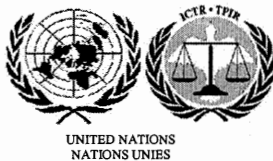


ICTR-99-50-I
28-10-2003
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Arlette Ramaroson

Registrar: Mr Adama Dieng

Date: 29 October 2003

2003 OCT 28 P 5:00
JUDICIAL RECORDS SECTION
ICTR

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerôme BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-I

DECISION ON THE PROSECUTOR'S REQUEST PURSUANT TO RULE 73(B)
FOR CERTIFICATION TO APPEAL AN ORDER DENYING LEAVE TO FILE
AN AMENDED INDICTMENT

Office of the Prosecutor

Paul Ng'arua
Melinda Pollard
Elvis Bazawule
George Mugwanya

Counsel for the Defence

Michelyne C. St. Laurent for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau for Jérôme Bicomumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Asoka de Zoysa Gunawardana and Judge Arlette Ramaroson (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Request pursuant to Rule 73(B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment,” filed on 13 October 2003, (the “Motion”);

CONSIDERING “Prosper Mugiraneza’s Response to the Prosecutor’s Request for Leave pursuant to Rule 73(B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment” filed on 17 October 2003, (“Mugiraneza’s Response”); **AND** “Réponse de la Défense de Casimir Bizimungu à la [Prosecutor’s Request pursuant to Rule 73(B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment]” filed on 20 October 2003, (“Bizimungu’s Response”)

CONSIDERING the “Decision on the Prosecutor’s Motion for Leave to File an Amended Indictment,” of 6 October 2003 in which the Chamber denied the Prosecution request for leave to file an Amended Indictment in this case (the “Decision for Amendment of the Indictment”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73(B);

NOW DECIDES the Motion solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

2. Pursuant to Rules 73(B) the Prosecution requests certification by the Chamber for leave to appeal its Decision for Amendment of the Indictment. The Prosecution relies on the jurisprudence of Trial Chamber I in the case of *Bagosora* in which the Chamber granted certification for an interlocutory appeal of two Decisions of the Trial Chamber because such Decisions involved issues that would significantly affect the fairness of the trial or its outcome so that an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹

¹ *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses, 11 September 2003 and Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY of 2 October 2003

3. The Prosecution requests certification submitting that the Chamber erred in fact and in law in the reasoning and in the Decision. In particular, it submits that the Chamber;

- (i) erred in fact and in law because it did not give due consideration to the main justification for the amendment of indictment, i.e., the obtaining of new and additional evidence since the confirmation of the existing Indictment;
- (ii) erred in fact and in law because it did not permit the alternative charging of genocide and complicity in genocide in accordance with the previous jurisprudence of the Tribunal rather, the Chamber denied this request for 'judicial economy;'
- (iii) erred in law and in fact when it found that the expansions, clarifications and specificity made in support of the remaining counts in the amended indictment amount to substantial changes prejudicial to the Accused when in fact the Accused have been given adequate time for the preparation of their defence when all new and additional evidence was disclosed prior to the filing of the Amended Indictment;
- (iv) erred in fact and in law when it refused leave to amend the Indictment on the basis of a finding of purported substantial changes when the jurisprudence of the Tribunal even in drastic circumstances grants amendments on the basis of new charges; and
- (v) erred in fact and in law when it over-emphasized the fact that the commencement of the trial has been set for 3 November 2003 so that this has not been balanced with the overall interests of justice and the mandate of the Tribunal, i.e., savings in the length of the trial based on a shorter and more specific amended indictment.

4. To cement its argument for granting certification to appeal so that the Appeal Chamber may give an immediate resolution, the Prosecution relies on the jurisprudence of the International Criminal Tribunal for Yugoslavia ("ICTY") in particular the case of *Kovacevic* where the Trial Chamber refused to allow any amendment by ruling that allowing amendments in a broad and substantial way, almost a year after the original indictment has been confirmed and seven months after the arrest of the accused, would serve to deny him access to a fair and speedy trial, noting that the amendment would add fourteen new counts and factual allegations that would increase the size of the indictment from eight to eighteen pages.² On appeal the Appeals Chamber reversed the Trial Chamber ruling and allowed the amendment for reasons *inter alia* that increasing the size of the indictment does not *per se* make an amendment unjust, an injustice must be shown that cannot be cured by disallowing some portion of the amendment.³

² *Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, Decision on Prosecutor's Request to file an Amended Indictment made on 5 March 1998; See Motion at para. 13

³ *Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, Appeals Chamber Decision Stating Reasons for Appeal Chamber's Order of 29 May 1998, made on 2 July 2003; See Motion at para. 14, 15 and 16

Defence Responses

5. The Defence for Mugiraneza takes no position on whether leave to appeal should be granted although it will make submissions to the Appeals Chamber if leave to appeal is granted.

6. The Defence for Bizimungu objects to the Prosecution Request for certification noting however that it is the Chamber's discretion whether to grant certification to appeal or not. Defence for Bizimungu argues that the Prosecution has not met the requirement under Rule 73(B) which would enable the Chamber to grant its request for certification. It notes that the trial has been set to commence on 3 November 2003 and a list of 24 witnesses have been indicated to be called for the first trial session. The Defence argues that nowhere in its Motion has the Prosecution shown that an immediate resolution of the matter by the Appeals Chamber would accelerate the proceedings and in fact the Defence submits that this will delay the proceedings. In fact, if the Appeals Chamber reverses the Chamber's Decision for Amendment of the Indictment, time would need to be given to the Defence to adequately prepare their case.

7. Defence for Bizimungu argues that the Prosecution is acting in bad faith when it seeks to file an Amended Indictment four years and seven months after the arrest of the Accused and one month before the trial of the Accused is set to commence. Granting certification to appeal the Chamber's Decision for Amendment of the Indictment will cause prejudice to the Accused because this will delay the commencement of the trial contrary to the good administration of justice.

8. Defence for Bizimungu thus requests the Chamber to reject the Prosecution Motion and in the alternative, if the Chamber grants certification to appeal, the Chamber should suspend the date set for commencement of trial until a final Decision is given by the Appeals Chamber.

DELIBERATIONS

8. The Rule governing interlocutory appeals from decisions on motions has recently been amended and the relevant sub-Rule now reads as follows:

Rule 73: Motions

(A) [...]

(B) 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.

(C) Requests for certification shall be filed within seven days of the filing of the impugned decision.

If certification is granted, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

(D) [...]

(E) [...]

(F) [...]


(G) [...]

9. After having reviewed the Prosecution's application, the Chamber is of the opinion that it falls within the provisions of Rule 73(B) of the Rules. Accordingly, the Chamber grants the Prosecution's request for certification to appeal.

THE TRIAL CHAMBER HEREBY

GRANTS the Prosecution's request for certification to appeal.

Arusha, 29 October 2003



William H. Sekule
Presiding Judge



Asoka de Zoysa Gunawardana
Judge



Arlette Ramaroson
Judge

