



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

11686  
Mwanja

OR: ENG

TRIAL CHAMBER II

**Before:** Judge William H. Sekule, Presiding  
Judge Arlette Ramaroson  
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 04 April 2006

ICTR-98-42-T  
04 - 04 - 2006  
(11686 - 11682)

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO *et al.*  
Case No. ICTR-97-21-T  
Joint Case No. ICTR-98-42-T

2006 APR 04 11:00 AM  
ICTR

DECISION

ON ARSÈNE SHALOM NTAHOBALI' S MOTION FOR CERTIFICATION TO  
APPEAL THE "DECISION ON ARSÈNE NTAHOBALI' S EXTREMELY URGENT  
STRICTLY CONFIDENTIAL-UNDER SEAL-MOTION TO HAVE WITNESS  
NMBMP TESTIFY BY VIDEO-LINK"

**Office of the Prosecutor**

Ms Silvana Arbia, Senior Trial Attorney  
Ms Adelaide Whest, Trial Attorney  
Ms Holo Makwaia, Trial Attorney  
Mr Gregory Townsend, Trial Attorney  
Ms Althea Alexis Windsor, Assistant Trial Attorney  
Mr Michael Adenuga, Legal Advisor  
Mr Cheikh T. Mara, Legal Advisor  
Ms Astou Mbow, Case Manager

**Defence Counsel**

Mr Normand Marquis  
Mr Louis Huot

**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 “*Requête d’Arsène Ntahobali afin d’obtenir la certification d’appel de la décision intitulée ‘Decision on Arsène Shalom Ntahobali’s Extremely Urgent- Strictly Confidential-Under Seal-Motion to Have Witness NMBMP Testify via Video-Link’*”, filed on 8 March 2006 but dated 7 September 2005 (the “Motion”);

**CONSIDERING** the “Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on the Motion to Have Witness NMBMP Testify via Video-Link”, filed on 14 March 2006 (the “Prosecution Response”);

**CONSIDERING** the “*Réplique de Arsène Shalom Ntahobali à la ‘Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Have Witness NMBMP Testify via Video-Link’*”, filed on 20 March 2006 (the “Defence Reply”);

**NOTING** the “Decision on Arsène Shalom Ntahobali’s Extremely Urgent- Strictly Confidential- Under Seal- Motion to Have Witness NMBMP Testify via Video-Link”, issued on 2 March 2006 (the “Impugned Decision”);

**NOTING** the facsimile titled: “In the matter of the Prosecutor vs. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko *et al.*”, issued by the Registry on 9 March 2006;

**CONSIDERING** 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), on the basis of the written submissions of the Parties.

## **SUBMISSIONS OF THE PARTIES**

### ***The Defence***

1. The Defence moves the Chamber for certification to appeal the Impugned Decision of 2 March 2006. The Defence submits that the Chamber erred in fact and in law in two respects: firstly, when the Chamber evaluated the burden imposed on the Defence;<sup>1</sup> secondly, when it evaluated the evidence adduced in support of the Motion and when it evaluated the legal consequences of Witness NMBMP’s status in relation to the procedure she is pursuing before the Immigration Committee of the United States.<sup>2</sup>
2. The Defence submits that Witness NMBMP’s testimony might affect the outcome of the trial as she is expected to give alibi evidence and to challenge the charge of rape against the Accused.<sup>3</sup> Furthermore, the Defence argues that the fairness of the trial would be significantly affected if the Defence were to withdraw NMBMP from its witness list due to her inability to travel out of her country of residence.<sup>4</sup>

<sup>1</sup> Paragraph 12 of the Motion.

<sup>2</sup> Paragraph 13 of the Motion.

<sup>3</sup> Paragraph 15 of the Motion.

<sup>4</sup> Paragraph 17 of the Motion.



3. The Defence submits that the Chamber erroneously concluded that the Defence failed to show that Witness NMBMP is actually unable to travel outside the United States, despite the production of supplementary documents by the Defence in support of the Motion which show this and which the Chamber has not challenged.<sup>5</sup>
4. The Defence argues that it is obvious that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sense that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of facts that Witness NMBMP could challenge at first instance.<sup>6</sup>

