ICTR-98-42-T
(21-09-2005
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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 Arlette Ramaroson
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 21 September 2005

**The PROSECUTOR**

**v.**

**Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI**

*Case No. ICTR-97-21-T*
*Joint Case No. ICTR-98-42-T*

**DECISION ON ARSÈNE SHALOM NTAHOBALI'S MOTION FOR CERTIFICATION TO APPEAL THE "DECISION ON THE DEFENCE MOTION TO MODIFY THE LIST OF DEFENCE WITNESSES FOR ARSÈNE SHALOM NTAHOBALI"**
***(Article 73 of the Rules of Procedure and Evidence)***

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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 Arlette Ramaroson, and Judge Solomy Balungi Bossa (the "Chamber");

**BEING SEIZED** of the Defence for Ntahobali's "*Requête d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée* 'Decision on the Defence Motion to Modify the List of Denfence (sic) Witnesses for Arsène Shalom Ntahobali'", filed on 2 September 2005 (the "Motion");

**HAVING RECEIVED** the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses", filed on 8 September 2005 (the "Prosecutor's Response") and the Defence for Ntahobali's "*Réplique de Arsène Shalom Ntahobali à la* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses' *(Article 73 Règlement de procédure et de preuve)*", filed on 12 September 2005 (the "Defence Reply");

**NOTING** the "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", issued on 26 August 2005 (the "impugned Decision");

**CONSIDERING** the provisions of the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C);

**NOW DECIDES** the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

## SUBMISSIONS BY THE PARTIES

***Defence for Ntahobali***

1. The Defence for Ntahobali moves the Chamber for certification to appeal the impugned Decision, of which it was notified on 29 August 2005. In particular, the Defence seeks certification to appeal the decision in relation to Witnesses WQMJP, MJ110, WDUSA, and NTN. The Defence takes issue with the impugned Decision because it denies the addition of Witnesses WDUSA and NTN to Ntahobali's witness list, and, whilst admitting Witnesses WQMJP and MJ110, restricts their respective testimonies to specific issues. [1]

2. The Defence submits that had it been able to meet Witnesses WQMJP, MJ110, WDUSA, and NTN prior to 31 December 2004, they would have been included in Ntahobali's witness list and the Chamber would not have had discretion to limit or deny the inclusion of their proposed testimonies. Consequently, the narrow approach taken by the Chamber in the impugned Decision seems altogether inequitable, at odds with the spirit of the Statute, and contrary to the guaranteed rights of the Accused.[2]

3. Primarily, the Defence for Ntahobali argues that the impugned Decision has grave consequences on the fair and expeditious conduct of the proceedings and the subsequent outcome of this trial, particularly where an Accused is deprived of presenting a defence of alibi because of a non-existent criterion or obligation;[3] that the fairness of proceedings are compromised if the Prosecutor is allowed a large

[1] The impugned Decision, paras. 47, 55, 64, and 68.
[2] *Ibid.*, paras. 16-17.
[3] *Ibid.*, paras. 8, 14, 39-42 and refers to *Prosecutor v. Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witnesses' Summaries (TC), 21 July 2005, para. 5; *Prosecutor v. Simba*, Decision on the Prosecutor's Request for Certification to Appeal Decision dated 14 July 2004 denying the Admission of Testimony of an Expert Witness (TC), 16 August 2004, paras. 3-4; *Prosecutor v. Karemera et al.*, Decision on the Request for Certification to Appeal the Decision on the Defence Motion for Subpoena to Witness G rendered on 20 October 2003 (TC), 17 February 2004, para. 7. The Defence recalls that the Prosecutor presented 11 witnesses who

number of witnesses while the Defence is restricted which denies the Defence the opportunity to provide an adequate Defence;[4] and, that the Chamber's Decision is in total contradiction with earlier decisions on similar motions, in particular those where the Chamber has permitted the Prosecutor to add witnesses of no great significance to his case, at a late stage of proceedings, and without restrictions.[5]

4. The Defence submits that it will be unable to respond adequately and completely to the Prosecution case if the witnesses it wishes to call and their testimony is significantly restricted. The Defence submits that the Chamber therefore risks issuing an erroneous conclusion in its final deliberations.[6]

5. The Defence submits that simply because witnesses for the Defence for Nyiramasuhuko mention certain facts should not deprive her co-Accused Ntahobali of the right to present his Defence case in his own way. The Defence argues that Ntahobali is in no way bound to content himself with evidence previously presented by the Accused Nyiramasuhuko.[7]

