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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: 1 June 2006

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ICTR
OFFICES

The PROSECUTOR v. Élie NDAYAMBAJE
(Case No. ICTR-96-8-T)
The PROSECUTOR v. Joseph KANYABASHI
(Case No. ICTR-96-15-T)
The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)
The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)

Joint Case No. ICTR-98-42-T

**DECISION ON NTAHOBALI'S MOTION FOR CERTIFICATION TO APPEAL THE
CHAMBER'S DECISION GRANTING KANYABASHI'S REQUEST TO
CROSS-EXAMINE NTAHOBALI USING 1997 CUSTODIAL INTERVIEWS**

Office of the Prosecutor

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

Defence Counsel for Ndayambaje

Mr Pierre Boulé
Mr Frédéric Palardy
Defence Counsel for Kanyabashi
Mr Michel Marchand
Ms Simone Santerre
Defence Counsel for Nyiramasuhuko
Ms Nicole Bergevin
Mr Guy Poupart
Defence Counsel for Ntahobali
Mr Normand Marquis
Mr Louis Huot
Defence Counsel for Nsabimana
Ms Josette Kadji
Mr Charles Tchakounte Patie
Defence Counsel for Nteziryayo
Mr Titinga Frédéric Pacere
Mr Richard Perras

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 B. Bossa (the “Chamber”);

SEISED of Ntahobali’s “*Requête en extrême urgence d’Arsène Shalom Ntahobali afin d’obtenir la certification d’appel de la décision intitulée ‘Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997,’*” filed on 19 May 2006 (the “Motion”);

CONSIDERING the Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, issued on 15 May 2006 (the “Impugned Decision”);

HAVING RECEIVED the

- i. “*Réponse de Joseph Kanyabashi à la Requête en extrême urgence d’Arsène Shalom Ntahobali afin d’obtenir la certification d’appel de la décision intitulée ‘Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997,’*” filed on 22 May 2006 (“Kanyabashi’s Response”);
- ii. “Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997”, filed on 23 May 2006 (“Prosecution’s Response”);
- iii. “*Réplique de Arsène Shalom Ntahobali à la Réponse de Joseph Kanyabashi à la Requête en extrême urgence d’Arsène Shalom Ntahobali afin d’obtenir la certification d’appel de la décision intitulée ‘Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997,’*” filed on 25 May 2006 (“Ntahobali’s Reply to Kanyabashi”); and
- iv. “*Réplique de Arsène Shalom Ntahobali à la Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997,’*” filed on 26 May 2006 (“Ntahobali’s Reply to the Prosecution”).

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), specifically Rule 73 (B) and (C) of the Rules;

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

SUBMISSIONS OF THE PARTIES

Defence for Ntahobali

1. The Defence for Ntahobali moves the Chamber for certification to appeal the Impugned Decision. Certification is sought with respect to the use of Ntahobali’s statements to the Prosecution investigators in 1997 during Ntahobali’s cross-examination.

2. The Defence submits that the Chamber erred in law regarding several issues¹ and that it raised three additional legal issues, namely, whether a *voir dire* proceeding should be held to ascertain that Ntahobali's statements were properly taken; the scope of the use of Ntahobali's statements at this stage of the proceedings; and their admissibility.² According to the Defence, these questions would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Appeals Chamber may materially advance the proceedings.³

3. The Defence argues that the question of admissibility or use of a prior statement of an accused is important and affects the fairness of proceedings because of the Accused's fundamental rights as guaranteed under the Statute and the Rules. These rights are affected by the Impugned Decision.⁴ It is undeniable that the credibility of an Accused's testimony is at the very core of the trial.⁵ Further, it is equally undeniable that the use of prior statements by opponents to assess the credibility of the Accused is likely to affect the outcome of the trial.⁶

4. The Defence relies on several decisions. In *Muvunyi*, the Trial Chamber held that the admissibility of evidence the Prosecution wished to use and which the Accused consistently denied, would have an impact on the rest of the trial, and that the decision thus regarded a question likely to affect the fairness and expeditiousness of proceedings.⁷ This Decision also held that an immediate resolution by the Appeals Chamber might advance proceedings, especially because of the impending evaluation of this evidence in the context of the Judgement.⁸ In the *Ndindiliyimana et al.* case, it was determined that "admitting documents with an unknown and possibly incriminating content into evidence may affect the fairness of the proceedings and the outcome of the trial".⁹ Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in *Halilovic* held that the admission of the Accused's interview had a bearing on the fairness of proceedings, as well as on the outcome of the trial, because it involved a number of the Accused's statutory rights. This decision also determined that an immediate resolution by the Appeals Chamber would materially advance proceedings and therefore granted the Motion for certification.¹⁰

