

**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 8 July 2009

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Reasons of: 8 July 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**WRITTEN REASONS FOR ORAL DECISION ON
DEFENCE APPLICATION FOR PERMISSION TO
CROSS-EXAMINE MUHAMED SACIRBEY
REGARDING HIS PRE-TRIAL STATEMENTS TO THE
PROSECUTION**

The Office of the Prosecutor

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Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) hereby renders written reasons for an oral decision handed down during the trial hearing of 1 July 2009.

I. PROCEDURAL BACKGROUND

1. On 29 June 2009, during the cross-examination of Muhamed Sacirbey, the Defence questioned him on the contents of a prior interview of the witness by members of the Prosecution. The Prosecution objected to the Defence’s line of questioning on grounds of relevancy.¹ Relying on a ruling by the International Criminal Tribunal for Rwanda (“ICTR”) in the case of *Prosecutor v. Bizimungu et al.* (“*Bizimungu Decision*”)², the Prosecution submitted that absent an application containing substantiated allegations of misconduct by Prosecution staff, the Defence should be limited to the topics of the number of such meetings, their dates and duration.³ As a result, the Trial Chamber ordered the Defence to file such a substantiated application before being allowed to pursue the desired line of cross-examination (“*Impugned Order*”).⁴

2. On 30 June 2009, the Defence publicly filed the “Application for Permission to Cross-Examine Muhamed Sacirbey Regarding His Pre-Trial Statements to the OTP, Made Pursuant to the Trial Chamber’s Oral Order of 29 June 2009 with Public Annex” (“*Application*”). On 1 July 2009, the Prosecution publicly filed the “Response to Defence Application for Permission to Cross-Examine Muhamed Sacirbey Regarding His Pre-Trial Statements to the OTP, Made Pursuant to the Trial Chamber’s Oral Order of 29 June 2009” (“*Response*”). During the trial hearing of 1 July 2009, the Trial Chamber orally granted the alternative request in the *Application*.⁵

II. SUBMISSIONS

A. Defence Application

3. In its *Application*, the Defence requested that (a) the Trial Chamber should reconsider its *Impugned Order* and not apply the holding in the *Bizimungu Decision* in the present circumstances

¹ T. 7582-7601.

² *Prosecutor v. Bizimungu et al.*, ICTR-00-56-T, Decision on Bizimungu’s Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor’s Objection Raised During the 3 March 2005 Hearing, 1 April 2005.

³ T. 7589.

⁴ T. 7598-7599.

⁵ T. 7728. See para. 3, *infra*.

("Main Request") and (b) in the alternative, that the Defence has shown good cause for pursuing the desired line of questioning with witness Sacirbey ("Alternative Request").⁶

4. In support of its Main Request, the Defence argued that the *Bizimungu* Decision was inapplicable to the present matter as, among other things, that case involved undisclosed interview records where privilege was asserted.⁷ The Defence further submitted that *Bizimungu* did not involve pre-trial witness interviews as is the case in the present matter.

5. More generally, the Defence asserted that pre-trial witness statements must be disclosed under Rule 66(A)(ii) and are *always* a proper subject for cross-examination under the Tribunal's Rules of Procedure and Evidence ("Rules"),⁸ and that it is not required to justify the basis for questions asked in cross-examination other than that they are relevant.⁹

6. Finally, the Defence invoked Momčilo Perišić's right to cross-examination under Article 21 of the Statute of the Tribunal, as governed by Rule 90(H) of the Rules, which would entitle the Defence to inquire about the manner in which a pre-trial witness interview is conducted.¹⁰ In this context, reference was made to a ruling by another Trial Chamber, which held that "[t]he Rules of the Tribunal do not limit the matters that may be raised during cross-examination which is directed solely at the credibility of the witness."¹¹

7. In support of its Alternative Request, the Defence asserted it should be permitted to cross-examine the witness regarding his pre-trial witness interviews because this line of inquiry was pursued in good faith and sufficient substantiation in justification thereof had been made.¹² In this regard, the Defence submitted an Annex with its Application ("Annex A"), which transcribed a portion of the conversation between Muhamed Sacirbey and (then) Prosecutor Geoffrey Nice during one of Sacirbey's pre-trial interviews.

