



UNITED NATIONS  
NATIONS UNIES

ICTR-99-50-T  
9-03-2005  
(20712-20706)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

20712

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr Adama Dieng

**Date:** 9 March 2005

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

JUDICIAL SECRETARIES/ARCHIVES  
ICTR  
2005 MAR -9 A 5: 34

Case No. ICTR-99-50-T

**DECISION ON CASIMIR BIZIMUNGU MOTION FOR CERTIFICATION TO  
APPEAL FROM THE TRIAL CHAMBER'S DECISION OF 3 SEPTEMBER 2004  
CONCERNING RULE 73 bis OF THE RULES AND FOR OTHER APPROPRIATE  
RELIEF**

**Office of the Prosecutor:**

Mr Paul Ng'arua  
Mr Ibukunolu Babajide  
Mr Justus Bwonwonga  
Mr Elvis Bazawule  
Mr George William Mugwanya  
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”);

**BEING SEIZED** of “Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber’s Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief” filed on 25 October 2004 (the “Motion”);

**CONSIDERING**

- (i) The “Prosecutor’s Response to Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber’s Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief,” filed on 1 November 2004 (the “Response”); And
- (ii) “Casimir Bizimungu’s Reply to the Prosecutor’s Response to the Motion for Certification to Appeal from the Trial Chamber’s Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief,” filed on 8 November 2004 (the “Reply”);

**NOTING** the “Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73 *bis* (E) to Vary the Prosecutor’s List of Witnesses filed on 25 May 2004” dated 3 September 2004 (the “Impugned Decision”);

**NOTING** further the official translations from the Language Section filed on 28 February 2005: “Casimir Bizimungu’s Response to the Prosecutor’s Motion for Leave to Add Witness GTC to the final list of witnesses”(originally filed in French on 16 August 2004), “Casimir Bizimungu’s amended and confidential response to the Prosecutor’s Motion for Leave to Add Witness GTC to the final list of witnesses” (originally filed in French on 21 August 2004), “Additional information regarding Casimir Bizimungu’s ‘Amended and confidential response to the Prosecutor’s Motion for Leave to Add Witness GTC’” (originally filed in French on 24 August 2004);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the matter solely on the basis of the briefs of the Parties pursuant to Rule 73(A) of the Rules.

## **SUBMISSIONS OF THE PARTIES**

### ***The Defence***

1. The Defence recalls that on 3 September 2004, the Chamber granted the Prosecutor’s Motion to vary his list of witnesses pursuant to Rule 73 *bis*. The Defence is seeking certification for an interlocutory appeal against the Impugned Decision pursuant to Rule 73. The Defence submits that the Impugned Decision raises issues affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution will advance the proceedings.



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2. The Defence presents a summary of the procedural history and background leading up to the Impugned Decision.<sup>1</sup>
3. The Defence submits that, as stated in the Chamber's Decision of 23 June 2004 on factors to be considered to allow a list of witnesses to be reinstated pursuant to Rule 73 bis (E), it has presented the Chamber with a "close analysis of these factors" with regard to the Prosecutor's Motion.<sup>2</sup> The Defence further submits that the errors in the Impugned Decision result from the fact that its submissions in response to the Prosecutor's Motion were not translated from French to English. It is thus argued that the Chamber did not understand fully the Defence submissions. This caused "judicial errors and raises questions of fairness" requiring an immediate resolution.
4. The Defence submits that a mere reading of the Impugned Decision shows the resultant errors: In respect of Witness GTC for example, Paragraph 9 of the Impugned Decision presents an incorrect summary of the Defence submissions as stated in Paragraphs 38-45 of its Amended Response. The Defence points out that at Page 2 of the Impugned Decision, the Chamber took into account the final list of witnesses as filed on 9 June 2004, and not the consolidated and final list dated 25 May 2004 which withdrew Witness GTC. The Defence alleges that this has an impact on the evaluation of the lateness of the filing of the Prosecution Motion.
5. Paragraph 10 of the Impugned Decision is likewise incorrect in its summary of the Defence submissions. The Defence alleges that the Prosecution's justification to add Witness GTC on the list was acknowledged by the Defence but was found to be unsatisfactory in light of the fact that the Prosecution Motion was filed on 12 August 2004 that is 48 hours after the Appeal's Chamber Decision regarding Casimir Bizimungu.
6. The Defence further submits that Paragraphs 13 and 22 of the Impugned Decision also reflect a misunderstanding of the Defence submissions in that the Defence never used the word "*crédibilité*" (credibility) in its submissions but used "probative value" which may be appreciated in the light of credibility and relevance.
7. Notwithstanding the wide discretion afforded to the Chamber by Rule 98(C), regard must be given to the Defence submission in the spirit of Rule 73 bis (E). Where the Chamber decides to allow the Prosecutor to vary his witness list "one full year after the commencement of the trial," the Defence argues that factors such as the probative value of the testimony sought to be included as well any prejudice which may be caused to the Accused person should be considered.
8. The Defence submits that Paragraph 19 of the Impugned Decision erred in holding that the disclosures as of 8 October 2003 provided by the Prosecutor gave the Accused sufficient notice such that he would not be prejudiced as a result of the varied list of witnesses. In fact, further disclosure in respect of Witness GTC was

<sup>1</sup> See the Motion, at pp. 2-5.

