



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-99-50-T

20-03-2006

(22865-22861)

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OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr. Adama Dieng

**Date:** 20 March 2006

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU

JUSTIN MUGENZI

JÉRÔME-CLÉMENT BICAMUMPAKA

PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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ICTR

**DECISION ON JUSTIN MUGENZI'S APPLICATION FOR CERTIFICATION TO  
APPEAL THE TRIAL CHAMBER'S DECISION ON DEFENCE MOTIONS  
PURSUANT TO RULE 98BIS**

*Rule 73(B) of the Rules of Procedure and Evidence*

**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 and Mr. Jonathan Kirk for Justin Mugenzi  
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka  
Mr. Tom Moran and Ms. Marie-Pierre Poulain for Prosper Mugiraneza

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“Tribunal”),

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

**BEING SEIZED** of “Justin Mugenzi’s Application for Certification of Interlocutory Appeal in Accordance with Rule 73(B)”, filed on 9 December 2005 (the “Motion”);

**CONSIDERING** the “Prosecutor’s Response to Mr Justin Mugenzi’s Motion for Certification of Interlocutory Appeal in Accordance with Rule 73B”, filed on 15 December 2005 (the “Response”);

**RECALLING** the “Decision on Defence Motions Pursuant to Rule 98 *bis*”, filed on 22 November 2005;

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), particularly Rules 73 (B) and 98 *bis*;

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

#### **SUBMISSIONS OF THE PARTIES**

##### ***The Defence Motion***

1. The Defence prays for certification to appeal the Trial Chamber’s Decision on Defence Motions Pursuant to Rule 98 *bis* (“the Decision”). The Defence’s application for certification is limited to the Chamber’s findings and decision in respect of Count 9 of the Indictment which charges the Accused with Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.<sup>1</sup> The Defence had argued that the Prosecution had failed to adduce evidence on a necessary element of the offence alleged in Count 9, namely that the armed conflict must be of a non-international character. According to the Defence, the Chamber accepted both that this was a necessary element to prove, and that the Chamber would not take judicial notice of this fact which must be borne out through evidence.
2. The Defence submits that the Chamber’s Decision on Count 9 is flawed. It points to the Chamber’s conclusion that:

The Conflict was between Government forces and the Rwandan Patriotic Front (“the RPF”), which consisted of Rwandan refugees, seeking to exercise their right of return.

<sup>1</sup> Article 4 of the Statute [in relevant part] provides:

“The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

[...]

The Defence contends that the Chamber failed to properly consider its Rule 98 *bis* submissions in respect of this point. It points to a lack of footnotes referring to the evidence in support of the Chamber's conclusion. Furthermore, the terms "Rwandan refugees", and "right of return" remain undefined by the Chamber. According to the Defence, the Chamber does not demonstrate in the Decision that it dealt with the Defence's submissions on the insufficiency of evidence on the nature of the conflict, nor their contention that the "principal Prosecution expert witness" Dr. Alison Des Forges herself expressed doubt as to whether the war was international or non-international in character. Thus, the Chamber did not take into account all the matters that it should have done when reaching its decision, which is therefore flawed with respect to Count 9.

3. The Defence submits that the Chamber should allow an interlocutory appeal on this issue, since it has demonstrated that all of the criteria under Rule 73(B) have been met. In particular, the Defence submits that a determination of this issue by the Appeals Chamber:
  - i) Would significantly affect the fair and expeditious conduct of the proceedings;
  - ii) Would shorten the length and expense of the trial, as the Defence currently intends to call an expert witness to testify on the character of the armed conflict;
  - iii) Would significantly affect the outcome of the trial. A successful appeal would see Count 9 resolved in favour of the Defendant and therefore not require him to answer to a charge for which there is insufficient evidence; and
  - iv) May materially advance the proceedings given that an appellate determination at this stage would negate the need for any defence evidence or submissions in respect of this count.

#### ***The Prosecution Response***

4. The Prosecution submits that the Defence has not shown that the Trial Chamber erred in the exercise of its discretion in finding in the Decision that the Prosecution had adduced evidence "to avert an acquittal beyond the balance of probabilities (the appropriate burden of proof for the purposes of Rule 98 *bis*)" against the Accused in respect of Count 9 of the Indictment.<sup>2</sup>
5. The Prosecution further submits that, in deciding whether to grant certification or not, the Trial Chamber exercises a discretionary power. The Defence fails to meet the criteria set down in Rule 73 (B), as the certification sought will not affect the fair and expeditious conduct of the proceedings, and may not affect the outcome of the trial. Therefore the application should fail.

