



ICR-00-55A-T
16-03-2005
(2187-2183)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2187

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge Asoka De Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 16 March 2005

The PROSECUTOR
v.
Tharcisse MUVUNYI

Case No. ICTR-2000-55A-T

2005 MAR 16 P 4: 48
ICTR

**DECISION ON THE PROSECUTOR'S MOTION PURSUANT TO RULE 73(B)
FOR CERTIFICATION TO APPEAL THE DECISION DENYING LEAVE TO
FILE AN AMENDED INDICTMENT AND FOR STAY OF PROCEEDINGS**

Office of the Prosecutor:
Mr Charles Adeogun-Phillips
Ms Sola Adeboyejo
Ms Renifa Madenga
Mr Dennis Mabura

Defence Counsel:
Mr William Taylor
Mr Jean Flamme
Ms Cynthia Cline
Ms. Veronique Pandanzyla

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge Asoka De Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion Pursuant to Rule 73 (B) for Certification to Appeal Trial Chamber Decision Denying Leave to File an Amended Indictment and for Stay of Proceedings" filed on 28 February 2005 (the "Motion");

HAVING RECEIVED Accused "Tharcisse Muvunyi's Reply (sic) to the Prosecutor's Motion pursuant to Rule 73(B) for Certification to Appeal Trial Chamber Decision Denying Leave to File an Amended Indictment and for Stay of Proceedings" filed on 9 March 2005 (the "Response");

RECALLING:

- (i) the Chamber's Decision on the Prosecutor's Motion for Leave to File an Amended Indictment filed on 23 February 2005 (the "Impugned Decision");
- (ii) the Chamber's Oral Ruling delivered on 7 March 2005 granting the Defence an extension of time till 8 March 2005 to file a Response to the Motion;

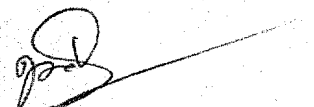
CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 73 (A) and (B) of the Rules;

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

ARGUMENTS OF THE PARTIES

The Prosecution

1. The Prosecution seeks leave of the Trial Chamber, pursuant to Rule 73(B) of the Rules, for certification to appeal against the Impugned Decision and for an adjournment of the proceedings.
2. The Prosecution argues that the Motion satisfies the requirements of Rule 73(B); that the issues for which he seeks certification to appeal would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and urges the Trial Chamber to exercise its discretion in favour of certification.
3. In support, the Prosecution submits that the Trial Chamber erred in refusing its application to amend the Indictment on the basis that the material which the Prosecution



sought to introduce amounted to new charges, as opposed to particularizations or clarifications of existing counts or crimes in the existing Indictment.

4. The Prosecution further argues that as a result of this error, it is prevented from leading evidence on a number of allegations relevant to the involvement of the Accused in genocide and other violations of international humanitarian law.

5. The Prosecution submits that the Chamber also erred in its approach to prejudice. It is the Prosecution's contention that the Impugned Decision failed to take into account that the material facts in the proposed amendment were drawn from materials that had long been disclosed to the Defence. In view of this timely disclosure, the Accused has had due notice of the scope of the allegations against him and would therefore not be prejudiced by the amendments sought.

6. The Prosecution argues that some aspects of the amendment sought were intended to provide clarifications or add particulars to existing allegations, and relies on the Appeals Chamber Decision in *Prosecutor v. Bizimungu et al*, to support the argument that such clarifications are to be encouraged because they positively impact the fairness of the trial.¹

The Defence Response

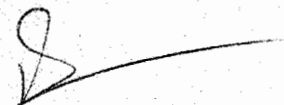
7. The Chamber wishes to note that the Defence Response having been filed on 9 March 2005, was filed out of time. However, the Chamber will, in the interest of justice, exercise its discretion and consider the Response in deciding the Motion.

8. The Defence response rehearses in detail the arguments made in the Prosecution Motion and submits that these arguments were either erroneous or based on a misunderstanding of the law and jurisprudence of the Ad-hoc tribunals.

