 8 February 2007, the Appellant submits that the Judges repeatedly suggested that they would grant Condition B provided that the scope of Ambassador Flaten's examination as authorized by the U.S. Government would be defined in writing. The Appellant contends that the Trial Chamber first denied Condition B because the scope authorised by the U.S. Government had not been indicated<sup>21</sup> and again denied Condition B in its Decision of 8 February 2007 because the scope of examination authorised by the U.S. Government remained unclear.<sup>22</sup> The Appellant complains that, despite having found that the "subject matter of the Ambassador's testimony" was clarified by the information subsequently provided by the U.S. Government, the Trial Chamber dismissed the Motion for Reconsideration on another ground, without explaining the reasons for departing from its previous decisions.<sup>23</sup>

9. The Appeals Chamber notes that during the hearing held on 24 January 2007, the essence of the discussion between the parties and the Trial Chamber was to reconcile the Appellant's request that the Trial Chamber give its assurance that the scope of examination defined by the U.S.

<sup>18</sup> *Karemera et al.* Decision, para. 3; *Milutinović et al.* Decision, para. 10; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for Prosecution Case, 6 February 2007 ("*Prlić et al.* Decision"), para. 8; *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4; "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision".

<sup>19</sup> *Karemera et al.* Decision, para. 3; *Zigiranyirazo* Decision, para. 9; *Bugosora et al.* Decision, para. 6. See also *Milutinović et al.* Decision, para. 10; *Prlić et al.* Decision, para. 8.

<sup>20</sup> Interlocutory Appeal, para. 27.

<sup>21</sup> Interlocutory Appeal, paras. 28-34 and 43, citing T. 24 January 2007, pp. 34-37 and pp. 46-47 (closed session) and referring to Decision of 8 February 2007, para. 3.

<sup>22</sup> Interlocutory Appeal, paras. 35-38.

<sup>23</sup> Interlocutory Appeal, paras. 42-47.

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Government would be respected during the course of Ambassador Flaten's testimony, with the Trial Chamber's hesitation to give such an assurance without knowing the scope of examination that was authorised by the U.S. Government.<sup>24</sup> The conclusion that emerged from that discussion was that without knowing the scope of examination authorised by the U.S. Government, the Trial Chamber would not be able to resolve disputes as to the proper scope of the questioning during Ambassador Flaten's testimony.<sup>25</sup> The Judges repeatedly suggested that the assurance sought – that is Condition B – could be granted if the scope authorised by the U.S. Government was clearly delimited.<sup>26</sup> The Trial Chamber therefore decided that “[w]ithout having received any indication as to the scope of topics that have been authorised by the U.S. Government, the Chamber is not comfortable granting Condition B at this time.”<sup>27</sup>

10. The Appeals Chamber further notes that, in its Oral Decision, the Trial Chamber reasoned that “as in previous cases at this Tribunal and before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) where such exceptional measures have been authorised, it will be the Chamber that resolves any dispute as to the proper scope of questioning which arises during the prospective witness's testimony.”<sup>28</sup> The Trial Chamber also stressed that “Rule 70(F) clearly

<sup>24</sup> T. 24 January 2007, p. 32, l. 5-7, l. 14-16 (closed session):

JUDGE SHORT: if you are asking us to make an order that the scope of direct examination should be limited to that authorised by the US government, and we don't know what the scope of that direct examination is, how can we make that order?

See also p. 34, l. 25; p. 40, l. 30-31; p. 42, l. 4-7 (closed session):

JUDGE MUTHOGA: And we are the people from whom the assurance is sought that we grant -- that we give the assurance that in the course of his testimony, *nothing beyond the scope of what the United States has been asked has been -- as approved shall be asked. And we don't know what that scope is. How can we then say -- how do we assure ourselves that we are giving an assurance which we can defend?*

<sup>25</sup> T. 24 January 2007, p. 35, l. 25-26 (closed session) :

MADAM PRESIDENT: We need to know the scope of your direct examination which has been authorized by the US authorities.

See also p. 42, l. 20-21 (closed session):

JUDGE MUTHOGA: [...] Then we will be left in a position where, not knowing the scope, we are not able to say, yes it is or it is without the scope.

See also p. 43, l. 16-17 (closed session):

JUDGE SHORT: [...] it is very clear that request B takes away our discretion when we don't know what the scope of matters authorized by the U.S. Government is.