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<sup>2</sup> Response, para. 8.

**DELIBERATIONS**

6. The Chamber has reservations as to whether a Rule 98 *bis* “Judgement of Acquittal” is the proper subject of an interlocutory appeal under Rule 73 (B), which deals with interlocutory appeals from “decisions”. Although the Appeals Chamber has in the past entertained an interlocutory appeal under Rule 73 (B) from a Rule 98 *bis* decision without comment,<sup>3</sup> in that case the correct Rule under which to appeal was not in issue. There is precedent at Trial Chamber level for denying such requests made under Rule 73 (B).<sup>4</sup> Nonetheless, the Parties in this case implicitly agree that a “Judgement of Acquittal” pursuant to Rule 98 *bis* is a “decision” which can be the subject of an interlocutory appeal.<sup>5</sup> Given that there is little authority on the matter, and that it was not specifically argued in this case, the Trial Chamber is prepared to consider the merits of the application.
7. Rule 73 (B) reads 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.
8. 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” (the “first limb”). If the first limb is met, the Chamber will then consider whether “an immediate resolution by the Appeals Chamber may materially advance the proceedings” (the “second limb”). This is the procedure that the Trial Chamber has followed in previous decisions in this case.<sup>6</sup>
9. The issue the Defence wishes to appeal is the part of the Decision denying the Defence Motion for Acquittal under Rule 98 *bis* on Count 9 of the Indictment. Conceivably, a successful appeal on this issue may significantly affect the *fair and expeditious conduct of the proceedings*, since it could result in the acquittal of the Accused on Count 9 of the Indictment, which in turn would obviate the need for the Accused to present evidence on this charge. Thus, the application meets the requirements of the first limb.
10. Having regard to the stage the trial has reached and the uncertainty as to when the Appeals Chamber would determine the interlocutory appeal, the Trial Chamber is not

<sup>3</sup> *Prosecutor v. Enver Hadzihasanović and Amir Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal (AC), 11 March 2005.

<sup>4</sup> *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber’s Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, (TC), 23 April 2004.

<sup>5</sup> Motion, para.13; Response, para. 2.

<sup>6</sup> *Bizimungu et al.*, Decision on Casimir Bizimungu’s 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, 9 March 2005; Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005.



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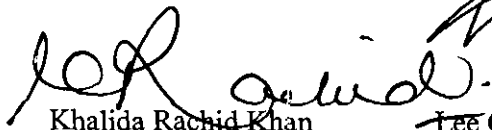
convinced that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The second limb is therefore not met.

11. While the language used in the Rule 98 *bis* Decision suggests that the Chamber has made a final determination about the non-international nature of the conflict, this is not what was intended. It would be recalled that the Chamber, throughout its Rule 98 *bis* Decision, referred to the test under Rule 98 *bis*, which involves a determination, by the Trial Chamber, that there is sufficient evidence upon the basis of which a reasonable trier of fact could find that the Prosecution has met its evidentiary threshold with respect to the particular element of the offence in question. The Chamber observes that the issue is still open and the Defence is at liberty to present evidence on the matter. The parties may then address the issue in their final submissions and the Chamber will make a final determination of the issue when it delivers its final Judgment.

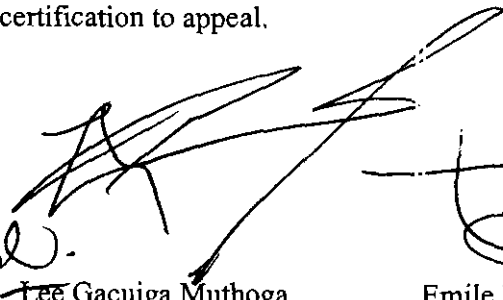
**FOR THE FOREGOING REASONS, THE CHAMBER**

**DENIES** the Defence Motion for certification to appeal.

Arusha, 20 March 2006



Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge



Emile Francis Short  
Judge

