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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr Adama Dieng

Date: 4 February 2005

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The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

DECISION ON BICAMUMPAKA'S REQUEST PURSUANT TO RULE 73 FOR CERTIFICATION TO APPEAL THE 1 DECEMBER 2004 "DECISION ON THE MOTION OF BICAMUMPAKA AND MUGENZI FOR DISCLOSURE OF RELEVANT MATERIAL."

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Elvis Bazawule
Mr. Justus Bwonwonga
Mr. Shyamlal Rajapaksa

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**
Mr. Ben Gumpert for **Justin Mugenzi**
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran for **Prosper Mugiraneza**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

RECALLING the "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material" filed on 1 December 2004 (the "Impugned Decision");

BEING SEISED OF "Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material" filed on 13 December 2004 (the "Motion");

HAVING RECEIVED AND CONSIDERED:

(i) The "Prosecutor's Response to Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material" filed on 15 December 2004 (the "Response");

(ii) Bicomumpaka's Reply to "Prosecutor's Response Pursuant to Rule 73 for Certification to Appeal the 01 December 2004 Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material" filed on 27 December 2004 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 68(B) of the Rules;

HEREBY DECIDES the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules.

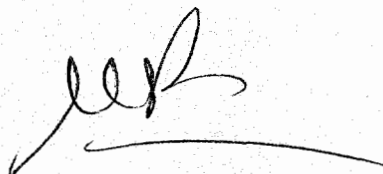
Submissions of the Defence***Relief Sought***

1. The Defence for Bicomumpaka seeks, pursuant to Rule 73, certification for an interlocutory appeal of the Chamber's 1 December 2004 "Decision on the motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material".

Supporting Arguments

2. The Defence for Bicomumpaka argues that under Rule 73(B), the Chamber may grant certification for an interlocutory appeal where the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Trial Chamber, an immediate resolution may materially advance the proceedings.

3. The Defence argues that the Chamber erred in the Impugned Decision when it ruled that Commander Nkole's reference to 35,000 documents and 5000 witness statements relate to the entire event referred to as "the 1994 Rwandan Genocide" and therefore may not have direct relevance to the Government II case. According to the Defence, it is clear from the



Indictment that the Accused are charged with superior responsibility for the events in Rwanda between April and July 1994 – the “1994 Rwandan Genocide”.

4. The Defence agrees with the Chamber’s interpretation that Rule 68(B) does not create new disclosure obligations for the Prosecutor. However, the Defence argues that the Rule provides the Defence with a right of access to the exculpatory material held by the Prosecutor, and that the Prosecutor’s discretion in selecting material to comply with Rule 66(A)(ii) does not preclude the existence of witness statements that are relevant and exculpatory to the Defence.

5. The Defence contends that the Chamber erred in holding that the reference to “without prejudice” in Rule 68(B) indicates that “Relevant Material” also has to be exculpatory, and that the Rule merely allows the Prosecutor to use modern technology to discharge its disclosure obligations. According to the Defence, such an interpretation contradicts the plain meaning, as well as the purpose and structure of Rule 68(B). The Defence argues that “without prejudice” in Rule 68(B) means that the fact that the Prosecutor makes relevant material available to the Defence, does not affect the positive duty to disclose exculpatory material under Rule 68(A).

6. The Defence argues that the Chamber’s interpretation is inconsistent with the intent evidenced in the recent amendment of Rule 68 and would render the Rule superfluous and the amendment redundant. It is the Defence’s submission that the amendment to the title of Rule 68 to refer to two distinct categories of evidence – namely “Evidence” and “Other Relevant” material clearly suggests that the drafters intended for the Defence to have electronic access to relevant material. The Defence argues that exculpatory evidence is a subset of, but distinct from, relevant evidence.

7. The Defence submits that it appears from Witness Nkole’s testimony that the Prosecutor is in possession of 35,000 documents and 5000 witness statements that could be potentially exculpatory, and that it is only by allowing the Defence to electronically access and search this collection that it could determine which evidence is exculpatory and therefore subject to disclosure under Rule 68(A).

8. The Defence further submits that access to this collection of material will ensure that these proceedings are conducted in a fair and expeditious manner, by making sure that the Defence is afforded a real possibility to adequately prepare its case.

9. The Defence cites the Canadian Supreme Court case of *R v. Stinchcombe*¹ and submits that the Prosecutor does not have a proprietary interest in evidence that he collects during investigation, but rather holds such evidence in trust to be utilized in the interests of justice.

10. The Defence argues that Rule 68(B) is a new rule. There are no decisions interpreting it. It is likely to be invoked in future by other accused persons. For these reasons, the Defence contends that appellate resolution would significantly affect the fair and expeditious conduct of this and other proceedings before the Tribunal.

¹ *Stinchcombe v. The Queen* [1991] 3 SCR 326, p333.



11. The Defence also argues that an immediate resolution of the issue will materially advance the proceedings because the collection of materials include broadcasts of Radio Rwanda and RTLM which are necessary for the Defence to substantiate some alibis and attack the credibility of some Prosecution witnesses.