<sup>2</sup> See *Bizimungu et al.*, ICTR-99-50-T, "Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 bis (E) for Leave to Vary the Prosecutor's List of Witnesses – Confidential," 23 June 2004 at para. 17.

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made on 17 August 2004. The Defence contends that its submissions in this regard were “apparently not understood or ignored in the impugned Decision.”

9. The Defence also states that it made extensive arguments in French challenging the Prosecution’s late submission, the lack of justification for the addition of Witness GTC, the late disclosures with regard to the latter. Submissions were also made as to how the addition of Witness GTC would cause “irreparable prejudice to the Accused” given the lack of relevance and probative value of the witness’ testimony.
10. Referring to Article 31 of the Statute on the working languages of the Tribunal, the Defence states that it has repeatedly complained of the language difficulties faced by it. The Defence points out that to date, none of its submissions has ever been formally translated into English before a Decision is rendered by the Chamber, thus placing it in a “complex dilemma” with regard to the working languages of the Tribunal and providing the Accused with an adequate Defence. In the final analysis, the Defence states that its submissions in English are a pale reflection of the arguments had they been made in French. It is submitted that, in effect, this leads to a situation in which the legal principle of *audi alteram partem* has been violated in that a party’s submissions are not being fully and accurately translated and therefore not fully and accurately understood; thus bringing into question the very fairness of the proceedings.
11. Finally, the Defence argues that the Impugned Decision raises an issue affecting the fair and expeditious conduct of the proceedings or the outcome of the trial as the addition of Witness GTC would cause an irreparable prejudice to the Accused.

### ***The Prosecution’s Response***

12. The Prosecution opposes the Motion and prays that it be denied as it does not meet the criteria of Rule 73 (B). The Prosecution particularly emphasises the exceptional nature of interlocutory appeals and cites the *Nyiramasuhuko* Decision, which this Trial Chamber concurred with, in support of its position.<sup>3</sup>
13. The Prosecution submits that in deciding whether or not to certify an appeal, the Chamber must consider factors such as the importance of the issue, whether the Appeals Chamber has previously provided guidance on the matter and whether there are conflicting approaches amongst the Trial Chambers in dealing with the issue.<sup>4</sup> It is argued that “only if factors are truly significant will an appeal be appropriate”.
14. It is also submitted that the instant application “has no prospects of success on Appeal”. The Prosecution contends that the Defence “is unlikely to prevail in persuading the Appeals Chamber to overturn the Trial Chamber’s decision based merely on [the] assumption that the Trial Chamber misunderstood [its] submissions”.

<sup>3</sup> *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motion 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, at paras. 14-15. *Bizimungu et al.*, ICTR-99-50-T, Decision On Prosper Mugiraneza’s Motion Pursuant To Rule 73(B) For Certification To Appeal The Trial Chamber’s Oral Decision Of 20 February 2004, 12 May 2004, at paras 6-7.

<sup>4</sup> *Prosecutor v. Milosevic*, IT-02-54-T, Decision On Prosecution’s Application For Certification Under Rule 73 (B) Concerning Rule 70, 29 August 2002.



15. As regards the issue of the working languages of the Tribunal and the difficulties faced by the Defence thereon, the Prosecutor contends that “this is a matter of a general nature”. The Prosecutor points out that this Chamber has previously ruled on the exceptional nature of Rule 73(B) and that the Rule cannot “be used for purposes of gaining access to the Appeals Chamber to resolve issues of a general nature”.<sup>5</sup>

**The Defence Reply**

16. The Defence challenges the Prosecution’s assertion that it has no prospects of success on appeal, and also disagrees with the criteria for certification submitted by the Prosecution. In support, the Defence cites the Appeals Chamber’s statement in the instant case:

The party challenging the exercise of discretion must show “that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.”<sup>6</sup>

17. The Defence also disagrees with the Prosecution’s contention that the language issues raised by the Defence are of a “general nature”. The Defence submits that notwithstanding the general nature of the problem, in the instant situation, the language difficulties and lack of translation have prevented the Chamber from giving weight, or “sufficient weight, to a number of considerations that are crucial and relevant under Rule 73 *bis* (E)[...]” The Defence reiterates that the Chamber’s exercise of discretion was based on specific errors as to the facts, as identified in the instant Motion.
18. Finally, the Defence also reiterates its submission with regard to the *audi alteram partem* principle as summarised in Paragraph 8 above.
19. In light of its submissions, the Defence prays for the Motion for certification to be granted. The Defence also prays for the Chamber to order the Registry to ensure *timely* translations of all submissions filed by it in French and for the accuracy of these translations to be verified by the Defence. Finally, the Defence moves for the Chamber to grant it “any other appropriate relief”.

