

ICTR-01-73-T
02-11-2006
(5690-5684)

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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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TRIAL CHAMBER III

Before: Judge Inés Mónica Weinberg de Roca, *Presiding*
Judge Khalida Rachid Khan
Judge Lee Gacuiga Muthoga

Registrar: Mr. Adama Dieng

Date filed: 2 November 2006

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

JUDICIAL RECORDS/ARCHIVES
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2006 NOV - 21 P 4: 52

**PROSECUTOR'S RESPONSE
to "Protais Zigirinyirazo's Application for Certification to Appeal
the Decision on the Defence Motion Pursuant to Rule 98 Bis"**

Office of the Prosecutor

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A. — Nature of the Motion and Respondent's position

1. On 24 October 2006, the Accused Protais Zigiranyirazo [hereinafter, "the Applicant"] filed *Protais Zigiranyirazo's Application for Certification to Appeal the Decision on the Defence Motion Pursuant to Rule 98 Bis* [hereinafter, "the Certification Request"].

2. On 1 November 2006, the Applicant filed *Application for Ex parte Judgment on Protais Zigiranyirazo's Application for Certification to Appeal the Decision on the Defence Motion Pursuant to Rule 98 Bis* [hereinafter, "the Ex parte Judgment Application"]. In his *Ex parte Judgment Application*, the Applicant requests the Trial Chamber to render an *ex parte* judgment on his Certification Request since, according to the Applicant, the Prosecutor has not responded to it within the prescribed period as provided by the Rules of Procedure and Evidence ("the Rules").

3. The Prosecutor acknowledges that he has not met the required time limit to respond the Certification Application and humbly prays the Trial Chamber to exercise its discretion to admit the Prosecutor's response out of time since the Applicant has not suffered any material prejudice as provided under Rule 5 of the Rules.

4. The Prosecutor, mindful of the significance of the issues raised by the Appellant, and aware of the need to provide the Trial Chamber with all the information available to enable it to make a fair determination of the issues, requests an extension of time to 2 November 2006 to respond to the matters raised by the Applicant in his Certification Request. The Prosecutor respectfully requests that the Application for an *Ex parte Judgment* as well as the Certification Request should be dismissed.

5. In the event that the Trial Chamber decides to exercise its discretion to render an *ex parte* decision in relation to the Certification request, the Prosecutor submits that the Trial Chamber should maintain its original decision and deny the Applicant's Certification request. The Applicant fails to meet the standard for the exceptional remedy of an interlocutory appeal. Furthermore, the Applicant has failed to show any serious doubt as to

the correctness of the legal principles applied by the Trial Chamber in arriving at the impugned decision.

B.—SUBMISSIONS

(i) *An Ex parte* Decision in this case would not be in the Interests of Justice

6. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so that is, justice to everyone concerned in the circumstances already stated.¹

7. As pointed out by the Trial Chamber in *Simic et. al., supra*, Trial Chambers need to exercise a great deal of caution when requested by parties to render decisions *ex parte*.

That is all that needs to be said, except to point out that a Trial Chamber must necessarily rely to a very large extent upon the assurances of counsel before entertaining an *ex parte* application. Experience suggests that counsels are sometimes over enthusiastic in their assurances that it is appropriate for a particular application to be heard *ex parte*.²

8. In the present case, the Applicant has requested that the Trial Chamber “render a decision on the motion *ex parte*” since, “pursuant to the rules, the Prosecutor was required to file a response within five days, that is by 30 October 2006, [T]he time has expired, [T]he time for interlocutory appeals is strict, it is important that this issue be settled since it will have a significant effect on the conduct of the defense and on the time for presenting the defense.” The Applicant acknowledges that this is an “unusual application” which in any other case, it “would not insist on strict respect of time but only diligence”.

9. The Prosecutor submits that, out of an abundance of caution, the Trial Chamber should allow the Prosecutor to respond to the Certification Request in order to avoid rendering any subsequent decision on the basis which has been put forward by the Defense for an *ex parte* decision. The Prosecutor submits that it would not be in the interests of justice for the Trial Chamber to render a decision *ex parte*.