5. The Defence submits that the admissibility or the use of Ntahobali's prior statements may also concretely advance proceedings, as it affects and will affect the Accused's defence strategy through defence exhibits introduced by other accused,

¹ The Motion, para. 12. As the Defence for Ntahobali indicates in its Reply to Kanyabashi, para. 17, that the errors in law have only been pointed out for reasons of judicial rectitude, and that Kanyabashi's response in that matter is not relevant to the question of certification, the Chamber deems it unnecessary to reproduce either the alleged errors in law or the Prosecution's or Kanyabashi's arguments.

² The Motion, para. 13.

~~³ The Motion, para. 14.~~

⁴ The Motion, para. 15.

⁵ The Motion, para. 16.

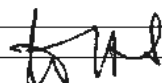
⁶ The Motion, para. 17.

⁷ The Motion, paras. 18-19, quoting *Prosecutor v. Muvunyi*, Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006, 12 May 2006, para. 8.

⁸ The Motion, para. 20, quoting *Prosecutor v. Muvunyi*, Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006, 12 May 2006, para. 9.

⁹ The Motion, para. 21, quoting *Prosecutor v. Ndindiliyimana et al.*, Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence, 27 February 2006, para. 12.

¹⁰ The Motion, para. 22, quoting *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005, p. 2.



considering the sometimes contradictory and incompatible defence strategies. This is particularly true with regard to the large number of witnesses which are yet to be heard in the course of all defence cases, and who are likely to aim at contradicting the Accused's former statements or his testimony in this respect.¹¹

6. Finally, and subsidiarily, the Defence submits that even if the criteria for certification have not been met, the importance of the question within the context of the *Butare* proceedings, where several Accused made statements when they were arrested, would justify the Chamber to order certification to appeal *proprio motu*, so that the Appeals Chamber determines these fundamental legal issues as a question of general interest.¹²

Kanyabashi's Response

7. The Defence for Kanyabashi requests the Chamber reject the Motion, as the conditions set out in Rule 73 (B) of the Rules are not met.

8. The Defence agrees that the admissibility of extra-judiciary statements of an accused made to persons of authority may have an impact on the fairness of proceedings, as has been held in the *Halilovic* case,¹³ where the Appeals Chamber quashed the Trial Chamber's decision which had admitted into evidence an extra-judiciary statement of the Accused made to Prosecution investigators.¹⁴ However, the Defence alleges that Halilovic's reasons were more serious than Ntahobali's.¹⁵ Further, not all decisions regarding the admissibility of such statements are subject to interlocutory appeal.¹⁶ Regarding the *Muvunyi* Decision cited, the Defence submits that its context is different in that it addresses the admissibility of evidence after the close of the Prosecution case.¹⁷

9. The Defence submits that none of Ntahobali's reasons are likely to affect the fairness of proceedings, because the Impugned Decision takes into account all of his arguments and demands the respect of Art. 20 of the Statute and Rules 42, 43, and 63 of the Rules. Further, the Chamber rejected the argument that a co-accused is bound by the rules on the admissibility of a statement¹⁸ and held an informal *voir dire* proceeding by ordering the respect of the rights of the Accused. Therefore, the Impugned Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁹

10. The Defence submits that it is equally difficult to see how an immediate resolution of the Appeals Chamber may materially advance the proceedings, since the

¹¹ The Motion, para. 24.

¹² The Motion, para. 25.

¹³ Kanyabashi's Response, para. 6, quoting *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005.

¹⁴ Kanyabashi's Response, para. 6, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005.

¹⁵ Kanyabashi's Response, para. 6.

¹⁶ Kanyabashi's Response, para. 7, quoting *Prosecutor v. Halilovic*, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Motion for Exclusion of Statement of Accused', 25 July 2005.

¹⁷ Kanyabashi's Response, para. 8.

¹⁸ Kanyabashi's Response, para. 9, quoting the Impugned Decision, para. 18.

¹⁹ Kanyabashi's Response, para. 9.