<sup>26</sup> T. 24 January 2007, p. 35, l. 1-3 (closed session):

JUDGE MUTHOGA: if we are told that the scope will be that which is limited by the US government, I see no difficulties in the US government saying, we allow cross-examination on these matters only [...]

T. 24 January 2007, p. 35, l. 21-23 (closed session):

JUDGE MUTHOGA: [...] Because if we have [an appendix comprising the subjects already agreed upon with the United States state department], we have no difficulty making the order because we know if you step out of that, you will be shown the red card.

T. 24 January 2007, p. 37, l. 20-22 (closed session):

JUDGE SHORT: [...] are you sure that everything in this will-say statement is authorized by the United States government? In which case we can make an order to satisfy them and the direct examination will be limited to what is contained in this will-say statement.

<sup>27</sup> T. 24 January 2007, pp. 46-47 (closed session).

<sup>28</sup> T. 24 January 2007, p. 46 (closed session). See also p. 36, l. 20-22:

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preserves the Chamber's power to apply Rule 89(C) and exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".<sup>29</sup> The Appeals Chamber concedes that one could have understood from the discussion held on 24 January 2007 that, at that time, the acceptance of Condition B was solely contingent upon clarification of the scope of examination authorised by the U.S. Government. However, the Appeals Chamber notes that the Trial Chamber did not stipulate that it would automatically grant Condition B upon that clarification being given.

11. In its Decision of 8 February 2007, the Trial Chamber elucidated the reasoning it had provided in its Oral Decision of 24 January 2007 by explaining that its concerns about retaining authority over the proceedings did not stem exclusively from the vagueness of the scope of examination authorised by the U.S. Government. It explained that a "proper balance between protecting the legitimate confidentiality concerns of the U.S. Government and the Chamber's authority over the proceedings" had been reached in the Oral Decision of 24 January 2007.<sup>30</sup> It emphasised that it was "not in favour of making an order limiting the direct and cross-examination of the Witness to what is authorised by the U.S. Government",<sup>31</sup> which made clear that the vagueness of the scope of examination authorised by the U.S. Government was not the only obstacle to the acceptance of Condition B. Accordingly, the reasons for which the Trial Chamber was unwilling to grant Condition B were that the protections granted in the Oral Decision were sufficient to address the U.S. Government's concerns, and that it had to "retain authority over the proceedings".<sup>32</sup> The Trial Chamber upheld this conclusion in the Impugned Decision on the ground that, although the subject matter of the Ambassador's testimony was clarified, the Appellant had not addressed its concerns about retaining authority over the proceedings.<sup>33</sup>

12. The Appeals Chamber therefore finds that the Trial Chamber did not depart from its previous decisions in the Impugned Decision. While the acceptance of Condition B was undeniably contingent upon the clarification of the scope of examination authorised by the U.S. Government, the Trial Chamber made clear in its Decision of 8 February 2007 that its concerns about retaining authority over the proceedings went beyond the delimitation of the scope of the examination. Contrary to the Appellant's submission, the Trial Chamber provided clear reasons for denying Condition B in both the Decision of 8 February 2007 and in the Impugned Decision. The Appeals Chamber concludes that the Trial Chamber did not err in the exercise of its discretion in this respect.

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JUDGE MUTHOGA: [if you provide us the scope authorized by the United States government] we will then be able to exercise the responsibility of being the determiners of any dispute that might arise between what you discussed to be the scope and what essentially is said to be the scope.

<sup>29</sup> T. 24 January 2007, p. 47 (closed session).

<sup>30</sup> Decision of 8 February 2007, para. 7.

<sup>31</sup> Decision of 8 February 2007, para. 7.

<sup>32</sup> Decision of 8 February 2007, para. 7.

<sup>33</sup> Impugned Decision, paras. 10-12.

