



UNITED NATIONS  
NATIONS UNIES

ICTR-00-56-T  
24-04-2007  
(64217-64214)

64217  
PM

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge Asoka de Silva, Presiding  
Judge Taghrid Hikmet  
Judge Seon Ki Park

**Registrar:** Mr Adams Dieng

**Date:** 24 April 2007

JUDICIAL RECORDS ARCHIVES  
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**The PROSECUTOR**  
v.  
**Augustin NDINDILYIMANA**  
**Augustin BIZIMUNGU**  
**François-Xavier NZUWONEMEYE**  
**Innocent SAGAHUTU**  
*Case No. ICTR-00-56-T*

**DECISION ON DEFENCE REQUEST FOR CERTIFICATION TO APPEAL THE  
CHAMBER'S DECISION PURSUANT TO RULE 98BIS**

**Office of the Prosecutor:**

Mr Ciré Aly Bá  
Mr Moussa Sefon  
Mr Segun Jegede  
Mr Lloyd Strickland  
Mr Abubacar Tambadou  
Ms Felistas Mushi  
Ms Faria Rekkas  
Ms Anne Pauline Bodley

**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu  
Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindiliyimana  
Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye  
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

## INTRODUCTION

1. The trial against the four Accused in this case commenced on 24 September 2004. After presenting 72 witnesses, the Prosecution closed its case on 7 December 2006.
2. On 20 March 2007, the Chamber rendered its Decision on the Defence Motions for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence (the "Rules"), denying Nzuwonemeye's request for acquittal on Count 1 (Conspiracy to commit Genocide), Count 4 (Murder as a Crime against Humanity) with respect to paragraph 108 of the Amended Indictment, Count 6 (Rape as a Crime against Humanity) and Count 8 (Rape, Humiliating and Degrading Treatment as War Crimes under Article 3 common to the Geneva Conventions and Additional Protocol II). On 23 March 2007, the Accused Nzuwonemeye filed a Motion requesting the Chamber to grant certification to appeal its Decision of 20 March 2007 (the "Impugned Decision") pursuant to Rule 73(B).<sup>1</sup> The Prosecution did not file a response.

## DELIBERATIONS

### *ij) Is a "Judgement of Acquittal" a "decision" under Rule 73?*

3. The Defence submits that a decision on a motion for acquittal under Rule 98bis could be appealed upon certification granted pursuant to Rule 73(B). The Chamber notes that judicial opinion on this issue still remains divided.<sup>2</sup>
4. Rule 73(B) states that decisions on motions filed after the initial appearance of the accused are without interlocutory appeal except upon certification granted by the Trial Chamber. Rule 98bis of the Rules does not expressly provide for a right of appeal. However, this Chamber considers that Rule 73(B) must be interpreted to include the situation where the outcome of a motion under Rule 98bis is that the Chamber denies the Defence request for acquittal on one or more counts.<sup>3</sup> Such an interpretation would be consistent with the fact that motions for acquittal fall within the genre of applications brought by the parties 'after the initial appearance of the accused', as required by Rule 73. If the Chamber were to read Rule 98bis completely in isolation from Rule 73(B), an accused person who is aggrieved by the Chamber's denial of a motion for acquittal would be left without an immediate remedy. For these reasons, the Chamber finds that the Defence request for certification to appeal was properly brought under Rule 73(B).

<sup>1</sup> "Motion for Certification of the Decision on Defence Motions pursuant to Rule 98bis - Rule 73(B) of the Rules of Procedure and Evidence".

<sup>2</sup> In *The Prosecutor v. P. Zigiranyirazo*, Trial Chamber III expressed the view that it was "not convinced that its decision not to enter a judgement of acquittal in favour of the Accused is the proper subject of an interlocutory appeal under Rule ... 73(B)." It added that unlike Rule 73, Rule 98bis does not provide the right to seek certification to appeal a Trial Chamber's refusal to enter a judgement of acquittal. See "Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence", T. 19 March 2007, p. 69). In *The Prosecutor v. C. Bizimungu et al*, Trial Chamber II, differently constituted, expressed reservations about whether a decision on a motion for judgement of acquittal "is the proper subject of an interlocutory appeal under Rule 73(B)." The Chamber, however, entertained the motion because both parties in that case implicitly agreed that a "Judgement of Acquittal" pursuant to Rule 98bis is a 'decision' which can be subject of an interlocutory appeal. See "Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions pursuant to Rule 98bis", 20 March 2006.