Impugned Decision limited the use of the statements to challenging Ntahobali's credibility and it is not clear how his testimony or the statements may be contradicted by witnesses led by the co-Accused.²⁰

11. The Defence submits that Ntahobali must have raised the argument that the Chamber could *proprio motu* grant certification to appeal knowing that his arguments were weak.²¹ It recalls that the Chamber clearly stated on 9 May 2006 that it was not going to address hypothetical issues.²² With regard to the statements the other accused allegedly made, the Defence points out that the Chamber does not have any information about their nature and the conditions under which they were made.²³

Prosecution's Response

12. The Prosecution submits that the Motion should be dismissed, as it does not meet the criteria for certification set out in Rule 73 (B) of the Rules²⁴ and is without merit in law or fact.²⁵ It argues that the Impugned Decision complied with Ntahobali's rights under Art. 20 of the Statute and Rules 42, 43, and 63 of the Rules.²⁶

13. The Prosecution recalls that the Chamber held that "certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence [...] it is the responsibility of the Trial Chamber, as triers of fact, to determine which evidence to admit during the course of the trial".²⁷

14. The Prosecution submits that the Chamber as the trier of fact is invested with inherent powers in its dispensation of justice under Rules 54, 73 *bis* (B) (v), 73 *ter* (B) (iv), 89, 95, and 98 of the Rules. The Prosecution stresses that the Appeals Chamber held in the *Halilovic* case that "the Trial Chamber [...] had the discretion to admit the record, at least so long as doing so did not violate any specific restrictions outlined in the remainder of the Rules nor the principle of Rule 89 (B) requiring application of the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".²⁸

15. With regard to the interviews of other Accused, the Prosecution argues that the Chamber should not allow Ntahobali to appeal a matter that is not before it. While the Chamber may make orders *suo motu*, it is submitted that the instant case does not require such order.²⁹

²⁰ Kanyabashi's Response, para. 10, quoting the Impugned Decision, para. 82.

²¹ Kanyabashi's Response, para. 11.

²² Kanyabashi's Response, para. 12, quoting *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 9 May 2006, p. 18.

²³ Kanyabashi's Response, para. 13.

²⁴ Prosecution's Response, para. 2.

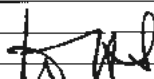
²⁵ Prosecution's Response, para. 18.

²⁶ Prosecution's Response, para. 16, quoting the Impugned Decision, para. 55.

²⁷ Prosecution's Response, para. 8, quoting *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004.

²⁸ Prosecution's Response, para. 9, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Admission of Records of the Interview of the Accused from the Bar Table, 19 August 2005, para. 14.

²⁹ Prosecution's Response, para. 13.

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16. The Prosecution further submits that the jurisprudence relied on by the Defence is only of persuasive value and can be distinguished from the matter at hand.³⁰

17. The Prosecution adds that all the assertions put forward by the Defence in support of its certification to appeal are a guise to further slow down proceedings rather than to expedite the process.³¹

Ntahobali's Reply to Kanyabashi

18. The Defence for Ntahobali submits that Kanyabashi's Response is contradictory, as it alleges that the admissibility of the interviews is not likely to significantly affect the fairness of proceedings, while it also indicates that the question of the admissibility of extra-judicial statements made by an accused to persons in position of authority can have an impact on the fairness of proceedings.³²

19. With regard to Kanyabashi's argument that the question at hand is not likely to substantially compromise proceedings, because the Impugned Decision only declared the interviews admissible with a view to test Ntahobali's credibility, the latter submits that the *Halilovic* Decision cited considered that the admissibility *stricto sensu* met the criteria for certification.³³ Besides, despite this limited use, the interviews have been declared admissible and the content read out in proceedings will be part of the evidence.³⁴

20. The Defence further argues that while Kanyabashi stated that the Chamber could not determine the question of the interviews of the other Accused, because it did not know the context of these interviews, the Chamber need not know these specific conditions.³⁵ The simple fact of the Appeals Chamber determining the question would significantly advance proceedings, since it might apply *mutatis mutandis* to subsequent cases.³⁶

Ntahobali's Reply to the Prosecution

21. The Defence for Ntahobali points out that even if the Appeals Chamber Decision in *Nyiramasuhuko et al.*, on which the Prosecution relies, indicates that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence, this does not mean that an accused's statement may not be one of these exceptional cases, both because of the importance of the question and the number of rights of the accused which are concerned.³⁷

22. Further, the Defence submits that the request for certification is not limited to the simple admissibility of the statements. Rather, the question of whether a *voir dire*

³⁰ Prosecution's Response, paras. 14-15, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Admission of Records of the Interview of the Accused from the Bar Table, 19 August 2005, paras. 19, 35, 40, 41, 45, 54, 62, 63, 65.

³¹ Prosecution's Response, para. 17.

³² Ntahobali's Reply to Kanyabashi, para. 27.

³³ Ntahobali's Reply to Kanyabashi, paras. 28-29.