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**B. Whether the Trial Chamber erred in the exercise of its discretion in denying Condition B**

13. The Appellant further submits that the Trial Chamber erred in declining to grant Condition B on the ground that it would not retain authority over the proceedings if it did so.<sup>34</sup> The Appellant argues that the only concerns expressed by the Trial Chamber stemmed from the vagueness of the scope of examination authorised by the U.S. Government and that, once that scope had been clarified, the Trial Chamber had not specified the exact nature of its new concerns, which, in any event, are ill-founded.<sup>35</sup> The Appellant emphasises that the Trial Chamber is the only entity that exercises authority over the conduct of the proceedings, and that the U.S. Government is not in a position to usurp that authority: the Trial Chamber would have full authority over the application and interpretation of Condition B, and nothing would prevent it from reversing or revising its decision during the proceedings.<sup>36</sup> He also points to the fact that the Trial Chamber could eventually decide to exclude Ambassador Flaten's testimony.<sup>37</sup> Referring to testimonies given pursuant to Rule 92bis of the Rules and, *inter alia*, to the *Bagosora et al.* case, he further submits that conditions similar to Condition B were imposed in other cases.<sup>38</sup>

14. Furthermore, the Appellant alleges that the Trial Chamber erred in failing to consider the fairness of the trial, the interests of justice and the rights of the accused in reaching the Impugned Decision. He argues that, had the Trial Chamber applied the correct legal test, balancing its discretionary power to control the proceedings with the interests of justice, it would have granted Condition B.<sup>39</sup>

15. Finally, the Appellant submits that the Impugned Decision is prejudicial to him insofar as it deprives his defence of an important, reliable and credible witness whose testimony was important to his case.<sup>40</sup> After having specified that Condition B would not prejudice the Prosecution, he recalls that the authorisation given by the U.S. Government is extremely broad and that, in practice, the parties would not be prevented from raising any questions they deem

<sup>34</sup> *Interlocutory Appeal*, p. 17, "Question II".

<sup>35</sup> *Interlocutory Appeal*, paras. 52-56.

<sup>36</sup> *Interlocutory Appeal*, paras. 57-61.

<sup>37</sup> *Interlocutory Appeal*, para. 62.

<sup>38</sup> *Interlocutory Appeal*, paras. 67-79, referring to *The Prosecutor v. Théoneste Bagosora et al.*, Case No ICTR-98-41-T, *Modalities for Presentation of a Witness*, 20 September 2006, attached to the Interlocutory Appeal as Annex XII; *The Prosecutor v. Jean-Paul Akayesu*, Case No ICTR-96-4-T, Order Granting Leave for Amicus Curiae to Appear, 12 February 1998, attached to the Interlocutory Appeal as Annex XIII (French version); T. 25 February 1998, pp. 2-22, attached as Annex XV; *The Prosecutor v. André Ntagerwa et al.*, Case No ICTR-99-46-T, T. 19 February 2003 (French version), p. 3 and T. 18 February 2003 (French version), pp. 62 and 74; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002; Special Court for Sierra Leone, *Prosecutor v. Brima et al.*, SCSL-04-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer on Grounds of Confidentiality, 26 May 2006.

<sup>39</sup> *Interlocutory Appeal*, paras. 82-97.

<sup>40</sup> *Interlocutory Appeal*, paras. 98-117.

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appropriate.<sup>41</sup> He asserts that the effects of Condition B should not have been considered as outweighing the prejudice caused to justice, and to himself, through the loss of evidence.<sup>42</sup>

16. The Prosecution responds that the Appellant fails to identify any error committed by the Trial Chamber in the exercise of its discretionary power to conduct the trial proceedings.<sup>43</sup> The Trial Chamber, it avers, "struck an appropriate balance between the interests of the U.S. and its judicial duty to maintain control over the proceedings."<sup>44</sup> The Prosecution further alleges that the "proposed condition is unsatisfactory and inconsistent with the good management of the trial",<sup>45</sup> mainly because it would unduly restrict the rights of the Prosecution and the co-accused to cross-examination.<sup>46</sup> It adds that the Trial Chamber's ruling is consistent with the provisions of Rule 90 of the Rules and that the interpretation of Rule 70 should not diminish the scope of Rule 90.<sup>47</sup> In its view, "if the Trial Chamber were to accept Condition B, it would be abdicating its responsibility to control the proceedings in an effective manner."<sup>48</sup>

