



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

28116  
*no*

ICTR-99-50-T  
23-07-2008  
(28116-28113)

OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr. Adama Dieng

**Date:** 23 July 2008

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

Case No. ICTR-99-50-T

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**DECISION ON JUSTIN MUGENZI'S MOTION FOR CERTIFICATION TO  
APPEAL THE DECISION ON MUGENZI'S MOTION FOR FURTHER CERTIFIED  
DISCLOSURE AND LEAVE TO REOPEN HIS DEFENCE**

*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. Shyamlal Rajapaksa  
Mr. Olivier De Schutter

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent for Casimir Bizimungu  
Mr. Ben Gumpert and Mr. Jonathan Kirk for Justin Mugenzi  
Mr. Michel Croteau and Mr. Philippe Larochelle for Jérôme-Clément Bicamumpaka  
Mr. Tom Moran and Ms. Cynthia Cline for Prosper Mugiraneza

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## INTRODUCTION

1. On 10 June 2008, the Trial Chamber rendered a decision denying Justin Mugenzi's Motion for further certified disclosure by the Prosecution and leave to reopen his Defence.<sup>1</sup> The Defence for Justin Mugenzi now seeks certification to appeal that Decision, pursuant to Rule 73 (B).<sup>2</sup>
2. The Impugned Decision held that the Defence had failed to show that four statements, disclosed by the Prosecution, were *prima facie* exculpatory under Rule 68 (A).<sup>3</sup> The Chamber therefore denied the Defence request for (i) reopening its case in order to call the makers of the statements to give evidence; or alternatively, (ii) for an order that the Prosecutor make formal admissions of fact with regard to the contents of the statements. The Impugned Decision also denied the Defence request for further disclosure by the Prosecutor.<sup>4</sup>
3. On 18 June 2008 the Prosecutor responded to the Defence Motion opposing the request for certification to appeal.<sup>5</sup> The Prosecutor submits that the Defence revisits its submissions in the original motion, and, that the Defence request would be unlikely to succeed before the Appeals Chamber. The Prosecutor's Response also states that the contents of the four statements are irrelevant to the charges against all the accused in these proceedings.<sup>6</sup>
4. The Defence replied to the Prosecutor's Response on 19 June 2008.<sup>7</sup> The Defence submits that the issues of whether the statements are relevant to the charges against the Accused, and whether they affect the credibility of Prosecution evidence, are central to the request for certification.<sup>8</sup>

## DISCUSSION

5. Rule 73 (B) of the Rules states that leave to file an interlocutory appeal of a decision may be granted if the issue involved "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and where "an immediate resolution

<sup>1</sup> *Prosecutor v. Bizimungu et al.*, Case No. 99-50-T, Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence (IC), 10 June 2008 ("Impugned Decision"). The Impugned Decision was rendered in relation to *Bizimungu et al.*, Justin Mugenzi's Motion for Further Certified Disclosure and For Leave to Reopen his Defence, 26 February 2008. The Defence request was made pursuant to Rule 68 (A) which provides that the "[p]rosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."

<sup>2</sup> *Bizimungu et al.*, Motion for Certification for Interlocutory Appeal of the Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence, 13 June 2008 ("Defence Motion").

<sup>3</sup> For details on the contents of the four statements, see Impugned Decision, footnote 2.

<sup>4</sup> Impugned Decision, paras. 20-22.

<sup>5</sup> *Bizimungu et al.*, Prosecutor's Response to Mr. Justin Mugenzi's Motion for Certification for Interlocutory Appeal of the Trial Chamber's Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence dated 10 June 2008, 18 June 2008 ("Prosecutor's Response").

<sup>6</sup> Prosecutor's Response, paras. 12 - 14.

<sup>7</sup> *Bizimungu et al.*, Justin Mugenzi's Reply to the Prosecutor's Response to Mr. Justin Mugenzi's Motion for Certification for Interlocutory Appeal of the Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence dated 10 June 2008, 19 June 2008 ("Defence Reply").

<sup>8</sup> Defence Reply, para. 5.



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by the Appeals Chamber may materially advance the proceedings". Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.<sup>9</sup>

6. In deciding whether to grant leave to appeal, the Chamber need not consider the merits of the challenged decision. Rather, a Chamber's inquiry under Rule 73 (B) will involve only a consideration of whether the criteria outlined in the sub-Rule have been satisfied.<sup>10</sup> However, a Trial Chamber may revisit the substance of an impugned decision to the extent that this is done within the context of the Rule 73 (B) criteria.<sup>11</sup>

#### *Preliminary Matter*

7. The Defence submits that the test applied by the Chamber was too strict, in finding that the four disclosed statements were not exculpatory under Rule 68 (A). The Defence submits that the correct test is whether the Defence had presented a *prima facie* case that the material was exculpatory or potentially exculpatory.<sup>12</sup> The Defence further argues that the requirement of defining the material sought with reasonable specificity, only applies where it is alleged that the Prosecutor is in breach of his Rule 68 obligations.<sup>13</sup>

8. With respect to the Defence submissions on Rule 68, the Chamber recalls that considerations, such as whether there was an error of law, are for the Appeals Chamber to determine after the Trial Chamber has granted certification to appeal. They are irrelevant to the decision for certification and will not be considered by this Chamber.<sup>14</sup>

#### *Whether the Defence has Satisfied the Rule 73 (B) Criteria*

9. The Chamber will proceed to examine the Defence submissions in light of the Rule 73 (B) criteria. The Chamber will first consider whether the Impugned Decision involves an issue that would significantly affect either: (i) the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial. Only if one of those criteria is satisfied, does the Chamber need to consider whether immediate resolution by the Appeals Chamber of that issue may materially advance the proceedings in this case.

