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UNITED NATIONS  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Case No. ICTR-2001-66-T

ENGLISH  
Original: FRENCH

Before: Judge Andréia Vaz, presiding  
Judge Karin Hökberg  
Judge Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 30 May 2006

THE PROSECUTOR

v.

ATHANASE SEROMBA

JUDICIAL RECORDS/ARCHIVES  
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DECISION ON THE DEFENCE MOTIONS FOR CERTIFICATION OF APPEAL  
AGAINST THE ORAL DECISIONS RENDERED ON 26 AND 27 APRIL 2006

*Rule 73(B) of the Rules of Procedure and Evidence*

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CIII06-0069 (E)

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Translation certified by LSS, ICTR

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

**SITTING** as Trial Chamber III (the "Chamber"), composed of Judges Andréia Vaz, presiding, Karin Hökberg and Gberdao Gustave Kam;

**SEIZED** of the Defence Motion entitled "Defence Motion for Certification of Appeal Against the Oral Decisions Rendered by the Trial Chamber on 26 April 2006 ...", filed with the Registry of the Tribunal on 2 May 2006 (hereinafter the "first Motion");

Also **SEIZED** of the Defence Motion entitled "Defence Motion for Certification of Appeal Against the Order of 27 April 2006 Relating to the Filing of Closing Briefs and Closing Arguments of the Parties", filed with the Registry of the Tribunal on 2 May 2006 (hereinafter the "second Motion");

**CONSIDERING** the Prosecutor's Response, entitled "Prosecutor's Response to Seromba's Motions for Certification of Appeals", filed with the Registry on 3 May 2006 (hereinafter the "Response");

**DECIDES** as follows, on the basis of the Statute of the Tribunal (hereinafter the "Statute") and Rule 73 of the Rules of Procedure and Evidence (hereinafter the "Rules").

## INTRODUCTION

1. The Accused Athanase Seromba is charged with genocide, or in the alternative, complicity in genocide, conspiracy to commit genocide and crimes against humanity for extermination.<sup>1</sup> His trial commenced on 20 September 2004.<sup>2</sup> The Prosecutor concluded the presentation of evidence on 25 January 2005.<sup>3</sup> The Defence, after numerous delays mainly due to its own actions,<sup>4</sup> only commenced the presentation of its evidence on 31 October 2005.<sup>5</sup>

2. On 23 March 2006, the Chamber commenced a session on the presentation of evidence by the Defence with the last Defence witnesses. By an Oral Decision of 24 March 2006, the Chamber allowed the Defence to vary its list of witnesses, by adding notably Witness PS2.<sup>6</sup> On 20 April 2006, the Chamber ordered that the testimonies of Witness PS2 be presented via video-link, since the said witness was not in Arusha for administrative reasons.<sup>7</sup> During the hearing of 21 April 2006, the Chamber, in order to avoid an interruption in the hearings and in order to take

<sup>1</sup> Indictment of 9 July 2001

<sup>2</sup> T.20 September 2004.

<sup>3</sup> T.25 January 2005.

<sup>4</sup> Thus, from 25 January 2005, date when the Prosecution concluded its presentation of evidence, the Defence only started presenting its evidence on 31 October 2005, after the case had been successively adjourned on 1 March 2005, 5 April 2005, 10 May 2005 and 24 June 2005, owing to unpreparedness of the Defence (*Cf.* T.25 January 2005, T.1 March 2005, 5 April 2005, T.10 May 2005 and T.24 June 2005).

<sup>5</sup> T.31 October 2005.

<sup>6</sup> T.24 March 2006, pp. 39-40.

<sup>7</sup> *The Prosecutor v. Athanase Seromba*, Case N° ICTR-2001-66-T, Decision on the Defence Motion to Introduce the Testimonies of Witness PS2 via Video-Link, 20 April 2006.

account of the fact that the session was scheduled to end on 27 April 2006, decided to hear the testimony of the Accused before that of Witness PS2.<sup>8</sup> On 24 April 2006, the Defence filed a Motion for review of that Decision.<sup>9</sup> The Chamber, by an oral decision rendered that same day, denied this request.<sup>10</sup> Following this decision, the Defence seized the Bureau of the Tribunal of a motion for disqualification of the Judges.<sup>11</sup> The Chamber therefore adjourned the proceedings pending the decision of the Bureau.<sup>12</sup> By a Decision dated 25 April 2006, the Bureau dismissed the request for disqualification of the Judges.<sup>13</sup>

3. At the hearing of 26 April 2006, the Chamber decided to continue without the testimony of Witness PS2, considering that Defence Counsel's refusal to examine Witness PS2 was tantamount to waiving the right to hear the witness.<sup>14</sup>

4. Lastly, at its hearing of 27 April 2006, the Chamber noted the persistent refusal of the Accused to appear for trial for his testimony and interpreted this as waiver of his right to testify before the Chamber.<sup>15</sup> The Chamber then noted that, since the Defence had no further witnesses to hear, the defence evidence was now closed, and ordered the parties to present their Closing Arguments on 27 June 2006.<sup>16</sup> It is in this context that the Defence filed the two Motions for Certification of Appeal referred to above.