B. Prosecution Response

8. In its Response, the Prosecution opposed both Requests contained in the Defence Application. The Prosecution argued that in the Impugned Order, the Trial Chamber correctly applied the *Bizimungu* Decision to the situation at hand and that no prejudice to the rights of the Accused results from it. Specifically, the Prosecution asserted that the *Bizimungu* Decision applies

⁶ Application, paras 36-37.

⁷ Application, paras 7, 19-24.

⁸ Application, para. 22, emphasis in the original.

⁹ Application, para. 26.

¹⁰ Application, paras 8, 14, 29-30.

¹¹ Application, para. 29, referring to *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, 15 December 2005, para. 9.

irrespective of whether the records in question were disclosed.¹³ The Prosecution also submitted that whether the Defence made any suggestion of prosecutorial misconduct in good faith is irrelevant.¹⁴

9. As regards prejudice to the rights of the Accused, the Prosecution averred that the Impugned Order does not foreclose the Defence pursuing its desired line of cross-examination; it only requires that the Defence file a substantiated allegation of prosecutorial misconduct beforehand.¹⁵ According to the Prosecution, such allegations were not thoroughly substantiated¹⁶ and the excerpt of the interview submitted by the Defence was put forward without consideration of the proper context.¹⁷

III. APPLICABLE LAW

10 The Trial Chamber recalls that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases if a clear error in reasoning has been demonstrated or if it is necessary to do so to prevent injustice.”¹⁸

11 Rule 66 of the Rules provides, in relevant part, that:

- (A) Subject to the provisions of Rules 53 and 69, the prosecutor shall make available to the defence in a language the accused understands,
- (i) [...]
 - (ii) within the time-limit prescribed by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

12 Rule 90 of the Rules provides, in relevant part, that:

- (H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

¹² Application, paras 28, 34.

¹³ Response, para. 6.

¹⁴ Response, para. 7.

¹⁵ Response, para. 10.

¹⁶ Response, para. 13.

¹⁷ Response, paras 16-21. The Prosecution included two annexes (“Prosecution Annex A” and “Prosecution Annex B”), and asserted that in light of these materials, the absence of improper conduct on the part of (then) Prosecutor Geoffrey Nice was evident.

¹⁸ *Prosecutor v. Édouard Karamera et al.*, Case No. ICTR-98-44-AR73(c), Decision on Motions for Reconsideration, 1 December 2006, para. 6; *Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21-A *bis*, Appeals Judgement on Sentence, 8 April 2003, para. 49.

IV. DISCUSSION

A. Main Request

13 In respect of its Main Request, the Defence had to demonstrate the existence of a clear error in reasoning in the Impugned Order, or that reconsideration was necessary to prevent injustice.

14 As a preliminary point, the Trial Chamber noted that the Defence was correct in asserting that the objection by the Prosecution in *Bizimungu* was made on the basis that the information sought by the Defence was privileged,¹⁹ which is not the case in the instant proceedings. However, the Trial Chamber noted that the *Bizimungu* Decision ultimately rejected the assertion of privilege.²⁰ Consequently, the Trial Chamber did not consider the matter of privilege a basis upon which the *Bizimungu* Decision is distinguishable from the present matter.

15 The Trial Chamber also noted that there is a difference between the present matter and the circumstances of the *Bizimungu* Decision because the facts in *Bizimungu* involved interviews with a witness and the Prosecution that were never disclosed to the Defence, whereas in this case audio-recordings of the interviews were disclosed to the Defence.²¹ However, the Trial Chamber did not consider that this distinction rendered the principle in the *Bizimungu* Decision inapplicable to the present case.²² The Trial Chamber did not find that the Defence's arguments in this regard demonstrated a clear error of reasoning in the Trial Chamber's Impugned Order.