10. With regard to the first requirement under Rule 73 (B), the Defence submits that the Impugned Decision involves an issue that would significantly affect the outcome of the trial because the four statements may suggest the innocence of the Accused or, undermine the

<sup>9</sup> *Bizimungu et al.*, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 22 May 2007, para.6. ("Decision on Casimir Bizimungu's Request"); See also, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para.4.

<sup>10</sup> Decision on Casimir Bizimungu's Request, para. 7; see also e.g., *Bizimungu et al.*, 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' (TC), 4 February 2005, para. 28; see also, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para.4.

<sup>11</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005, para. 5, cited in *Bagosora et al.*, Decision on Motion for Reconsideration of Standards of Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

<sup>12</sup> Defence Motion, paras. 9 – 28.

<sup>13</sup> Defence Motion, paras. 29 – 32.

<sup>14</sup> *Bizimungu et al.*, Decision on Bicamumpaka's Request for Certification (TC), 4 February 2005, para.28



credibility of Prosecution evidence. The Defence argues that had the statements been disclosed earlier in accordance with Rule 68 (A), they could have been used to raise doubt as to the Accused's guilt, and thus, significantly affect the outcome of the trial.

11. The Chamber will now turn to consider the Defence submission that the contents of the four statements could significantly affect the outcome of the trial. In doing so, the Chamber recalls that it may revisit the substance of the Impugned Decision to the extent that it is done within the context of Rule 73 (B).

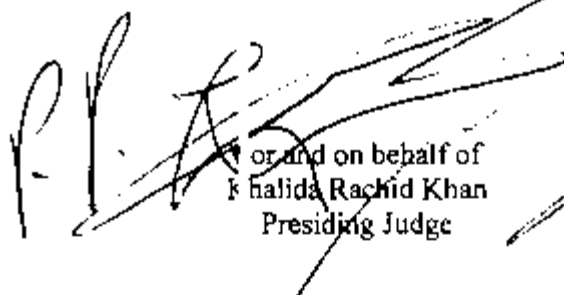
12. The Chamber recalls that the statements detail activities of the Rwandan Patriotic Front ("RPF") during the genocide, including infiltration of roadblocks, and attacks in specific locations - some resulting in a large number of deaths. However, as set out in the Impugned Decision, the Chamber does not consider these statements to be relevant to the charges against any of the accused in these proceedings.<sup>15</sup> The Chamber therefore finds that the issues in the Impugned Decision could not significantly affect the outcome of the trial.

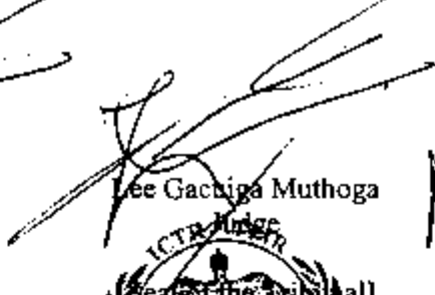
13. As the Defence has failed to satisfy the first requirement under Rule 73 (B), it is not necessary for the Chamber to consider the Defence submissions with regard to the second requirement. Accordingly, the Chamber finds that the Defence has failed to satisfy the criteria for certification to appeal under Rule 73 (B).

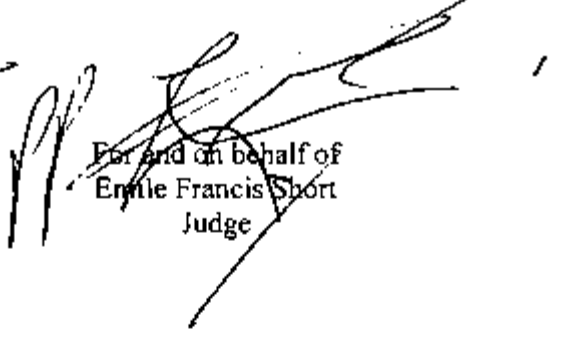
**FOR THESE REASONS**, the Chamber

**DENIES** the Defence Motion in its entirety.

Arusha, 23 July 2008

  
For and on behalf of  
Halida Rachid Khan  
Presiding Judge

  
Lee Gacanga Muthoga  
ICTR Judge  
[Seat of the Tribunal]

  
For and on behalf of  
Emile Francis Short  
Judge



<sup>15</sup> See Impugned Decision, paras. 13, and 15. The Chamber considered: (i) the issue of whether the RPF were infiltrating already established roadblocks is not relevant to whether the Accused gave orders to establish roadblocks for the purpose of killing Tutsis, as alleged by the Prosecution; (ii) details of RPF attacks being carried out in specific locations, as set out in the statements, does not demonstrate that members of the Interim Government no longer had the necessary control to perform their responsibilities as Ministers; and (iii) the issue of a large number of deaths in Rwanda, resulting from RPF attacks, does not negate the occurrence of genocide in Rwanda in 1994.



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<b>Dates:</b>	Transmitted: 23 July 2008		Document's date: 23 July 2008	
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