## SUBMISSIONS OF THE PARTIES

### *The Defence*

5. In its first Motion, the Defence argued that it had not renounced the testimony of Witness PS2. It contended in particular that waiver was a voluntary act, "necessarily taken on the initiative of its author, which cannot be attributed to the latter either by a third person, or by a court".<sup>17</sup> It maintains that the Decision of 26 April 2006 deprives it of its right to present its

<sup>8</sup> T.21 April 2006, p. 2. At the 18 April 2006 hearing, the Defence moreover recalled, unchallenged, that the session was scheduled to close on 27 April 2006 : "(...) We do not know what decision was taken when we parted company; as you know the date of the 27th of April is the deadline for these proceedings" T.18 April 2006, p. 6.

<sup>9</sup> Extremely Urgent Motion to Review the Decision of 21 April 2006 Regarding the Appearance in Court of the Accused as a Witness, 24 April 2006.

<sup>10</sup> T.24 April 2006, pp. 6-7. The Chamber's Decision was motivated as follows: "The Chamber, out of concern for judicial management of the trial and in the interest of justice, and taking into account technical problems connected with the hearing of the last witness PS2 scheduled for next Wednesday, merely reverted or varied the sequence of appearance of the said witness, in order to comply with the date set for the closing of the Defence case which is scheduled on the 27th of April 2006, as jointly agreed on by the parties and the Trial Chamber."

<sup>11</sup> Defence's Extremely Urgent Motion for Disqualification of Judges Andrézia Vaz, Gustave Kam and Karin Hökborg, 24 April 2006.

<sup>12</sup> T.24 April 2006, pp. 13-14.

<sup>13</sup> *The Bureau*, Decision on Motion for Disqualification of Judges, 25 April 2006. It should be recalled that the Appeals Chamber rendered a Decision on 22 May 2006, dismissing the appeal lodged by the Defence against the Decision of the Bureau (Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006).

<sup>14</sup> T.26 April 2006, p. 8.

<sup>15</sup> T.27 April 2006, p. 5.

<sup>16</sup> *Ibidem*.

<sup>17</sup> *Ibidem*. First Motion, p. 2, para. 2.

evidence, as provided for under Rule 85(A) of the Rules, while also denying the Accused the right to a fair trial guaranteed by Article 19 of the Statute. It further argues that Article 20 of the Statute, which gives the accused “the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”,<sup>18</sup> has been breached.

6. The Defence further submits that the Decision of 26 April 2006 has caused it “serious prejudice”.<sup>19</sup> To support this allegation, it argues notably that the testimony of Witness PS2 was crucial, because it was intended to contradict the acts alleged in the Indictment, namely the Accused’s direct involvement in the death of Anicet Gatare.<sup>20</sup>

7. From the foregoing, the Defence concludes that the Decision of 26 April 2006 involves an issue that may affect the fair conduct of the proceedings and the outcome of the trial and for which an immediate resolution by the Appeals Chamber could materially advance the proceedings. Consequently, the Defence prays the Chamber to certify the appeal against this decision pursuant to Rule 73(B) of the Rules.<sup>21</sup>

8. In its second Motion, the Defence argues that the Order of 27 April 2006 failed to take account of the pending appeal by the Accused against the decision of the Bureau.<sup>22</sup> The Defence submits that, even though this appeal has no formal suspensive effect, the Chamber should have conformed with the practice in “all modern judicial systems”, by refraining from continuing the proceedings until the Appeals Chamber had rendered its decision on the appeal.<sup>23</sup> It adds further that the Chamber, by considering that the Accused had renounced his right to testify in his own defence, had deprived the latter of his right to a fair trial and therefore violated Articles 19 and 20 of the Statute. On that issue, it argues particularly that waiver is “a voluntary act which must necessarily and expressly be articulated by the person concerned”.<sup>24</sup> It further submits that the Order represents a particularly serious breach of the equality principle, since it has denied the Accused the opportunity to conclude his evidence on the same terms as the Prosecution had been able to do.<sup>25</sup>

9. The Defence further contends that the Order of 27 April 2006 flouts the Decision rendered on 29 September 2004, whereby the Chamber decided to disregard the objections raised by the Defence while at the same time reserving to the latter the right to recall for further cross-examination the Prosecution witnesses designated by the pseudonyms YAU, YAT, CBI and CBS.<sup>26</sup> It argues that, by “prematurely” concluding the presentation of Defence evidence and ordering the Defence to file its Closing Brief by 16 June 2006, the Order caused prejudice to the

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<sup>18</sup> Ibid, p. 3, para. 7.