<sup>3</sup> See also *The Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, "Decision on the Request for certification to appeal the Decision rendered pursuant Rule 98bis of the Rules" (TC), 26 October 2004, p. 2.

*ii) Criteria for certification*

5. This Chamber has, on a number of occasions, discussed the criteria for certification under Rule 73(B).<sup>4</sup> In particular, the Chamber stresses the principle that decisions under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73(B) are satisfied. The moving party 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" and that "in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

6. The Defence submits that although the Chamber stated the appropriate legal standard in the Impugned Decision, it did not apply it in its evaluation of the evidence. The Defence claims that the Chamber relied on weak evidence from single witnesses who are incapable of belief, drew incorrect inferences from alleged facts and cited transcripts which did not support these inferences. The Defence argues that the issue affects the fair and expeditious conduct of the proceedings because answering a case that does not exist would waste judicial resources in light of the Completion Strategy and because a reasonable trier of fact could not have concluded that the Accused bears any responsibility for the alleged crimes. Furthermore, the Defence submits that a decision by the Appeals Chamber may materially advance the proceedings because the Trial Chamber has erred in both fact and law and, therefore, to have to present its case on the basis of such an "incorrect and unfair legal footing", would be a waste of judicial resources.

7. The Defence essentially asks the Chamber to evaluate whether or not the Impugned Decision would succeed on appeal. This would be an improper course of action because the correctness of a Trial Chamber decision is a matter for the Appeals Chamber.<sup>5</sup> However, in deciding whether to grant certification to appeal, Trial Chambers "do have a responsibility to screen out requests for certification with no prospect of success and which, accordingly, would not 'materially advance the proceedings'."<sup>6</sup> This is a preliminary assessment aimed at determining whether the requirements of Rule 73(B) are met, rather than a pronouncement on the possible outcome of an appeal if one were certified. In all circumstances therefore, the moving party must still satisfy the cumulative conditions set out in Rule 73(B) of the Rules.<sup>7</sup>

8. The Chamber is not convinced that the first criterion under Rule 73(B) is met. The Impugned Decision did not render a final verdict on the guilt of the Accused. The consequence of that Decision is simply to require the Accused to answer the case he was

<sup>4</sup> *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2005, para. 16; Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005, para. 17; Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005, para. 7; Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence, 27 February 2006, para. 11; Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision Dated 15 June 2006, 14 July 2006, para. 7; Decision on the Defence Requests for Certification to Appeal the Chamber's Decision of 20 October 2006, 7 November 2006, para. 7.

<sup>5</sup> *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline 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' (TC), 18 March 2004, para. 15.



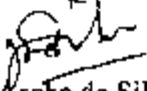
confronted with from the start of his trial. That in itself does not affect the fair or expeditious conduct of the proceedings. Furthermore, while the Chamber is aware of the Tribunal's limited resources and time, this cannot be the sole basis for granting certification of appeal. Similarly, the Chamber is not persuaded that the Impugned Decision affects the outcome of the trial. Accepting that the Prosecution evidence is sufficient for the purpose of denying a motion for acquittal, does not preclude the Chamber from ultimately finding that the Prosecution evidence fails to establish the Accused's guilt beyond a reasonable doubt at the close of the case. Indeed, such a finding could be reached even if no defence evidence is adduced.<sup>8</sup> It is a fairly elemental proposition that while at the stage of considering a motion for acquittal the Chamber looks for evidence which, if believed, *could* ground a conviction beyond reasonable doubt, at the stage of final judgement, the Chamber's obligation is to enter a conviction *only* when the evidence in fact establishes the guilt of the accused beyond all reasonable doubt. These two standards must not be confounded.

9. Since the first requirement for certification has not been met, the Chamber does not need to address the second criterion under Rule 73(B).

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence's request for certification to appeal the Impugned Decision.

Arusha, 24 April 2007

  
Asoka de Silva  
Presiding Judge

  
Taghrid Hikmet  
Judge

  
Seon Ki Park  
Judge

[Seal of the Tribunal]

<sup>8</sup> *Prosecutor v. Goran Jelisec*, Case No. IT-95-10-A, Appeals Chamber Judgement, 5 July 2001, para. 37; See also *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Oral Decision on Certification to Appeal the Decision on the Defence Motion Pursuant to Rule 98bis, T. 19 March 2007, p. 69.



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(Art. 27 of the Directive for the Registry)

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From:	<input checked="" type="checkbox"/> Chamber Bruno Zehnder (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
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Dates:	Transmitted: 24 April 2007		Document's date: 24 April 2007	
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<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
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