<sup>5</sup> *Bizimungu et al.*, ICTR-99-50-T, Decision On Prosper Mugiraneza’s Motion Pursuant To Rule 73(B) For Certification To Appeal The Trial Chamber’s Oral Decision Of 20 February 2004, 12 May 2004, at para. 7.

<sup>6</sup> *Bizimungu et al.*, ICTR-99-50-T, Decision On Prosecutor’s Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave To File Amended Indictment, 12 February 2004, at para. 11, citing *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 (“*Karemera*”), para. 9; *Prosecutor v. Milosević*, 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. 5 (footnotes omitted).

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## DELIBERATIONS

20. The Chamber notes that Rule 73(B) which governs the certification of appeal of Motions brought under Rule 73(A) 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.

21. First, the Chamber recalls with approval the reasoning of the Trial Chamber in the *Nyiramasuhuko* case:<sup>7</sup>

As a general observation, it must be noted that the general rule in Rule 73(B) remains this: 'Decisions rendered on such motions are without interlocutory appeal.' This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases,<sup>8</sup> or allowed only in very limited circumstances.<sup>9</sup> Rule 73(B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of such decisions.

22. Second, the Chamber will consider the submissions relating to the first condition for certification and decide if the “decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.” If this condition is met, the Chamber will then consider whether “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.
23. The Chamber notes that the Motion alleges that the Chamber did not fully understand the Defence submissions when rendering the Impugned Decision, in which judicial errors were committed, raising questions of fairness and requiring an immediate resolution by the Appeals Chamber.
24. The Chamber does not consider that the Defence’s general submissions with respect to the working languages of the Tribunal and the difficulties in obtaining translation for the Registry affect in any way the fair and expeditious conduct of the proceedings or the outcome of the trial. The Parties are entitled to file their submissions in either French or English and the Chamber disposes of motions on the basis of submissions filed in both languages.
25. With respect to the Defence’ specific submissions, the Chamber does not find any support in the contention that the Chamber erred in its consideration of the Defence

<sup>7</sup> *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motion 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, at para. 14.

<sup>8</sup> See *R. v. Mills* 1986 Carswell Ont 11652 CR (3d) 1, [1986] 1 SCR 863, 26 CCC (3d) 481 [Supreme Court of Canada]; *Cobbledick v. US*, 60 S Ct 540 (1940) [US Supreme Court]; *Firestone Tire & Rubber Co v. Risjord* 101 S Ct 669(1981) [US Supreme Court].

<sup>9</sup> See, in England and Wales, ss 9(11), 9(3) and 7 of the Criminal Justice Act 1987; ss 35, 31 and 29 of the Criminal Procedure and Investigations Act 1996. See also *R. v. Gunawardena*, [1990] 91 Cr App R 55 [Court of Appeal of England and Wales].




submissions before allowing the Prosecution to reinstate its witness list on the alleged basis of a lack of understanding. The Chamber notes that all relevant factors were duly considered and analysed before rendering the Impugned Decision.

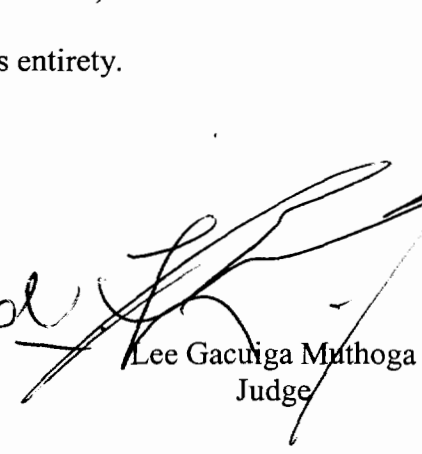
26. Moreover, upon receipt of the translation from the Language Section, the Chamber has reviewed the submissions and arguments put forward by the Defence and do not find any change of its understanding or perception of these submissions and arguments. Its understanding and perception remain the same and its Decision would also not change. The Chamber is satisfied that its understanding of the arguments was correct and that no question of fairness of the proceedings or outcome of the trial can therefore be raised on the basis of the Impugned Decision.
27. Since the Defence failed to demonstrate the first criterion for certification, there is no need to consider whether the second criterion has been met. Consequently, the Chamber considers that the Motion fails to meet the certification criteria and is denied.

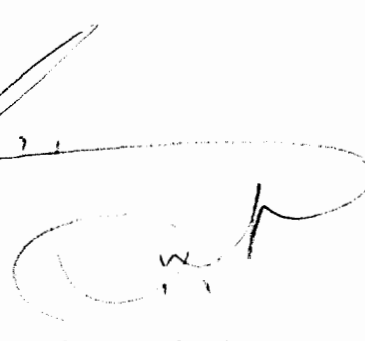
**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion in its entirety.

Arusha, 9 March 2005

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacunga Muthoga  
Judge

  
Emile Francis Short  
Judge

[Seal of the Tribunal]