<sup>19</sup> Ibid, p. 4.

<sup>20</sup> Idem.

<sup>21</sup> Ibid., pp. 4, 5 and 6.

<sup>22</sup> See *supra*, para. 2.

<sup>23</sup> Second Motion, p. 3, para. 1.

<sup>24</sup> Ibid., para.2

<sup>25</sup> Ibid., paras. 3-4.

<sup>26</sup> Second Motion, pp. 3-4.

Defence. It thus submits that the Closing Brief can be filed only after the Defence has gathered all the exculpatory evidence by “the mechanisms” of examination and cross-examination.<sup>27</sup> The Defence therefore considers that it was not afforded full exercise of its right to present its case. It argues that the Order of 27 April 2006 involves “an issue that may affect the fair conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber will materially advance the proceedings”.<sup>28</sup> Consequently, the Defence prays the Chamber to certify its appeal against the Order of 27 April 2006 pursuant to Rule 73(B) of the Rules. Furthermore, it prays the Chamber to order that Prosecution Witnesses YAU, YAT, CBI and CBS should be recalled for further cross-examination at a date to be determined by the Chamber.<sup>29</sup>

### *The Prosecutor*

10. The Prosecutor submits that the Defence voluntarily declined to examine Witness PS2.<sup>30</sup> He explains that Co-Counsel stated at the hearing of 26 April 2006 that he was not prepared to examine Witness PS2, despite the efforts and costs incurred by the Tribunal in organizing the hearing of the said witness. He considers that this attitude on the part of the Defence amounted to an implicit renunciation of Witness PS2’s testimony, as part of the strategy adopted by the Defence despite the Chamber’s ruling that no stay of proceedings was granted and of the fact that the wish of the Defence to see the Accused testify last had been satisfied.<sup>31</sup>

11. The Prosecutor submits, further, that the Defence should have examined Witness PS2 if the latter’s testimony was as important as it claims. He also emphasizes that the importance of Witness PS2’s testimony does not prove that the Defence failed to waive the examination of Witness PS2.<sup>32</sup>

12. The Prosecutor submits furthermore that the request for certification of appeal against the Order of 26 April 2006 fails to meet the requirements of Rule 73(B) of the Rules for certification of appeal. In support of this contention, he submits that the issue of the waiver by the Defence of Witness PS2’s testimony would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that its immediate resolution would not materially advance the proceedings.<sup>33</sup>

13. Regarding the request for certification of appeal against the Order of 27 April 2006, the Prosecutor submits that the Defence argument that the Chamber had deprived the Accused of his right to testify in person is mistaken. He contends that the Defence voluntarily declined to call

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<sup>27</sup> Ibidem, p. 4.

<sup>28</sup> Ibidem.

<sup>29</sup> Ibid., p. 5.

<sup>30</sup> Response, p. 1, para. 2.

<sup>31</sup> Ibid., p. 2, paras. 10-11.

<sup>32</sup> Response, p. 3, para. 13.

<sup>33</sup> Ibidem, para. 14.

and examine the Accused in full knowledge of its waiver of his right to testify.<sup>34</sup> He argues, citing the transcripts of the hearing,<sup>35</sup> that the Chamber simply noted this waiver.<sup>36</sup>

14. The Prosecutor submits that the Defence alternative request to recall for cross-examination Prosecution Witnesses YAU, YAT, CBI and CBS is dilatory. He contends that this request was not only submitted after the close of evidence but also that it was submitted late, since it was filed 19 months after the Chamber's referenced oral ruling of 29 September 2004.<sup>37</sup>

15. For the foregoing reasons, the Prosecutor emphasizes that the request for certification of appeal against the Order of 27 April 2006 fails to meet the requirements of Rule 73(B) of the Rules. To that end, he submits that the issue of the Defence's refusal to examine the Accused as well as the Defence request to recall some Prosecution witnesses would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial nor would its immediate resolution by the Appeals Chamber materially advance the proceedings.

16. In conclusion, the Prosecutor asks the Trial Chamber to deny the two Defence motions, pointing out that dates have already been fixed for filing the parties Closing Briefs and Arguments.<sup>38</sup>

## DELIBERATIONS

### Findings of the Chamber on joinder of the proceedings

17. The Chamber notes that the two motions for certification of appeal filed by the Defence have a common objective, which is to challenge the final decision of the Chamber ruling the Defence evidence closed,<sup>39</sup> after having noted the failure of the Defence to examine Witness PS2 and the Accused. The Chamber is of the opinion that the two proceedings should be joined in the interests of the sound administration of justice.