³⁴ Ntahobali's Reply to Kanyabashi, para. 30.

³⁵ Ntahobali's Reply to Kanyabashi, paras. 33-34.

³⁶ Ntahobali's Reply to Kanyabashi, paras. 34-35.

³⁷ Ntahobali's Reply to the Prosecution, paras. 6-7.



proceeding has to be held also satisfies the conditions under Rule 73 (B), and is distinct from the admissibility issue.³⁸

23. With regard to the *Halilovic* Decision on which the Prosecution relies and which held that “the Trial Chamber had the discretion to admit the record, at least so long as doing so did not violate any specific restrictions outlined in the remainder of the Rules”, the Defence submits that the spirit of the Rules is clearly violated if promises and threats are used to obtain a statement from an accused. Evidence for this violation is found both in the affidavit and in the transcripts of the Accused’s cross-examination, especially those of 24 May 2006.³⁹

24. Concerning the Prosecution’s submission that referring to the other Accused’s statements is inappropriate and that the Chamber should not allow Ntahobali to appeal questions that are not before it, the Defence replies that it never intended appealing this issue.⁴⁰ Rather, these statements were mentioned in the Motion in relation to the condition of materially advancing proceedings, pursuant to Rule 73 (B) of the Rules.⁴¹ The Defence submits that it is obvious that if a contentious legal issue is determined by the Appeals Chamber, proceedings advance concretely, in the sense that if the same question is raised subsequently, the Appeals Chamber’s position will be already established.⁴²

DELIBERATIONS

25. The Chamber notes that decisions under Rule 73 (A) of the Rules are “without interlocutory appeal”, and that certification to appeal is an exception the Chamber may grant, if the two criteria under Rule 73 (B) of the Rules are satisfied. This is the case if the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or the outcome of the trial, and (b) if the applicant demonstrates 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 a general reference to the submissions on which an impugned Decision was rendered.⁴³ The Chamber will address the conditions set out in Rule 73 (B) of the Rules in turn.

26. The Chamber is aware of the Appeals Chamber’s ruling that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence, and

³⁸ Ntahobali’s Reply to the Prosecution, para. 8.

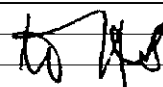
³⁹ Ntahobali’s Reply to the Prosecution, para. 9.

⁴⁰ Ntahobali’s Reply to the Prosecution, paras. 11-12.

⁴¹ Ntahobali’s Reply to the Prosecution, para. 12.

⁴² Ntahobali’s Reply to the Prosecution, para. 13.

⁴³ *Prosecutor v. Nyiramasuhuko et al.*, 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 et al.*, 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 et al.* 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

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that it is the responsibility of the Trial Chamber to determine which evidence to admit during the course of the trial.⁴⁴

27. Nonetheless, the Chamber is of the view that the admissibility of an accused's interviews is an important matter that could have a bearing on the fairness of the proceedings, as it affects the fundamental rights of the accused.⁴⁵ Therefore, the Chamber finds that the Impugned Decision involves an issue that could significantly affect the fair conduct of the proceedings. With respect to the expeditious conduct of the proceedings, the Chamber notes that the Impugned Decision is the first decision on the admissibility of prior statements of an Accused in this case. Moreover, the Chamber has noted the Parties' submissions that there may be similar statements made by other Accused. The Chamber therefore considers that a resolution of this issue by the Appeals Chamber at this stage could significantly expedite the conduct of the proceedings. Accordingly, the first condition set out in Rule 73 (B) of the Rules is met.

28. The Chamber also notes that in the specific circumstances of this case, similar issues may arise in the future, and that an immediate resolution of this matter by the Appeals Chamber may therefore materially advance the proceedings. Accordingly, the second criterion for certification, pursuant to Rule 73 (B) of the Rules, is also satisfied.

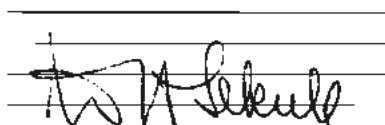
29. The Chamber has carefully considered all the other submissions of the Parties and is of the view that while they may be relevant on appeal, they are not relevant to the determination of this Motion.

30. The Chamber therefore grants Ntahobali certification to appeal the Impugned Decision.

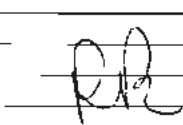
FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion.

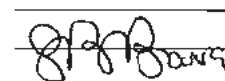
Arusha, 1 June 2006



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

⁴⁴ *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 5.

⁴⁵ *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005, p. 2.