

ICTR-99-54-1
10-08-09
(3418-3411)

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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 Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 10 August 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-PT

JUDICIAL
FILED
2009 AUG 10 P 4:50
YES

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER DECISION ON DEFENCE EXTREMELY URGENT
MOTION FOR RECONSIDERATION OF THE TRIAL CHAMBER'S DECISION
ON THE TRIAL DATE RENDERED ON 15 JULY 2009**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Trial Chamber");

BEING SEIZED of the "Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on July 15, 2009" filed on 21 July 2009 (the "Motion");

CONSIDERING the:

- (a) "Prosecution's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on July 15 2009", filed on 22 July 2009 (the "Response");
- (b) "Defence's Reply to the Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date rendered on July 15, 2009", filed on 27 July 2009 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 of the Rules.

INTRODUCTION

1. On 12 June 2009, the Chamber issued its decision setting the date for commencement of trial as 3 August 2009 (the "12 June Decision").¹
2. On 16 June 2009, the Registrar withdrew David Thomas' assignment as Lead Counsel for the Accused,² and on 1 July 2009, the Registrar appointed Peter Herbert Lead Counsel for the Accused.³
3. On 7 July 2009, the Defence moved for reconsideration of the 12 June Decision.⁴ On 15 July 2009, the Chamber granted reconsideration of the 12 June Decision, and ordered the trial to begin on 23 September 2009.⁵

¹ The complete procedural history of the case has been set out in detail in the Chamber's previous decisions. For parsimony, the Chamber sets out herein only that portion of the procedural history directly relevant to the instant Decision.

² Registrar Decision Withdrawing Professor David Thomas as Lead Counsel for the Accused Augustin Ngirabatware, 16 June 2009 (the "Withdrawal Decision").

³ See Letter from the Registry titled "Your Assignment as Lead Counsel to represent the Accused Augustin Ngirabatware."



4. On 21 July 2009, the Defence filed the instant Motion, seeking certification to appeal the Impugned Decision under Rule 73(B).

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence submits that certification should be granted because the Defence's new Lead Counsel and co-counsel will not have adequate time to prepare for trial under the Impugned Decision for three broad reasons: (1) both Defence Counsel were recently assigned to the case; (2) the Prosecution has been dilatory in fulfilling its disclosure obligations; and (3) the Registry has not completed translation of all the documents provided to the Defence. Specifically, the Defence avers:

- The preparation time provided by the Impugned Decision is objectively inadequate, and the Defence would suffer considerable prejudice if not given additional time.⁶
- The Defence reiterates its original assertion that it would be unable to commence trial until December 2009 or January 2010, noting that "most defence witnesses of fact are resident in various countries in Africa, Europe and North America."⁷
- The accusations of diversion of funds levelled in the Indictment are unique in the ICTR, and preparing to rebut them will require considerable time and effort.⁸ Moreover, conducting the Defence investigations during the break after the Prosecution case will be inadequate.⁹
- Decisions in the *Bagosora* and *Krajišnik* cases¹⁰ support the proposition that a decision setting the trial date subsequent to a change in the staffing of the Defence team is an appropriate subject for interlocutory appeal.¹¹
- The Prosecutor has failed to comply with his disclosure obligations under Rule 66 (A) (ii). The Defence notes that the Prosecutor has disclosed Rule 66 (A) (ii) material gradually, and while the Defence concedes that it cannot identify any particular material which the Prosecution has not

⁴ "Defence Extremely Urgent Motion for reconsideration of the Trial Chamber's decision on the trial date," filed 7 July 2009 (the "Reconsideration Motion").

⁵ Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009 (the "Impugned Decision").

⁶ Motion, paras. 21-22.

⁷ Motion, para. 24.

⁸ Motion, paras. 25-26.

⁹ Motion, para. 27.

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses*, 11 September 2003, para. 9; and *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal*, 15 March 2005.

¹¹ Motion, paras. 31-32.

disclosed, asserts that the Rule should be approached broadly and the Prosecution's dilatory disclosure should be considered an abuse of process.¹²

- Two motions for disclosure of closed session transcripts are still pending, regarding testimony and exhibits given by witnesses ANAI and ANAA in the *Bagosora et al.* and *Government II* cases.¹³ On the other hand, recent disclosures focused heavily on the charge of diversion of funds, which will necessitate additional investigations.¹⁴
- The Language Services Section of the ICTR has not translated documents disclosed in Kinyarwanda quickly enough to meet the Defence's needs.¹⁵
- Immediate resolution of the issue will advance the proceedings because such resolution is necessary to ensure a fair trial, and if the issue is raised after trial it would likely be dismissed as moot.¹⁶

6. Accordingly, the Defence requests that the Chamber certify the Impugned Decision for immediate interlocutory appeal.¹⁷

Prosecution Response

7. The Prosecution "defers to the Trial Chamber's discretion" in deciding those aspects of the Motion unrelated to the state of the Prosecution's disclosure.¹⁸

8. With regard to disclosure issues, the Prosecution submits that it has "disclosed to the Defence in a timely manner all disclosable material as and when it became in possession of such material."¹⁹ Moreover, it performed additional disclosure on 17 July 2009, and reiterates that it "has fully complied with its disclosure obligations under the Rules."²⁰ Accordingly, the Defence is not entitled to additional preparation time based on the state of the Prosecution's disclosure.

Defence Reply

9. Like the Response, the Reply focuses primarily on disclosure issues, and reiterates the arguments in the Motion. Specifically, the Defence avers:

- The Prosecution "does not contest the huge burden that falls on Defence with regard to disclosure matters," and reiterates that much of the 18 and 26 June disclosures were Rule 66(A) material. Moreover, the Defence submits

¹² Motion, paras. 34-40.