6. The Defence specifically argues the importance of the aforementioned witnesses to Ntahobali's defence strategy.[8]

   a. Despite being the twelfth Defence witness to testify to the alleged erection of a roadblock where Ntahobali is accused of having committed crimes from 20 or 21 April 1994 , the Defence submits that to prevent Witness WQMJP from testifying on this issue will deprive the Chamber of the opportunity to appraise whether particular Prosecution witnesses have either erred or lied. Moreover, it is both inequitable and unusual to prevent the witness from testifying whether he knew the Accused and the nature of their relationship;[9]

   b. Witness MJ110 would have given evidence of life at, and around, Ihuliro hotel, to the alibi of the Accused during some days in April and May 1994, and to the Accused's departure to Cyangugu and subsequent exile from Rwanda;[10]

   c. Witness WDUSA was the only proposed witness without family ties with the Accused Ntahobali and whose testimony would have been able to account for the Accused at Cyangugu;[11]

   d. Witness NTN was the only proposed witness who could demonstrate how he differs both physically and physiologically from the Accused Ntahobali; matters crucial to the issue of identification, for the transcripts do not reveal the physical characteristics of the wrongly identified witness.[12]

7. In relation to Witness WDUSA, the Defence stresses that this witness provides the Accused with a defence of alibi. Considering the Defence is not obliged to provide notice pursuant to Rule 67, the Defence submits that it does not understand how the absence of the non-obligatory notice poses an obstacle to adding such witnesses to its list. However, if required, this notice will obviously affect the expeditiousness of proceedings and the resources of the Tribunal. The Defence suggests efficiency

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testified to Ntahobali's presence at the *Bureau préfectoral*, 10 witnesses who testified to the existence of the alleged roadblock, and five witnesses testifying to Ntahobali's presence at EER.

[4] *Ibid.*, paras. 39-42.

[5] *Ibid.*, paras. 47-58. The Defence cites the addition of Witnesses FAW, RV, QBX, FA FCC, an expert in linguistics, and a handwriting expert.

[6] *Ibid.*, paras. 71-74.

[7] *Ibid.*, paras. 44-45.

[8] *Ibid.*, para. 24.

[9] *Ibid.*, paras. 25-28.

[10] *Ibid.*, para. 29.

[11] *Ibid.*, paras. 30-31.

[12] *Ibid.*, paras. 33-37.

would be best served by adding Witness WDUSA to the Defence witness list, and to determine the weight of that testimony at the appropriate time.[13]

8. The Defence accepts that the addition of the remaining three witnesses will affect the expeditiousness of proceedings. However, the Defence argues that a more liberal interpretation of Rule 73 (B) is required, suggesting that in this context, the Rule only demands that proceedings not be significantly affected. Considering that this trial has been running for over four years, the Defence for Ntahobali maintains that some extra hours are insignificant when weighed against the Accused's rights.[14]

9. In conclusion, the Defence submits that an intervention by the Appeals Chamber is necessary and urgent in order to clarify the above questions, to enable Ntahobali to take the appropriate decisions with regard to his defence prior to the conclusion of the defence for Nyiramasuhuko. Further, a favourable decision by the Appeals Chamber will allow Ntahobali to present a more convincing, efficient, and expeditious defence.[15]

***The Prosecutor's Submissions***

10. Relying on the criteria for certification under Rule 73 (B) and the *Bagosora et al.* Decision of 5 December 2003, the Prosecutor submits that the Defence for Ntahobali has failed to meet any of the crucial requirements set forth in Rule 73 (B) and that the motion is unfounded and lacks merit.[16]

11. The Prosecutor relies upon the Chamber's Decisions of 4 October 2004 and 30 November 2004 in its submissions on the scope of Rule 73 (B), according to which certification of an appeal has to be an absolute exception when deciding on the admissibility and the materiality of the evidence sought to be presented. Furthermore, on the issue of applications for adding witnesses or modifying a witness list, the Prosecutor submits that it is the responsibility of the Trial Chamber, as trier of fact, to determine which evidence to admit during the course of the trial, and in this case, after reviewing the materiality of the evidence the proposed witnesses are expected to address. [17]

12. The Prosecutor submits that should a witness wrongly identify an Accused, it is not essential in law for the discrepancies to be reflected in the court record. The Chamber, the Prosecutor submits, has indicated that it has observed the mistaken identity and should the description not be reflected in the court records, the video recordings of the proceedings can be utilised.[18]

13. The Prosecutor maintains that the Defence, despite arguing infringement of the Accused's rights, does not demonstrate how the impugned Decision will affect the fair and expeditious conduct of proceedings and the hypothesis that the witnesses would have been on the original list is irrelevant to the present motion.[19]

14. The Prosecutor maintains that the seriousness, complexity and magnitude of the current case is based on quality and substance of the evidence provided and not the quantity of witnesses called. For this

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[13] *Ibid.*, paras. 59-62.
[14] *Ibid.*, paras. 63-70. The Defence submits that Rule 73 (B) was not drafted with the intention of totally excluding this type of decision from being appealed.
[15] *Ibid.*, paras. 75-78.
[16] The Prosecutor's Response, paras. 4, 5, relying upon *Bagosora et al.*, Decision on the Certification of Appeal Concerning Will-Say Statements of Witnesses DPQ, DP, and DA (TC), 5 December 2003, para. 10.
[17] *Ibid.*, paras. 7, 8, 10-16, 25, relying upon Rule 73*ter* and the following Decisions: *Nyiramasuhuko et al.*, Decision of Nyiramasuhuko's Appeal on the Admissibility of Evidence (TC), 4 October 2004, para. 5; Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 (TC), 30 November 2004, para. 11; Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the Decision on the Defence Urgent Motion to Declare Parts of the Evidence of Witness RV and QBZ Inadmissible (TC), 18 March 2004, paras. 14-17, 20-22.
[18] *Ibid.*, para. 20.
[19] *Ibid.*, para. 17.