17. The Appeals Chamber recalls that Rule 70 has been incorporated in the Rules to encourage States to fulfill their cooperation obligations under Article 28 of the Statute of the Tribunal.<sup>49</sup> It creates an incentive for such cooperation by permitting information to be shared on a confidential basis and by guaranteeing the providers of such information that the confidentiality thereof, together with its sources, will be protected.<sup>50</sup> Rule 70 operates on the basis that governments showing a genuine interest in protecting the information in their possession may invoke Rule 70 to ensure the protection of such information by requiring limitations on the scope of a witness's testimony or on the dissemination of that witness's testimony.<sup>51</sup> If a Trial Chamber finds that the information has been provided in accordance with Rule 70(B), the information will benefit from the protections afforded under Rules 70(C) and (D).<sup>52</sup> However, the restrictions referred to under Rules 70(C) and (D) will only apply after the Trial Chamber has determined that the

<sup>41</sup> Interlocutory Appeal, paras. 120-121.

<sup>42</sup> Interlocutory Appeal, paras. 123-125.

<sup>43</sup> Response, paras. 7-8.

<sup>44</sup> Response, para. 9.

<sup>45</sup> Response, p. 3.

<sup>46</sup> Response, paras. 10-13.

<sup>47</sup> Response, paras. 14-16.

<sup>48</sup> Response, para. 14. With respect to the reception of Ambassador Flaten's evidence, the Prosecution submits that the appropriate course would be to allow the Trial Chamber to decide if any particular question infringes Rule 70 in presence of a representative of the U.S. Government during the hearing (para. 17). The Prosecution also requests the Appeals Chamber to rule on whether Rule 70 can be relied upon by the Defence and whether it applies to trial matters as opposed to matters of investigation (para. 18).

<sup>49</sup> See *Milutinović et al.* Decision, para. 18. Article 28(1) reads: "States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."

<sup>50</sup> *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-AR108bis&AR73.3, Decision on Interpretation and Application of Rule 70, confidential, 23 October 2002 ("*Slobodan Milošević* Decision of 23 October 2002"), para. 19.

<sup>51</sup> *Prosecutor v. Dragomir Milošević*, Case No IT-98-29/1-T, Decision on Prosecution's Application for Rule 70 Conditions for Testimony of Witness W-156 and Prosecution Motion for Admission of Witness Statement Pursuant to Rule 92ter, 23 April 2007, p. 3. See also *Prosecutor v. Milutinović et al.*, Case No IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007, para. 26.

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restrictions imposed by the government upon the witness's testimony would not undermine the need to ensure a fair trial, and that the need to ensure a fair trial would not substantially outweigh the probative value of the testimony so as to lead to its exclusion.<sup>53</sup> Indeed, Rule 70(F) provides that Rule 70 restrictions shall not "affect a Trial Chamber's power under Rule 89(C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."<sup>54</sup>

18. By conducting the balancing exercise under Rule 70(F), a Trial Chamber ensures that the government's legitimate confidentiality concerns are respected, and, at the same time, that the conduct of the trial remains fair and expeditious. While according due weight to legitimate State concerns related to national security and the need for States to safeguard their interests,<sup>55</sup> the Appeals Chamber adopts the holding of the ICTY Appeals Chamber in the *Milutinović et al.* case that "this deference to States' interests does not go as far as to supersede a Trial Chamber's authority to maintain control over the fair and expeditious conduct of the trial".<sup>56</sup>

19. In the Impugned Decision, the Trial Chamber denied Condition B on the ground that it had to retain authority over the proceedings.<sup>57</sup> The Appeals Chamber recalls that a Trial Chamber must retain control over proceedings before it in order to fulfil its obligation to ensure that the proceedings are fair and expeditious. The Appeals Chamber will now examine whether Condition B would have precluded the Trial Chamber from exercising its authority over the proceedings in such a way that it would have outweighed the purported probative value of Ambassador Flaten's testimony.

20. First, the Appeals Chamber notes that the Trial Chamber had been apprised prior to issuing the Impugned Decision that the U.S. Government would not authorise Ambassador Flaten to testify before the Tribunal unless the Trial Chamber accepted limitations on the scope of his testimony, as had been requested.<sup>58</sup> The U.S. Government adhered to its requirement that Condition B be granted even after the Trial Chamber found in its Decision of 8 February 2007 that the proper

<sup>52</sup> See *Slobodan Milošević* Decision of 23 October 2002, paras. 20 and 29.

<sup>53</sup> See *Milutinović et al.* Decision, para. 18.