¹ *Simic et. al.*, Decision on (1) Application by Stevan Todorovic to re-open the Decision of 27 July 1999, (2) Motion by ICRC to re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access Material, 28 February 2000 (Trial Chamber).

² *Ibid.*, at para. 42.

10. The Prosecutor submits that the defence has not been prejudiced as a result of the Prosecutors failure to respond within the time limit. It is in the interests of all parties, and especially the Trial Chamber to have all the necessary information in order to arrive at a fair decision.

The Prosecutor's Response to the Application for Certification to Appeal

(ii) Standard for Granting Certification of an Interlocutory Appeal

11. According to the jurisprudence of the Tribunal, "[l]eave to appeal may be granted under Rule 73 (B), where a 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'."³ The Applicant fails to show how he satisfies both of these cumulative conditions, such that the Chamber should exercise its discretion in favour of certification.⁴

12. Interlocutory appeals under Rule 73 (B) are exceptional⁵, and nothing in this Request meets the threshold of the exceptionality contemplated here. The applicant attempts to introduce a new test for the Application of Rule 98 *bis*⁶ but fails to demonstrate

³ See for example, *Prosecutor v. Bagosora et al.*, Decision on Application for certification to Appeal Decision on Exclusion of Testimony, 10 February 2006; *Prosecutor v. Karemera et al.*, Decision on the Defence Motion to Unseal and for Application for Certification to Appeal Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T, Rule 73 (B) of the Rules of Procedure and Evidence, 7 October 2005.

⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Defence Requests for Certification to Appeal Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 17 March 2006, para. 8.

⁵ *Prosecutor v. Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 2 and cases cited in footnote 2; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-2 1-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, paras. 14-15; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Vacate Sanctions, 26 May 2005, para. 5.

⁶ See para. 2 of the request where the Applicant states: The Impugned Decision is based on an error in law in considering an application with respect to Rule 98 *bis*. The law with respect to applications under Rule 98 *bis* should be:

- b) Secondly, it must examine the evidence on specific allegations in specific paragraphs of the indictment as argued in the Rule 98 *bis* motion. If the paragraphs, standing alone, could constitute counts, and if the evidence is insufficient to sustain a conviction on the paragraph considered as a count, it must acquit the Accused on the paragraph

how this case is one which warrants the exceptional remedy of an interlocutory appeal, because the Trial Chamber committed any specific error or errors in the exercise of its discretion.⁷ The Trial Chamber's ruling does not affect the fair and expeditious conduct of the proceedings in the sense contemplated in the Rule. In addition, the applicant fails to demonstrate how an immediate resolution by the Appeals Chamber is warranted in order to materially advance the proceedings, since nothing prevents the case from proceeding.

(iii) Fair and Expeditious Conduct of Proceedings

13. In order to qualify for certification to appeal, pursuant to the provisions of Rule 73 (B), the Decision has to involve an issue that would significantly affect the fair and expeditious conduct of the proceedings.

14. Conceivably, a successful appeal on the issue may affect the *fair and expeditious conduct of the proceedings, and an immediate resolution by the Appeals Chamber may materially advance the proceedings*. The second limb of the test, whether the immediate resolution by the Appeals Chamber may materially advance the proceedings requires consideration not only of the effect on the proceedings assuming that there would be a reversal or modification of the Decision, but also whether there is serious doubt as to the correctness of the legal principles at issue.⁸

15. However, in the circumstances of this case, and at this stage of the proceedings, it is insufficient, the Prosecutor submits, to simply assert that the Decision involves an issue that would significantly affect the fairness and the expeditiousness of the trial. The applicant's grounds fail to identify how, specifically, he meets the requirement, in that the Trial Chamber did not commit any error in the exercise of its discretion, to the detriment of the fair and expeditious conduct of the proceedings. In particular, the applicant does not demonstrate how, if the impugned Decision were to stand, it would have a significant impact on both the fairness and the expeditiousness of the trial, to his detriment.

⁷ See e.g. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR.6, Decision on the Interlocutory Appeal by *Amici Curiae* Against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 16.