16 Finally, the Trial Chamber was fully mindful of the Accused's right to examine the witnesses testifying against him under Article 21 of the Statute, as well as that evidence tendered under Rule 66(A)(ii) of the Rules and matters of witness credibility, including the manner in which a pre-trial interview was conducted and whether a witness was exposed to improper influence, are squarely within the bounds of cross-examination under Rule 90(H)(i) of the Rules. However, recalling the *Bizimungu* Decision, the Trial Chamber also noted that a presumption exists that counsel perform their duties in accordance with ethical principles that govern the legal profession.²³ The *Bimizungu* Chamber balanced these principles by deciding that a party must make a substantiated allegation of misconduct on the part of counsel before they will be permitted to ask questions about the conduct of counsel during pre-trial meetings. While this Trial Chamber is not bound by the findings of other Trial Chambers, it took into account the *Bizimungu* Decision for its

¹⁹ Application, para. 7. See also *Bizimungu* Decision, para. 2.

²⁰ *Bizimungu* Decision, para. 31.

²¹ Application, para. 20.

²² The Trial Chamber still considered that, in light of the presumption of proper conduct of counsel, it is appropriate to require a substantiated allegation of misconduct before allowing cross-examination regarding the manner in which a pre-trial witness interview was conducted: see para. 16, *infra*. See also Response, para. 6.

persuasive value on a point of principle. Reconsideration of the Impugned Order to prevent injustice was therefore not warranted.

17 In conclusion, the Trial Chamber found that the Defence had not demonstrated a clear error of reasoning in the Impugned Order, or that it was necessary to reconsider the Impugned Order to prevent an injustice. The Main Request of the Defence was therefore denied.

B. Alternative Request

18 Alternatively, the Defence sought permission to cross-examine the witness regarding the manner in which the pre-witness interview was conducted on the basis of the substantiated allegation of misconduct. In the absence of guidance in the jurisprudence regarding the threshold required for such substantiation, the Trial Chamber found that the Defence merely had to demonstrate the existence of circumstances upon which a reasonable and informed observer may conclude that the witness was exposed to improper influence. In light of the prominence held by the right of the accused to test the evidence against him, the Trial Chamber was of the opinion that the scope of cross-examination should not be limited lightly.

19 The Trial Chamber carefully examined the transcripts proffered by both the Defence and the Prosecution,²⁴ and found that there is evidence from which a reasonable and informed observer may infer improper influence on the part of Prosecution counsel.²⁵ The Trial Chamber would emphasise that this should by no means be understood as a determination that there in fact *was* such misconduct. However, the transcripts are of a nature warranting further enquiry by the Defence.

20 For these reasons, the Trial Chamber considered that the Defence had sufficiently substantiated its allegations to justify allowing cross-examination of witness Sacirbey about conversations with the Prosecution during pre-trial witness interviews, and granted the Alternative Request.

²³ *Bizimungu* Decision, para. 35.

²⁴ See Application, paras 32-35 and Annex A; Response, paras 13-21 and Annexes A and B.

²⁵ Examples of such evidence include the prosecution's assertion that it create the structure of the witness statement, as well as that the prosecution would decide what the contents of the statement would be and what "sections" of information provided by the witness would be included in a witness statement: Annex A, p. 1. These statements by the Prosecution could give rise to a concern that the contents of a witness statement were improperly influenced by instructions issued by the Prosecution. Additionally, the Trial Chamber considers some of the language used by the prosecution within Annex A questionable, including the assertion the witness' statement should "seduce the judges" into accepting the witness' evidence: Annex A, p. 1.

V. DISPOSITION

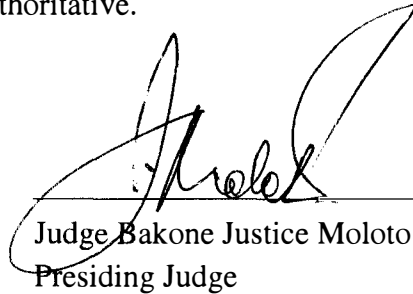
21. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Article 21 of the Statute and Rule 90 of the Rules, the Trial Chamber thereby

GRANTED the Defence Application in part;

ALLOWED the Defence to cross-examine witness Muhamed Sacirbey about discussions with Prosecution Counsel during pre-trial witness interviews; and

DISMISSED the Defence Application in all other respects.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this eighth day of July 2009

At The Hague

The Netherlands

[Seal of the Tribunal]