<sup>54</sup> See *Milutinović et al.* Decision, para. 16, referring to Rule 70(G) of the Rules of the ICTY.

<sup>55</sup> See *Prosecutor v. Tihomir Blaškić*, Case No 95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 67; See also *Milutinović et al.* Decision, para. 18.

<sup>56</sup> *Milutinović et al.* Decision, para. 18.

<sup>57</sup> Impugned Decision, para. 12.

<sup>58</sup> Letter of the Executive Agent for Information Sharing of the United States Department of State to Counsel Marciel, confidential, dated 2 April 2007 ("U.S. Letter Dated 2 April 2007"), attached to the Interlocutory Appeal as Annex B of Annex VI ("The Trial Chamber did not limit cross-examination to direct examination, a condition that we had set for making Ambassador Robert Flaten available to testify for the defence [...] As a Rule 70 provider this condition is necessary to protect our equities. In that regard, governments are different from individuals testifying in their private capacity about activities undertaken outside government channels"); Letter from the U.S. Government Giving Authorisation for the Testimony of Ambassador Robert Flaten, sent by the Executive Agent for Information Sharing of the United States Department of State to Counsel, confidential, dated 3 April 2007 ("U.S. Letter Dated 3 April 2007"), attached to the Interlocutory Appeal as Annex A of Annex VI ("this authorisation is contingent upon the Court's willingness to grant Condition B of the measures requested"). See also Motion for Reconsideration, paras. 26-27.

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balance between the U.S. Government's concerns and the Chamber's authority over the proceedings had been reached without granting the condition. In the Certification Decision, the Trial Chamber explained that "it is the U.S. Government's insistence that the Chamber grant condition (b) which has made it impossible for Ambassador Flaten to testify."<sup>59</sup> The Appeals Chamber considers, however, that the U.S. Government's insistence that the Chamber grant Condition B had been counterbalanced by its efforts to clarify the scope of Ambassador Flaten's testimony.<sup>60</sup> The Appeals Chamber concludes that the U.S. Government attempted to cooperate with the Tribunal in good faith, and displayed a genuine interest in protecting the confidential information in its possession.

21. The Appeals Chamber further takes note of the Appellant's argument that Ambassador Flaten would have been able to give evidence directly relevant to some of the charges against him.<sup>61</sup> It finds that the Appellant's perseverance in requesting the Trial Chamber to grant Condition B tends to show that Ambassador Flaten's testimony is important for his defence. Considering that the Trial Chamber itself has held that the Impugned Decision affected "the right of a party to adduce potentially important evidence in a trial",<sup>62</sup> the Appeals Chamber accepts that Ambassador Flaten would have given evidence of potentially high probative value to issues in the present case.

22. With regard to whether the limitations placed upon Ambassador Flaten's testimony under Condition B would have resulted in substantial unfairness such as to outweigh the probative value of his testimony, the Appeals Chamber makes the following observations. On 24 January 2007, the Trial Chamber observed that "[a]s the prospective witness is a Defence witness, the limitations on cross-examination do not impact the rights of the Accused."<sup>63</sup> The Appeals Chamber recalls that Rule 70(E) is indeed aimed at ensuring that the right of an accused to challenge evidence presented by the Prosecution under Rules 70(C) and (D) remains unaffected and, therefore, finds no error in the Trial Chamber's statement.

23. The Appeals Chamber notes that prior to filing its Response to the Interlocutory Appeal, the Prosecution had not expressed any concerns with the Appellant's request other than those related to the vagueness of the scope of examination authorised by the U.S. Government under Condition B.<sup>64</sup> Therefore, by arguing in its Response to the Interlocutory Appeal that Condition B would affect its cross-examination of Ambassador Flaten in such a way that his testimony should be

<sup>59</sup> Certification Decision, para. 10.

<sup>60</sup> The U.S. Government provided twice new detailed information in order to clarify the scope of Ambassador Flaten's testimony. See Annexes A and B to Motion of 30 January 2007, and Annexes A and B to Motion for Reconsideration.

<sup>61</sup> Interlocutory Appeal, paras. 98-116. See also Motion for Certification, para. 13.

<sup>62</sup> Certification Decision, para. 10.

<sup>63</sup> T. 24 January 2007, p. 46 (closed session).