### **The Prosecution**

5. The Prosecution submits that rather than focus on the criteria for certification in Rule 73 (B) (ii), the Defence dwells extensively on irrelevant considerations, and attempts to re-litigate issues already decided by the Chamber in its Impugned Decision.<sup>7</sup> The Prosecution asserts that the submissions and implicit threats in the Motion regarding Rule 115 are both irrelevant to a motion for certification and premature.<sup>8</sup> The Prosecution alleges that the Defence has essentially relied on submissions contained in its motion to have Witness NMBMP testify by video-link, including submissions on the witness' immigration status, which the Chamber has considered and accorded due weight to.<sup>9</sup> The Prosecution further argues that the Motion deals extensively with the grounds of appeal, rather than addressing the certification criteria.<sup>10</sup>
6. The Prosecution submits that the Defence has failed to demonstrate that the Impugned Decision involves an issue that would significantly affect the expeditious conduct of the proceedings.<sup>11</sup>
7. The Prosecution asserts that the Defence has failed to sufficiently demonstrate why an appeal is warranted on a matter falling squarely within the Chamber's discretion.<sup>12</sup>
8. The Prosecution submits that according to the Defence there are procedures allowing persons in circumstances comparable to Witness NMBMP's to leave the country in question, but that the Defence has not established that these procedures have been exhausted.<sup>13</sup> The Prosecution further argues that it is rather speculative and hypothetical for the Defence to submit that the witness may not be allowed to return to her country of residence if she applies for and obtains an advance parole.<sup>14</sup>

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<sup>5</sup> Paragraph 20 of the Motion.

<sup>6</sup> Paragraph 35 of the Motion.

<sup>7</sup> Paragraphs 5 and 22 of the Prosecution Response.

<sup>8</sup> Paragraph 21 of the Prosecution Response.

<sup>9</sup> Paragraphs 10 and 16 of the Prosecution Response.

<sup>10</sup> Paragraphs 5 and 23 of the Prosecution Response.

<sup>11</sup> Paragraph 15 of the Prosecution Response.

<sup>12</sup> Paragraph 16 of the Prosecution Response.

<sup>13</sup> Paragraph 17 of the Prosecution Response.

<sup>14</sup> Paragraph 18 of the Prosecution Response.



9. The Prosecution submits that the arguments of the Defence do not raise 'serious doubts as to the correctness of the legal principles at issue'.<sup>15</sup> The legal principles alluded to relate to United States' immigration law, which the Chamber is not bound to accept.<sup>16</sup> Consequently, a resolution of the matter by the Appeals Chamber may not materially advance the proceedings.<sup>17</sup>
10. The Prosecution argues that the Chamber has not denied the Accused the right to call Witness NMBMP as an alibi witness, but has decided that the testimony should not be given by video-link.<sup>18</sup> The Prosecution further submits that the Defence intends to call other witnesses to provide alibi evidence, including the Accused himself, his spouse, and Witness NMBMB, who has already testified.<sup>19</sup>

### ***The Defence Reply***

11. The Defence submits that the Prosecution Response of 14 March 2006 was filed out of time and should be dismissed. According to the Defence, the time frame of five days within which the Prosecution should have filed its response expired on 13 March 2006.

### **HAVING DELIBERATED,**

12. As a preliminary matter, the Chamber finds that the Prosecution Response was filed on time, as the Registry's notification of 9 March 2006 specifies that "the Parties have five (5) days to file their Responses *after* receipt of this notification" [emphasis added]. The Chamber notes that the Prosecution acknowledged receipt of the notification on 9 March 2006 and the time frame for it to file its response therefore ran from 10 March 2006. Accordingly, the Chamber rejects the Defence request for dismissal of the Prosecution response.
13. The Chamber recalls Rule 73 (B), which stipulates:

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.
14. The Chamber notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except that the Chamber has discretion to grant certification in the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first limb of Rule 73 (B), the applicant must show how the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or (b) the outcome of the trial. Under the second limb, the applicant has

<sup>15</sup> Paragraph 19 of the Prosecution Response.

<sup>16</sup> Paragraph 19 of the Prosecution Response.

<sup>17</sup> Paragraph 19 of the Prosecution Response.

<sup>18</sup> Paragraph 20 of the Prosecution Response.

<sup>19</sup> Paragraph 20 of the Prosecution Response.



the burden of convincing the Chamber that an “immediate resolution by the Appeals Chamber may materially advance the proceedings”. Both of these conditions require a specific demonstration, and are not met through general reference to the submissions on which the Impugned Decision was rendered.<sup>20</sup>

15. The Chamber takes note of the Defence submissions and points out that it did not deny the Defence the opportunity to call Witness NMBMP in the Impugned Decision; rather, it found that the legal requirements to allow NMBMP to testify via video-link were not met. Furthermore, the Chamber is of the view that the reasons invoked by the Defence constitute grounds of appeal, rather than grounds to support a motion for certification. The Chamber therefore concludes that the Defence has failed to meet the requirements provided for by Rule 73 (B).

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Motion in its entirety.

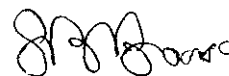
Arusha, 04 April 2006



William H. Sekule  
Presiding Judge



Arlette Ramaroson  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]

<sup>20</sup> *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, “Decision on Prosecutor’s Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence”, 4 February 2005, para. 11; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, “Decision on Defence Motion for Certification to Appeal the “Decision on Defence Motion for a Stay of Proceedings and Abuse of Process”, 19 March 2004, paras. 12 – 16; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, “Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible”, 18 March 2004, paras. 14 – 17.