⁸ *Bagosora et. al.*, Decision on Certification of Appeal Concerning Admission of Written Statements of Witness XXO, 11 December 2003, para. 6.

16. In this regard, the Applicant has not only failed to show that the Trial Chamber in exercise of its discretion misdirected itself when it determined that a reasonable trier of fact could arrive at a conclusion of guilt beyond a reasonable doubt if it believed at the close of the Prosecutor's case, that the prosecution evidence was sufficient for a finding of guilt on a particular count; But he has also failed to show that the Trial Chamber exercised its discretion incorrectly when it stressed that "Rule 98 *bis* requires it to consider *counts*; [and] not engage in a paragraph by paragraph analysis of the Indictment."

17. The Trial Chamber's decision at this stage of the proceedings, would not "significantly affect the fair and expeditious conduct of the proceedings" in the way envisaged in the Rules. It is true that the impugned decision allows the trial to proceed; the trial has not been halted by a judgment of acquittal as the Applicant would have liked. However, the impugned decision does not affect the eventual outcome of the trial. So far, the Trial Chamber has found that the prosecution evidence is sufficient to sustain a conviction on particular counts beyond reasonable doubt. Nevertheless, even if no defence evidence is subsequently adduced, the Trial Chamber may proceed to acquit at the end of the trial, if in its own view of the evidence, the Prosecution has not in fact proved guilt beyond reasonable doubt. A rejection of the motion for acquittal in the impugned decision is not a decision on the guilt of the Applicant.

18. In fact, the main effect of the Applicant's request is to impair the expeditiousness of the proceedings. Interlocutory appeals under Rule 73 interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so—that is, when, in the Trial Chamber's judgment, there is an important issue meriting immediate resolution by the Appeals Chamber. This request, the Prosecutor submits, does not fall into that category.

(iv) An intervention of the Appeals Chamber is unwarranted

19. An intervention of the Appeals Chamber is not necessary, as the Trial Chamber correctly exercised its discretion. The Applicant has not established an error of law that would necessitate an immediate resolution by the Appeals Chamber in order to advance the

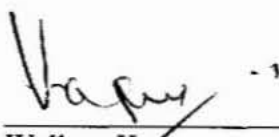
proceedings materially. An appeal will simply delay the trial, without advancing an important point of law or any other significant issue.

C.—RELIEF SOUGHT


20. The Prosecutor requests the Trial Chamber to reject the Applicant's invitation to render an *ex parte* decision on his [Applicant's] Application for Certification. The defence has not been prejudiced as a result of the Prosecutors failure to respond within the time limit. It is in the interests of the parties, and especially the Trial Chamber to have all the necessary information in order to arrive at a fair decision.

21. The Prosecution submits that the Applicant has not met any of the criteria in Rule 73 (B), accordingly, the certification to appeal is not justified. The Prosecutor respectfully requests that this Honourable Trial Chamber dismisses the request for certification to appeal to the Appeals Chamber from the Decision of the Trial Chamber as well.


Dated 2 November 2006, at Arusha, Tanzania



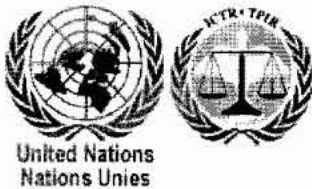
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Senior Trial Attorney



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Senior Legal Advisor



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Associate Legal Officer



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COURT MANAGEMENT SECTION
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From:	<input type="checkbox"/> Chamber (names)	<input type="checkbox"/> Defence (names)	<input checked="" type="checkbox"/> Prosecutors Office Wallace Kapaya (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Protais Zigiranyirazo		Case Number: ICTR-2001-73-T	
Dates:	Transmitted: 02/11/06		Document's date: 02/11/06	
No. of Pages:	6	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
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PROSECUTOR'S RESPONSE TO "PROTAIS ZIGIRANYIRAZO'S APPLICATION FOR CERTIFICATION TO APPEAL THE DECISION ON THE DEFENCE MOTION PURSUANT TO RULE 98BIS"

Date Filed / Date enregistrée
03 November 2006

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