<sup>64</sup> See T. 24 January 2007, pp. 29 and 33 (closed session); Prosecution Response of 31 January 2007. The Appeals Chamber notes that, at the outset, the Prosecution even accepted the Appellant's request that the Trial Chamber grant the four conditions imposed by the U.S. Government upon Ambassador Flaten's testimony. See Prosecution Response of 24 January 2007, para. 6 and T. 24 January 2007, p. 46 (closed session).

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excluded, the Prosecution clearly departs from its previous position on the issue.<sup>65</sup> However, the Appeals Chamber considers that the Prosecution would not have suffered undue prejudice from the limitations imposed by the U.S. Government under Condition B.

The Appeals Chamber finds that the Appellant's co-accused would not have suffered undue prejudice either. During the hearing of 24 January 2007, only Counsel for Justin Mugenzi expressed concern that his right to cross-examination would be affected if the Trial Chamber were to grant Condition B.<sup>66</sup> The Appeals Chamber however notes that his concern stemmed from the vagueness of the scope of examination authorised by the U.S. Government and that it would have been allayed as soon as the scope were clarified. Counsel for Prosper Mugiraneza, in contrast, offered arguments clearly in support of the Appellant's request.<sup>67</sup>

25. In addition, the extent of the scope of examination authorised by the U.S. Government indicates that the application of Condition B would not have resulted in substantial unfairness to any of the parties. In this regard, the Appeals Chamber points to the observations made by the U.S. Government in the letters it exchanged with the Appellant after the Oral Decision of 24 January 2007. The U.S. Government stated that it was "confident that the broad scope provided will allow for any direct or cross-examination relevant to [the Appellant's] defence."<sup>68</sup> It also stressed that it would be prepared to work with the Prosecution and Defence to resolve expeditiously any dispute arising during Ambassador Flaten's testimony.<sup>69</sup> In light of the U.S. Government's purported flexibility with regard to the limitations imposed under Condition B and its apparent readiness to solve any disputes arising from these limitations, the Appeals Chamber is persuaded that the application of Condition B would not have precluded the co-accused and the Prosecution from conducting thorough cross-examinations on matters relevant to their cases.

26. Lastly, the Appeals Chamber reiterates that pursuant to Rule 70(F), the Trial Chamber would have been able to exclude the evidence provided by Ambassador Flaten if it found – during the course of his testimony – that the application of Condition B unfairly limited the rights of the co-accused or the Prosecution. Rule 70(F) provides a safeguard against any undue prejudice that could be caused to the parties as a result of the limitations imposed by a State for the protection of the confidential information in its possession. The Appeals Chamber recalls in this regard that the public interest served in ensuring that information given in confidence to one of the parties remains confidential finds its limitation in the obligation imposed on this Tribunal by Articles 20 and 21 of

<sup>65</sup> Response, paras. 10, 14-15.

<sup>66</sup> T. 24 January 2007, pp. 37-39 (closed session).

<sup>67</sup> T. 24 January 2007, pp. 39-43 (closed session).

<sup>68</sup> U.S. Letter Dated 2 April 2007.

<sup>69</sup> U.S. Letter Dated 2 April 2007. *See also* U.S. Letter Dated 3 April 2007 ("our authorization of the scope of Ambassador Flaten is very broad, indeed. [...] We have been, and remain, prepared to address any concerns the prosecution might have as they arise and would respond with alacrity to any of their concerns").

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the Statute to ensure a fair trial. In the present case, the Trial Chamber stressed on 24 January 2007 that "Rule 70(F) clearly preserves the Chamber's power to apply Rule 89(C) and exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."<sup>70</sup> The Appeals Chamber finds that such a safeguard in the Rules means that the Trial Chamber would have retained authority over the proceedings even with Condition B applied. Indeed, if the Trial Chamber were to find that the application of Condition B had unfairly limited the rights of the co-accused or the Prosecution to confront the witness during his testimony, the ultimate remedy would be the exclusion of the evidence.<sup>71</sup>

27. The Appeals Chamber considers that the application of Condition B would not have undermined the fairness of the trial, as the Trial Chamber would have ultimately retained authority over the proceedings under Rules 70(F) and 89(C). As a result of the Impugned Decision denying Condition B, the Appellant has been prevented from exercising his right to adduce potentially probative evidence in his defence. Balancing the different interests involved in the case, the Appeals Chamber finds that the Trial Chamber committed a discernible error in the exercise of its discretion when denying the request to Grant Condition B.