12. The Defence contends that, contrary to the Chamber's holding in the Impugned Decision, the Motion is not frivolous because the Defence has on several occasions met with representatives of the Prosecutor's office and agreed that the interpretation of Rule 68(B) is material and the Prosecutor in fact agreed to grant the Defence access to the relevant material.

The Prosecutor's Response

13. The Prosecutor opposes the Motion and urges the Trial Chamber to refuse certification to appeal.

14. The Prosecutor argues that the jurisprudence of the Tribunal makes it clear that certification to appeal under Rule 73(B) is to be granted only sparingly.² According to the Prosecutor, in determining whether or not to grant certification for an interlocutory appeal, both the ICTR and the International Criminal Tribunal for Yugoslavia (ICTY) have taken the following factors into account: the importance of the issue; whether or not the Appeals Chamber has provided guidance on the issue; and whether there are conflicting approaches among Trial Chambers. The Prosecutor further submits that an appeal would be appropriate only if these factors are truly significant.³

15. The Prosecutor submits that Bicomumpaka's appeal has no prospects of success and that it fails to meet the requirements for certification under Rule 73(B).⁴

16. The Prosecutor further submits that the Chamber neither committed an error of law nor did it abuse its discretion in deciding that Rule 68(B) did not create a new disclosure obligation for the Prosecutor.

The Defence Reply

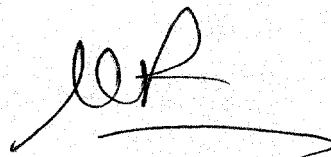
17. The Defence replies that the Prosecutor's response is wrong in law and in fact. The Defence argues that the response contradicts the Prosecutor's stated position in a letter dated 2 December 2004 from the Defence Counsel and Detention Management Section (DCDMS) transmitting the Prosecutor's request to notify all Defence teams of the commissioning of an electronic disclosure system (EDS) at the Office of the Prosecutor (OTP) and encouraging Defence teams to register to use the facility.⁵ Among other things, the DCDMS letter quotes the following paragraph from the Prosecutor's request:

² Prosecutor's response to Bicomumpaka's request Pursuant to Rule 73 for Certification to Appeal the 01 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material", filed 15 December 2004, para. 5.

³ *Ibid.*, para. 7

⁴ *Ibid.*, para. 12 & 15.

⁵ Bicomumpaka's Reply to "Prosecutor's Response to Rule 73 for Certification to Appeal the 01 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material", filed on 23 December 2004, Annex 1 para. 1.



Subsequent to the adoption of Rule 68(B) in the ICTR Rules of Procedure and Evidence, this office has developed and commissioned the Electronic Disclosure System ("EDS") to facilitate electronic disclosure to the Defence of materials in the possession of the OTP that "may be relevant" to their respective cases.⁶

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18. The Defence argues that based on the contents of this letter, Defence teams in other cases not bound by the Impugned Decision, will presumably have electronic access to materials in the possession of the Prosecutor.

19. The Defence argues that the Chamber's interpretation of Rule 68(B) is inconsistent with judicial rules of interpretation and cannons of construction. The interpretation is inconsistent with the structure of Rule 68, and does not follow the plain language of the Rule which only re-emphasizes the Prosecutor's positive obligation to disclose exculpatory material pursuant to Rule 68(A). By limiting access to relevant material, argues the Defence, the Chamber's interpretation is prejudicial to Mr. Bicamumpaka because it undermines the court's truth seeking objectives and contravenes the right to a fair trial guaranteed under Articles 19 and 21 of the Statute.

20. The Defence argues that the Prosecutor's assertions in paragraphs 7 and 12 of the Response support granting certification to appeal the Impugned Decision.⁷

21. The Defence submits that in view of the Prosecutor's failure to oppose the original motion, the Chamber's exercise of discretion in the Impugned Decision was erroneous because it only considered *suo moto* objections to access relevant material.

23. The Defence replies that, contrary to the Prosecutor's pleading in paragraph 14 of the Response, the denial of fees of a motion that was unopposed by the non-moving Prosecutor is a significant issue supporting the granting of certification to appeal.

DELIBERATIONS

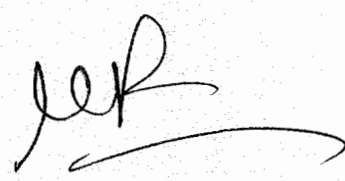
24. The Chamber recalls Rule 73(B) of the Rules which provides as follows:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

25. The Chamber recalls the Decision in *Prosecutor v. Nyiramuhuko* that the general rule is that decisions rendered on motions brought under Rule 73(B) are without interlocutory

⁶ Bicamumpaka's Reply to "Prosecutor's Response to Rule 73 for Certification to Appeal the 01 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", filed on 23 December 2004, Annex 1 para. 2 (1).

⁷ Paragraphs 14 and 15 above.



appeal.⁸ However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled.

26. First, for the Chamber to exercise its discretion in favour of certification, the applicant must show that "the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial." The Chamber considers that the use of the word "significantly" implies that the drafters of the Rule intend to exclude minor or trivial issues that may arise in the course of a trial from certification to appeal. Examples of "significant" issues within the meaning of Rule 73(B) include those that affect the rights of the Accused to a fair trial or, upon which a decision whether or not to certify an appeal may lead to a different result at the end of the trial.