9. The Defence challenges the Prosecution assertion that the Trial Chamber erred in its characterization of the materials the Prosecution sought to introduce in its Proposed Amended Indictment, and draw a distinction between the 'nature' of a charge and its 'cause'. According to the Defence, the former refers to the precise legal qualification or definition of the offence, while the latter reflects the underlying facts alleged by the Prosecutor, and which if proved, would support a conviction on the charge.

10. The Defence further challenges the Prosecution argument that the Trial Chamber erred in its conclusion that substantial prejudice would be caused to the Accused if the amendments sought were granted at that stage of proceedings.

¹ Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003, denying Leave to File an Amended Indictment, filed 12 February 2004, para. 20.



11. Finally, the Defence argues that the Prosecution has failed to meet the requirements for certification of interlocutory appeals under Rule 73(B) and urges the Trial Chamber to exercise its discretion against granting certification.

DELIBERATIONS

12. The Chamber recalls Rule 73(B) of the Rules which provides as follows:

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.

13. The Chamber notes that Rule 73 (B) confers a discretion to grant certification to appeal when the conditions delimited above are fulfilled.

14. First, for the Chamber to exercise its discretion in favour of certification, the applicant 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." The Chamber considers that the phrase "would significantly affect" implies that the drafters of the Rule intend to exclude minor or trivial issues that may arise in the course of a trial from certification to appeal..

15. Second, the Trial Chamber must be satisfied that immediate resolution by the Appeals Chamber of the issue involved in the decision "may materially advance the proceedings". The Chamber considers that the use of the word "and" in Rule 73(B) implies that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification. The Chamber notes that these are the only two conditions it must consider in deciding whether or not to certify an appeal. In this connection, the Chamber notes that although the Prosecution has expended much energy discussing errors of law, such considerations are irrelevant to the decision on whether or not to grant certification to appeal.

16. The Chamber recalls the Prosecution's argument, citing the Appeals Chamber Decision in *Bizimungu et al*, that amendments sought to clarify or expand existing allegations might be allowable because of their positive impact on the fairness of the trial. The Chamber wishes to draw the Prosecution's attention to the fact that in the same paragraph, the Appeals Chamber also indicated that it was improper for the Prosecution to inseparably lump together changes that narrow the scope of the existing allegations in

an indictment with changes that expand the scope, and that where this happens, the Trial Chamber is justified in dismissing the entire request to amend the indictment.²

17. Having said the foregoing, it is the Chamber's view that a Decision on the amendment of an Indictment would significantly affect the outcome of the trial. Therefore the Chamber is satisfied that the first condition for certification under Rule 73(B) is met.

18. It is further the view of the Chamber that appellate resolution of the question whether the material sought to be introduced by the Prosecutor through the proposed amendments, amount to new charges or merely constitute particularizations of existing charges, may materially advance the current proceedings. Therefore, the Chamber finds that the second condition under Rule 73(B) is also satisfied.

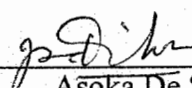
19. Accordingly, the Chamber exercises its discretion in favour of granting certification to appeal the Impugned Decision. However it is the Chamber's considered opinion that adjourning the proceedings will not serve the interest of justice and therefore denies the Prosecutor's prayer for an adjournment or stay of proceedings.

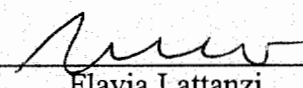
FOR THE ABOVE REASONS, THE TRIBUNAL

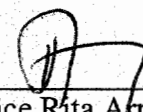
GRANTS the Prosecutor's prayer for certification to appeal; and

DENIES the prayer for stay of proceedings.

Arusha, 16 March 2005, done in English.


Asoka De Silva
Presiding Judge


Flavia Lattanzi
Judge


Florence Rita Arrey
Judge

[Seal of the Tribunal]

² *The Prosecutor v. C. Bizimungu et al*, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to file an Amended Indictment", A.C., 12 February 2004, para. 20.