#### IV. DISPOSITION

28. For the foregoing reasons, the Appeals Chamber

**ALLOWS** the Interlocutory Appeal,

**SETS ASIDE** the Impugned Decision and

**ORDERS** the Trial Chamber to grant Condition B.

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

Done this sixteenth day of July 2007,  
At The Hague, The Netherlands.



Fausto Pocar  
Presiding Judge

<sup>70</sup> T. 24 January 2007, p. 47 (closed session).

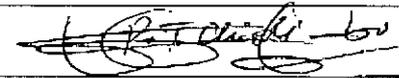
<sup>71</sup> The same *rationale* was applied in several cases before ICTY Trial Chambers: *Prosecutor v. Radoslav Brdudin and Momir Talić*, Case No IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paras. 25 and 27; *Prosecutor v. Milutinović et al.*, Case No IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend its Rule 65ter List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, paras. 34 and 36; *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-T, Decision on the Prosecution's Motion to Grant Specific Protection Pursuant to Rule 70, confidential, 25 July 2002, para. 19; *Slobodan Milošević* Decision of 23 October 2002, para. 26. Incidentally, the Appeals Chamber notes that the Trial Chamber seized of the *Bagosora et al.* case granted a condition similar to Condition B for the appearance of a colonel serving in the French military, recalling that it retained authority to resolve any disputes as to the proper scope of questioning which might arise during the testimony: *The Prosecutor v. Théoneste Bagosora et al.*, Case No ICTR-98-41-T, Modalities for Presentation of a Witness, 20 September 2006, para. 5 and Disposition.



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

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**APPEALS CHAMBER – PROOF OF SERVICE**  
**CHAMBRE D'APPEL - PREUVE DE NOTIFICATION**

Date:	17 July 2007	Case Name / affaire: <i>Bizimungu et al.</i>	The Prosecutor v. <b>Casimir BIZIMUNGU</b> <b>Justin MUGENZI</b> <b>Jerome BIKAMUMPAKA</b> <b>Prosper MUGIRANEZA</b>
		Case No / no. de l'affaire: <b>ICTR-99-50-T</b>	
To:	<b>OTP, Trial Attorney in charge of case</b> <input type="checkbox"/> In The Hague <input checked="" type="checkbox"/> In Arusha <input type="checkbox"/> In Kigali <b>A:</b> <b>APPEALS UNIT</b> <input checked="" type="checkbox"/> Ms Félicité Talon  <input checked="" type="checkbox"/> Judge / Juge Theodor Meron President / <i>Président</i> <input checked="" type="checkbox"/> Judge / Juge Mohamed Shahabuddeen <input checked="" type="checkbox"/> Judge / Juge Florence Mumba <input checked="" type="checkbox"/> Judge / Juge Fausto Pocar <input checked="" type="checkbox"/> Judge / Juge Andresia Vaz  <input checked="" type="checkbox"/> Ms Catherine Marchi-Uhel <input checked="" type="checkbox"/> Mr Roman Boed <input checked="" type="checkbox"/> Concerned Associate Legal Officers <input checked="" type="checkbox"/> Mr. Charles Zama  <b>DEFENSE</b> <input checked="" type="checkbox"/> Accused / <i>accusé</i> : Casimir BIZIMUNGU; Justin MUGENZI; Jerome BIKAMUMPAKA; Prosper MUGIRANEZA.  <input checked="" type="checkbox"/> Lead Counsels / <i>Conseil Principal</i> : Ms. Michelyne C. St. Laurent; Mr. Ben Gumpert; Mr. Pierre Gaudreau; Mr. Tom Moran <small>(name / nom)</small> <input type="checkbox"/> In Arusha <small>(complete CMS 2)</small> <input checked="" type="checkbox"/> Fax Number: 1 418 659 4346, 0044 207 421 8080, 1 418 692 3818, 1 713 224 6008  <input type="checkbox"/> Co-Counsel / <i>Conseil Adjoint</i> : Ms. Alexandra Marcil; Mr. Michel Croteau <small>(name / nom)</small> <input type="checkbox"/> In Arusha <small>(complete CMS 2)</small> <input type="checkbox"/> Fax Number:		
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