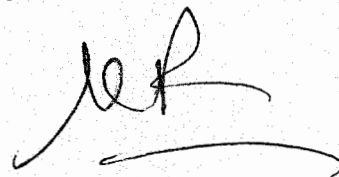
27. Second, the Trial Chamber must be satisfied that immediate resolution by the Appeals Chamber of the issue involved in the decision "may materially advance the proceedings". The Chamber considers that the use of the word "and" in Rule 73(B) implies that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.

28. The Chamber notes that these are the only two conditions it must consider in deciding whether or not to certify an appeal. All other considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber.

29. The Chamber will now consider the Defence arguments in support of the conditions under Rule 73(B). With respect to the first condition, the Chamber recalls the Defence submission that Rule 68(B) is a new provision, there are no decisions interpreting it, and it is likely to be invoked by other accused persons in this and other trials before the Tribunal. The Prosecutor responds that in deciding whether or not to certify an appeal, the Chamber must consider the importance of the issue; whether or not the Appeals Chamber has provided guidance on the issue; and whether there are conflicting approaches among Trial Chambers. The Chamber is satisfied that Rule 68(B) is new, and there are no decisions interpreting it. In view of the significance of the Prosecutor's disclosure obligation in proceedings before the Tribunal, it is likely that Rule 68(B) will be invoked by many other accused persons in future. For these reasons, the Chamber is satisfied that a definitive interpretation of Rule 68(B) by the Appeals Chamber would significantly affect the fair and expeditious conduct of the current proceedings. The Chamber considers that the first limb of the disjunctive first condition for certification to appeal having been satisfied, there is no need to consider the alternative limb i.e. whether the issue will affect the outcome of the trial.

30. With respect to the second condition, the Chamber recalls the Defence contention that it needs access to the material in the Prosecutor's possession in order to prepare its case and because the material includes broadcasts of Radio Rwanda and RTLM which are necessary for the Defence to substantiate some alibis and attack the credibility of some Prosecution witnesses. The Chamber recalls its finding in the Impugned Decision that Rule 68(B) does

⁸ *The Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR 97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, para. 14.



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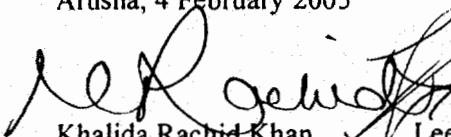
not create a new disclosure obligation for the Prosecutor.⁹ The Chamber also notes that while it agrees with the *dicta* of the Supreme Court of Canada in *R v. Stinchcombe* that the fruits of the Prosecutor's investigation should be used in the interests of justice, this does not absolve the Defence from its obligation to conduct its own investigations and to prepare its case. The Chamber wishes to restate its finding in the Impugned Decision that Rule 68(B) "does not give the Defence the right to conduct an unrestricted search of the electronic databases of the Prosecution."¹⁰ The Chamber is not satisfied that merely stating that the collection of material in the Prosecutor's database may "potentially" include exculpatory material and that the Defence needs this material to prepare its case, is sufficient for the Defence to show that appellate resolution will materially advance the proceedings. The Chamber is therefore not satisfied that the Defence has fulfilled the second requirement for certification under Rule 73(B).

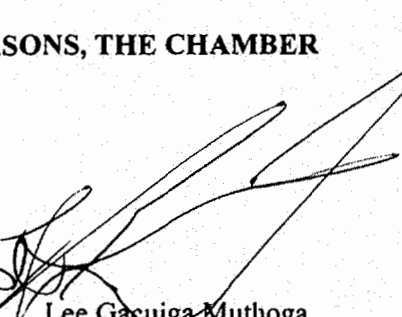
31. The Chamber concludes that the conditions under Rule 73(B) have not been satisfied and is therefore unable to grant certification to appeal the Impugned Decision. However, the Chamber wishes to express its displeasure at the fact that not only did the Prosecutor fail to file a response to the original motion filed on 6 July 2004 after seeking for and being granted an extension of time within which to do so, but also that in its Response to the present motion filed as late as 15 December 2004, the Prosecutor chose to ignore the Defence assertion that the Parties had commenced negotiations with a view to granting the Defence electronic access to relevant material. The Chamber considers it inappropriate that the Prosecutor issued instructions to the DCDMS on or before 2 December 2004, to notify Defence teams of the commissioning of the electronic disclosure system, but chose not to so notify the Chamber even though there was a pending motion seeking electronic access to the same material which was the subject matter of the new disclosure system.

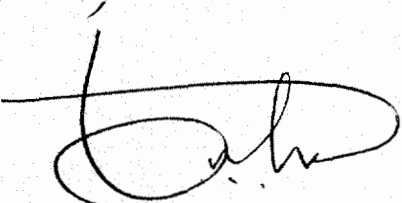
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 4 February 2005


Khalida Rachid Khan
Presiding Judge


Lee Gacuiya Muthoga
Judge


Emile Francis Short
Judge



⁹ The Prosecutor v. C. Bizimungu et al, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material*, 1 December 2004, para. 9.

¹⁰ *Ibid.*