



ICTR-98-41-T
17-02-2006
(25498-26494)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

26498

TRIAL CHAMBER I

S. MUSA

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

Registrar: Adama Dieng

Date: 16 February 2006

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 FEB 17 A 9:24

**DECISION ON MOTION FOR RECONSIDERATION CONCERNING STANDARDS
FOR GRANTING CERTIFICATION OF INTERLOCUTORY APPEAL**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershon Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Kabiligi "Motion for Reconsideration of the 'Decision on Kabiligi Application for Certification'", etc., filed on 12 December 2005;

CONSIDERING the Prosecution Response, filed on 16 December 2005; and the Kabiligi Reply, filed on 21 December 2005.

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 October 2005, the Chamber made an oral ruling preventing the Defence from asking questions after the Prosecution's cross-examination. The Chamber observed that the questions concerned a "general issue which has been on the table throughout these proceedings", and which, therefore, was not a new question arising only during the Prosecution cross-examination.¹ Leave to appeal this decision was subsequently denied.²

2. The Kabiligi Defence now asks the Chamber to reconsider the denial of leave to appeal. Its primary argument is that the Chamber should not have considered the merits of the underlying decision. Rule 73 (B), which requires that the appeal may "materially advance the proceedings", is said to exclude consideration of the nature of the underlying decision or the likelihood of success on appeal.³ A second but related argument is that the Chamber should not have relied on the "primacy of Trial Chamber decisions which involve an exercise of discretion", a consideration which applies only to the standard of appellate review, not the standard for leave to appeal. Finally, the Defence complains that the Chamber's explanation that "interlocutory appeals are only warranted under exceptional circumstances" did not sufficiently address the specific arguments presented by the Defence.

DELIBERATIONS

3. The present motion raises the question whether a Trial Chamber is barred from considering the merits of an appeal in deciding whether leave for that appeal should be granted. In the Decision challenged by the Kabiligi Defence, the Chamber held, quoting a decision from 2003, that

the question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings "requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue". The Defence has failed to raise such doubt on the

¹ T. 21 October 2005 pp. 43, 49.

² *Bagosora et al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005 ("the Decision").

³ Motion, paras. 14, 17.

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Chamber's decision, in large part because the decision rested on an exercise of the Chamber's discretion.⁴

4. The correctness of a decision is a matter for the Appeals Chamber, should certification be granted. In this sense, it is certainly true that a Trial Chamber is not concerned with the correctness of its own decision when determining whether to grant leave to appeal.⁵ On the other hand, Trial Chambers do have a responsibility to screen out requests for certification with no prospect of success and which, accordingly, would not "materially advance the proceedings". The Appeals Chamber has emphasized, for example, that certification should not ordinarily be granted on questions of admissibility of evidence, reasoning that "as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it ... should not have been certified".⁶ Numerous Trial Chamber decisions – and not only by this Trial Chamber – have applied this concept more generally, and inquired into the basis of the prospective appeal in relation to other types of decisions.⁷ The approach advocated by the

⁴ Decision, para. 7 (citations omitted).

⁵ *Milosevic*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 3 ("A request for certification is not concerned with whether a decision was correctly reasoned or not. This is a matter for appeal, be it an interlocutory appeal or one after the final Judgement has been rendered"). *Bizimungu et al.*, Decision on Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material" (TC), 4 February 2005, para. 28 ("All other considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber"); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 21 ("The Chamber notes that the Defence submissions on the Chamber's alleged errors in law and fact, in Impugned Decisions I and II, are not relevant at the certification stage").

⁶ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("Indeed, the submissions regarding the chain of custody, ownership of the diary, and whether pages are missing are all matters which go to the authenticity, reliability and admissibility of the diary, the assessment of which falls within the discretion of the Trial Chamber. It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility"); *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence"). Trial scheduling, though often implicating the rights of the accused under Articles 19 and 20 of the Statute, has also been described as a matter within the discretion of a Trial Chamber, subject to reversal on interlocutory appeal "in limited circumstances only, for instance where the Trial Chamber has failed to exercise such discretion or to take into account a material consideration". *Bagosora et al.*, Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003) (AC), 28 October 2003, p. 4.

⁷ See e.g. *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005, para. 5 ("Interlocutory appeals under Rule 73 (B) have been described as exceptional, and the Appeals Chamber has underscored the primacy of Trial Chamber rulings involving an exercise of discretion. Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior decision on the merits by the Trial Chamber. Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B)"); *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Certification (TC), 7 July 2005, para. 12 ("[The] Chamber does not consider that there is serious doubt, raised by the Defence Motion, about any question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B)"); *Bagosora et al.*, Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003, para. 7 ("In light of Rule 90 (A), and the absence of any argument raising a serious doubt as to the correctness of its oral decision of 20 November 2003, the Chamber does not believe that immediate resolution of the legal issue by the

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Defence would require Trial Chambers to certify decisions even on motions which had been found to be frivolous, provided that the subject-matter concerned the fair and expeditious conduct of proceedings, and reversal of which would advance the proceedings. Rule 73 (B) requires no such inconceivable result. It must be "the opinion of the Trial Chamber" that certification could "materially advance the proceedings": in the absence of any reasonably articulated ground of appeal, certification could not materially advance the proceedings. This does not mean, of course, that a Trial Chamber should simply substitute its own opinion for that of the Appeals Chamber; rather, the appropriate inquiry is whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁸

5. The Decision correctly observes that the "Appeals Chamber has repeatedly emphasized the primacy of Trial Chamber rulings involving an exercise of discretion".⁹ The underlying decision "rested on an exercise of the Chamber's discretion", based on a fact-specific analysis of the particular cross-examination in question.¹⁰ The Chamber concluded in summary fashion that no "serious doubt as to the correctness of the legal principles" had been raised. For the reasons described above, the Chamber was correct to consider whether the appeal had any prospect of success. The reference to the settled formulation that interlocutory appeals "are only warranted under exceptional circumstances" was descriptive, rather than determinative, of the Chamber's conclusion. No error of law or abuse of discretion has been demonstrated.

Appeals Chamber may materially advance the proceedings, as required by Rule 73 (B)"); *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10 ("The Chamber does not believe that there is serious doubt on a question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B)"). *Prlic et al.*, Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motions Alleging Defect in the Form of the Indictment (TC), 19 September 2005 (asserting that "the Chamber has properly addressed and adequately examined the 'essence of those complaints or arguments' enumerated in the motion"); *Strugar*, Decision on Defence Motion for Certification (TC), 17 June 2004, para. 8 ("... the Trial Chamber is not able to see from the very general terms of the Defence Motion that there may well be some oversight or error which has affected its decision"); *Strugar*, Decision on the Defence's Request for Certification to Appeal the Trial Chamber's Decision Dated 26 November 2003 on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-trial Conference and the Start of the Trial Against Pavle Strugar (TC), 12 December 2003, paras. 7-8 ("the Defence failed to identify an error ... Moreover, the November Decision found that Pavle Strugar's right to an expeditious trial would be promoted by the separation of cases. The Defence has not cast doubt on this either"); *Hadzihasanovic and Kubura*, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 bis of the Rules (TC), 26 October 2004 (asserting that "the case-law of the Tribunal has ruled on repeated occasions" that the elements applied in its decision were correct).

⁸ See *Milosevic*, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel (TC), 1 November 2004, para. 10.

⁹ Decision, para. 5.

¹⁰ Decision, paras. 7-8.

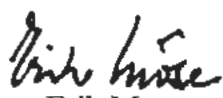
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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 16 February 2006


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

