



ICTR-98-41-T
14-07-2004
(21350-21347)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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S. Musingu

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 14 July 2004

THE PROSECUTOR

v.

**Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA**

Case No. ICTR-98-41-T

2004 JUL 14 P 12 28
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**DECISION ON PROSECUTOR'S REQUEST FOR CERTIFICATION UNDER RULE 73
WITH REGARD TO TRIAL CHAMBER'S "DECISION ON PROSECUTOR'S
REQUEST FOR A SUSPENSION OF THE TIME-LIMIT"**

Office of the Prosecutor:

Barbara Mulvaney
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Peter Erlinder
André Tremblay
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Gershom Otachi Bw'omanwa

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Prosecutor’s Request for Certification Under Rule 73 with Regard to Trial Chamber’s ‘Decision on Prosecutor’s Request for a Suspension of the Time-Limit under Rule 73(C) in Respect of the Trial Chamber’s ‘Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)’”, filed on 23 June 2004;

CONSIDERING the Ntabakuze Defence Response, the Kabiligi Defence Response and the Bagosora Defence Response, all filed on 28 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 May 2004, the Chamber issued its Decision regarding an application by the Prosecution to vary its witness list. The Prosecution was allowed to add Witnesses AAA, ABQ, AFJ and Commander Maxwell Nkole (another witness, Witness AL, had already been added during the trial, before the Decision was rendered). The Chamber denied the motion in respect of Witnesses AJP, AMI, ANC and ANE, citing, *inter alia*, the lateness of the disclosure of the statements of these witnesses to the Defence and the advanced stage of proceedings. The Prosecution filed a motion on 28 May 2004 for the suspension of the time-limit for certification of the Decision, which was denied on 16 June 2004. On 1 June 2004, the Prosecution filed a motion for reconsideration of the 21 May Decision, which was denied on 15 June 2004. The Prosecution now seeks certification to appeal the decision of 16 June 2004. The Prosecution has additionally filed a second reconsideration motion on 2 July 2004 in respect of the same witnesses as the first reconsideration motion which was denied.

SUBMISSIONS

2. The Prosecution seeks certification to appeal the Suspension Decision, pursuant to Rule 73(B), which contains two cumulative prongs: a) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial; and b) the impugned decision involves an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Prosecution need not demonstrate that the impugned decision involved an error, which is properly to be argued before the Appeals Chamber. It is argued that the decision involves an issue of the fairness and expeditiousness of the proceedings *and* the outcome of the trial, because the Prosecution has been unfairly penalized for attempting to save judicial resources by seeking reconsideration prior to certification, and because the Prosecution has been deprived of the ability to seek relief from the Chamber’s decision of 21 May 2004. The Prosecution asserts that it acted in good faith and with diligence in preserving its procedural rights. According to the Prosecution, the Chamber acknowledged the existence of “good cause” when it held that certification should have been

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sought instead of reconsideration, and therefore it would be an unfair abuse of the Chamber's discretionary power to suspend the time-limit. The decision could also significantly affect the outcome of the trial as it excluded material evidence. For the same reasons, and because an appeal would resolve the issue of the power to grant suspension under Rule 73(C), the Prosecution submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Further, it would be in the interests of justice, as the new evidence would not be raised on appeal.

3. The Ntabakuze Defence submits that the Prosecution's multi-stepped appeal initiative in relation to the original motion to vary the witness list has not been in the interests of judicial economy. In order to succeed in this motion, the Prosecution has a persuasive burden to show that there was an abuse of discretion. Agreeing with the two-pronged approach to Rule 73(B), the Ntabakuze Defence contends that there was no unfairness in the Suspension Decision that followed the Rules. The Ntabakuze Defence points out that the Prosecution has not explained why it chose to file a reconsideration motion, rather than a certification motion. It also notes that the Chamber found no "good cause" to suspend the time-limit, even if it had the power to do so, and therefore resolving the question of the existence of the discretion to suspend would not materially advance the proceedings. Even if the Prosecution has met the conditions for certification, the Chamber still retains the discretion as to whether or not to certify.

4. The Kabiligi Defence argues that unlike Rule 72, Rule 73 does not provide for the waiver of the time-limit, and therefore the Chamber was correct in doubting its power to suspend the time-limit. Even if there was such a power, which the Prosecution has not shown, there must be a showing of good cause, which the Prosecution has not demonstrated. Where there is good cause, the Chamber still has the discretion whether or not to grant the suspension, taking into consideration other factors like the interests of justice. The interests of justice do not require suspension of the time-limit, nor clarity on the issue of the power to suspend the time-limit. As the Prosecution did not highlight any error in the Suspension Decision, the two prongs of the certification test are not met.

5. The Bagosora Defence joins in the responses of the Ntabakuze and Kabiligi Defence, emphasizing that the Chamber held in the impugned decision that even if it had the power to suspend the time-limit, it declined to do so. The issue is therefore not a live one and its resolution would not materially advance the proceedings.

DELIBERATIONS

6. Rule 73(B) and (C), which provides for interlocutory appeals, states as follows:

(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.

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7. Decisions on motions are generally without interlocutory appeal unless the conditions in Rule 73(B) are satisfied, in which case the Chamber *may* certify a matter for interlocutory appeal.¹ The Chamber has previously taken into consideration, in deciding whether or not to certify for appeal, whether there was an error of law or abuse of discretion in the impugned decision.²

8. The motion involves an examination of the issue of a suspension of the time-limit under Rule 73(C), rather than the substantive issue of the addition of Witnesses AMI, ANC and ANE. The issue must significantly affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial, and must be an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber considers that the issue of suspension of the time-limit would unduly prolong the proceedings and cause potential prejudice to the Accused by abrogating the Rules of the Tribunal. For these reasons, the Chamber considers that the issue would not significantly affect the fair and expeditious conduct of the proceedings.

9. Although it is not necessary to consider the second cumulative prong, the Chamber nonetheless notes that appellate resolution of this issue would not materially advance the case. If the appeal was certified and succeeded, the Appeals Chamber would only remit the matter back to the Chamber for consideration of whether there was "good cause" to suspend the time-limit. This would not advance the proceedings as the Chamber indicated in its Suspension Decision that even if it had the power to grant suspension, it was not inclined to suspend the time-limit. The issue is many steps removed from the substantive issue of the addition of the witnesses. If the time-limit was suspended and the certification motion filed, the Chamber would still then have to consider whether or not to certify the matter for appeal. If certified, only then would the matter be sent to the Appeals Chamber for a consideration of the substantive issue of the addition of the witnesses.

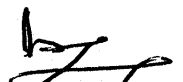
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge



¹ *Ntahobali et al.*, Decision on Ntahobali's and Ntahobali'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, paras. 14-15.

² *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003; Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003.