reason, the Prosecutor submits that a comparison of the number of witnesses the Prosecutor called is inappropriate and misleading, for the Prosecution witnesses added were relevant, essential, and material to the indictment and the Chamber deemed their addition necessary in the interests of justice.[20]

15. In relation to the defence of alibi, the Prosecutor submits that the Defence for Ntahobali has misconstrued the impugned Decision with respect to Witness WDUSA, for the denial to add this witness was not for lack of an alibi notice.[21]

16. The Prosecutor submits that the Defence for Ntahobali should not have based part of its defence on witnesses that may or may not be called by another Party in the proceedings. The only common witness was Edmond Babin, and thus the Prosecutor submits that this submission by the Defence for Ntahobali is irrelevant.[22]

17. In conclusion, the Prosecutor submits that the Defence has failed to specifically demonstrate fulfilment of the criteria in Rule 73 (B), instead re-litigating its submissions contained in the previous motions of 2 and 10 August 2005.[23] The Prosecutor further submits that the Defence for Ntahobali makes speculative submissions on the interpretation of Rule 73 (B) without supporting them with any jurisprudence. The addition of the proposed Defence witnesses will significantly affect the expeditiousness of the proceedings, the Prosecutor maintains, particularly when the proposed evidence is not material to the Indictment or other witnesses have testified to the same issues. According to the Prosecutor, the Defence for Ntahobali has failed to meet the crucial and stringent Rule 73 (B) criteria, especially as the matters challenged are matters to determine for the Chamber as trier of fact, and not the subject of appellate review.[24]

***The Defence Reply***

18. The Defence for Ntahobali reiterates its plea for certification of appeal and addresses the arguments put forward by the Prosecutor. It submits that the Prosecutor errs when he criticizes the motion for stressing issues regarding the fairness of proceedings, as this is at the core of Rule 73 (B).[25] Further, the reiteration of certain arguments previously raised in the motion to modify the Defence's list of witnesses is necessary to recall the context of the motion to the Chamber.[26]

19. The Defence further stresses the importance Witnesses MJ110 and WDUSA - the former because of the withdrawal by the Defence of Nyiramasuhuko of Witness WFMG, the latter as a result of the Accused's proposed defence of alibi.[27]

20. The Defence acknowledges that the calling of additional witnesses will inevitably delay proceedings, but maintains that a delay of three days is not significant in comparison to the full length of the trial. The Defence suggests that this must be seen in relation to the time gained as a result of the previous withdrawal of the Defence's three expert witnesses.[28]

21. The Defence reiterates that Ntahobali has the right to present his defense case in the manner he judges necessary, independently of his co-Accused's defence cases.[29]

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[20] *Ibid.*, para.21, 22, 23, referring to *Nyiramasuhuko et al.*, Decision on Prosecutor's Motion to Drop and Add Witnesses (TC), 30 March 2004, para. 28.
[21] *Ibid.*, para. 24.
[22] *Ibid.*, para 18.
[23] *Ibid.*, paras. 6, 9, 19, 22, 27.
[24] *Ibid.*, para. 25-27.
[25] Defence Reply, paras. 12, 14, 15.
[26] *Ibid.*, para. 17.
[27] *Ibid.*, paras. 27-31.
[28] *Ibid.*, paras. 21-22.
[29] *Ibid.*, para. 32.

**DELIBERATIONS**

22. The Chamber recalls the relevant provisions of Rule 73, in particular, the following sub-rules:

> (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. [...]

23. The Chamber notes that the impugned decision was rendered on 26 August 2005. Upon application of Rule 73 (C), the Chamber observes that the Defence should have filed its Motion for certification of appeal on 1 September 2005 to fall within the time-limits provided. The Defence does not provide the Chamber with an explanation for the delay in the submission of this Motion for certification to appeal, save that it received the impugned Decision on 29 August 2005. Given that Rule 73 (C) is clear and unambiguous, the Chamber finds that this Motion has been filed out of time and is therefore time barred.

24. The Chamber reminds the Defence for Ntahobali of its Decision of 26 August 2005, where it drew the Defence's attention to Rule 67 in full, and in particular Rule 67 (B).[30] The Defence for Ntahobali is not limited by the Chamber's Decision of 26 August 2005 if it wishes to avail itself of its right to present a defence of alibi.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Motion for certification to appeal the impugned Decision in its entirety.

Arusha, 21 September 2005

| Arlette Ramaroson | William H. Sekule | Solomy Balungi Bossa |
|---|---|---|
| Judge | Presiding Judge | Judge |

[Seal of the Tribunal]

[30] *Nyiramasuhuko et al.*, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 *ter* (E), Rules of Procedure and Evidence, 26 August 2005 (TC), para. 65.