### The Trial Chamber's findings on the recall of Prosecution witnesses YAU, YAT, CBI and CBS for further cross-examination

18. The Chamber recalls that at its hearing of 29 September 2004 it decided to disregard the objection to disclosure raised by the Defence regarding the testimonies of certain Prosecution witnesses, while reserving the right for the Defence, if necessary, to seize the Chamber of a request to cross-examine the witnesses in question on the basis of the new documents disclosed by the Prosecutor.<sup>40</sup>

<sup>34</sup> Ibidem, paras. 15-16.

<sup>35</sup> T.27 April 2006, p. 4.

<sup>36</sup> Response, p. 3, para. 16.

<sup>37</sup> Ibid., para. 18.

<sup>38</sup> Response, pp. 3-4.

<sup>39</sup> See *supra* para. 11.

<sup>40</sup> T.29 September 2004, p. 8.

19. The Chamber further recalls that the case-law of the Tribunal only allows a witness to be recalled in the most compelling of circumstances<sup>41</sup> and on presentation of a good cause by the demanding party.<sup>42</sup> In the instant case, the Chamber notes that the Defence merely requested that Witnesses YAU, YAT, CBI and CBS should be recalled without giving any justification.

20. In light of the foregoing, the Chamber considers that it is necessary to rule that the Defence motion to recall the above-mentioned witnesses lacks merit.

### **The Chamber's findings on the requests for certification of appeal.**

21. The Chamber notes that pursuant to Rule 73(B) of the Rules two requirements should be met for a certification of appeal to be granted: the applicant must demonstrate (i) that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, and (ii) that its immediate resolution by the Appeals Chamber may materially advance the proceedings.

22. The Chamber recalls that in the instant case the Defence was allowed considerable time to present its evidence. Also, contrary to the Defence claims, the Chamber is of the opinion that the Accused had had plenty of time to prepare its defence and present its evidence.<sup>43</sup> It notes further that Rule 85(A) of the Rules empowers the Chamber to change the order of appearance of witnesses, even where the Accused decides to testify in his own defence, and that the Accused was in fact ultimately given the opportunity to testify last. The Chamber accordingly considers that the objections raised by the Defence in relation to the Oral Decision of 26 April 2006,<sup>44</sup> rendered by the Trial Chamber under its discretionary power, and to the Order of 27 April 2006<sup>45</sup> are merely dilatory. For that reason, the Chamber is of the opinion that the said objections would not affect the fair conduct of the proceedings or its outcome.

23. The Chamber also notes that Rule 90(F) of the Rules gives broad powers to the Chamber, which exercises control over the mode and order of interrogating witnesses and presenting evidence as well as the order in which they shall intervene in order to avoid needless consumption of time, notably by using dilatory tactics. Thus, while all its witnesses had been called except for Witness PS2 and the Accused, the Defence, despite the efforts made by the Chamber, refused to conduct the examination-in-chief, leaving the Chamber with only one alternative, that of closing the Defence evidence.

<sup>41</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2.

<sup>42</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination (TC), 3 March 2006, para. 32.

<sup>43</sup> The Defence called 24 witnesses whereas the Prosecutor called 15.

<sup>44</sup> See *supra*, para. 9.

<sup>45</sup> See *supra*, para. 10.

24. Lastly, the Chamber recalls that the evidence closed on 27 April 2006, with the parties then being requested to present their Closing Briefs and Arguments at the hearing of 27 June 2006. The Chamber therefore cannot see how the immediate resolution by the Appeals Chamber of the objections raised by the Defence could materially advance the proceedings.

25. In light of the foregoing, the Chamber is of the opinion that the requirements for the certification of appeal have not been met in the instant case. Consequently, it considers that it is necessary to find that the requests for certification of appeal filed by the Defence lack merit.

**FOR THE FOREGOING REASONS, THE CHAMBER**

**ORDERS** the joinder of the proceedings relating to the requests for certification of appeal filed by the Defence on 2 May 2006;

**DISMISSES** the Defence request to recall Prosecution Witnesses YAU, YAT, CBI and CBS;

**DISMISSES** the request for certification of appeal against the Oral Decision of 26 April 2006;

**DISMISSES** the request for certification of appeal against the Order of 27 April 2006.

Arusha, 30 May 2006

[Signed]

Andrésia Vaz  
Presiding

[Signed]

Karin Hökberg  
Judge

[Signed]

Gberdao Gustave Kam  
Judge

[Seal of the Tribunal]