¹³ Motion, para. 41.

¹⁴ Motion, paras. 42-43.

¹⁵ Motion, para. 45.

¹⁶ Motion, paras. 46-47.

¹⁷ Motion, para. 48.

¹⁸ Response, para. 4.

¹⁹ Response, para. 5.

²⁰ Response, paras. 6-7.

that the Prosecution has committed an abuse of process in its approach to disclosure. The Defence notes that the Prosecution asserted it had satisfied its disclosure obligations on two previous occasions: 19 May 2009 and 8 July 2009.²¹ However, the Defence points out, disclosure has continued as recently as 26 July 2009.²² Moreover, a letter requesting disclosure, sent to the Prosecution on 6 July 2009, has not been answered.²³

- The disclosures of 26 July concerned witness statements, and consequently material governed by Rule 66(A)(ii). The Defence rejects the Prosecution's assertion that these disclosures were governed by Rule 67(D), noting that the materials are all at least three years old; that the Prosecution was not "promptly notify[ing]" the Defence of additional materials but responding to a standard discovery request; and that the Prosecution responded to the request almost immediately, suggesting that it did not discover the materials between 21 and 24 July 2009.²⁴
- Disclosures are still pending, and as it is now less than 60 days before the commencement of trial, the Prosecution cannot possibly execute those disclosures in accord with Rule 66(A)(ii).²⁵
- Two disclosure motions are pending before different Chambers.²⁶

DELIBERATIONS

10. The Chamber notes that certification for interlocutory appeal is governed by Rule 73 (B), which directs that such certification is only appropriate where two factors are present: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²⁷

11. Where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber.²⁸ Moreover, "even [when both factors are present], certification to appeal must remain exceptional."²⁹

²¹ Reply, paras. 15, 18.

²² Reply, para. 21.

²³ Reply, para. 19.

²⁴ Reply, para. 23.

²⁵ Reply, para. 27.

²⁶ Reply, para. 32. One such motion has subsequently been decided. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Ngirabatware's Confidential Motion for Disclosure of Exhibits Admitted During the Testimony of Prosecution Witness GTC, filed 7 August 2009.

²⁷ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

²⁸ See *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

12. The Chamber recalls that the Appeals Chamber remanded the determination of a trial date to the Trial Chamber in its Decision of 12 May 2009 (the "Appeal Decision") after the Trial Chamber issued its Decision of 15 April 2009 certifying the issue of scheduling of the trial date of 18 May 2009.

13. The Chamber recalls its Scheduling Order of 13 May 2009, in which it instructed the Parties to file written submissions regarding the commencement of the trial, addressing the issues raised in the Appeal Decision. Although the Defence submitted additional issues which had not been raised in the Appeal Decision,³⁰ the Chamber carefully considered all the relevant matters raised and the circumstances of the case in reaching its Decision of 12 June 2009 which extended the commencement date by over two and a half months to 3 August 2009.

14. On 7 July 2009, the Defence moved for reconsideration of the 12 June Decision.³¹ On 15 July 2009, the Chamber issued its Decision granting reconsideration of the 12 June Decision in light of the fact that the Lead Counsel for the Defence had been replaced and the disclosure issues raised in the Motion. The Chamber ordered that the trial begin on 23 September 2009.³²

15. The grounds for this second certification Motion are that: Lead Defence Counsel was recently assigned to the case and needs more time to prepare; the Prosecution has been dilatory in fulfilling its disclosure obligations; and the Registry has not completed translation of all the documents provided to the Defence. In the Chamber's view, all of these issues were considered along with the totality of all the circumstances of the case when reaching the Impugned Decision.

16. With regard to the issue of disclosure, the Chamber considers that it was raised and addressed in the Impugned Decision. The Chamber noted, and the Defence has conceded, that not all of the material in question was Rule 66(A) material.³³ Even for material that could fall under that rule, the point had been raised in the original motion for reconsideration, and the 60 day requirement for disclosure under Rule 66 (A) will have been met by the trial date of 23 September 2009. As for the remaining material which has not been specified or even verified, its alleged lack of disclosure is

²⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-NZ, Decision on Joseph Nizorera's Application for Certification to Appeal Decision on the 24th Rule 66 Violation, 20 May 2009, para. 2; *see also* *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4 (citation omitted).

³⁰ Particular issues of disclosure and specific points relating to the state of the Defence investigation were not raised in the Parties' submissions before the Appeals Chamber, but were addressed in the 12 June Decision.

³¹ Reconsideration Motion, *supra* note 4.

³² Impugned Decision, *supra* note 5.

³³ Impugned Decision, paras. 32-34; *see* Motion, paras. 35-36.



unsubstantiated and could be speculative.³⁴ Moreover, additional disclosure issues or arguments not raised in the original Motion can not justify certification.³⁵

17. On the issue of newly appointed Lead Counsel, the Chamber considers that when determining whether a recently-appointed Defence counsel has had adequate time to prepare for trial, a Chamber considers the entirety of the proceedings, "not only the time and facilities afforded to an accused's most recently appointed defence team, but also, usually, to the time and facilities afforded ... since the beginning of the case."³⁶ At the time of rendering the Impugned Decision, the Chamber noted that but for Lead Counsel, the defence team was fully constituted. In the Impugned Decision, the Chamber noted that "[a]lmost two months will have been added to the latest trial date, Lead Counsel will have been assigned to the case for nearly three months, and Co-Counsel will have been assigned to the case for nearly four months, while the rest of the team remained intact."³⁷

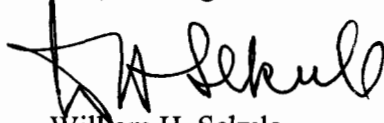
18. The Chamber further notes that in the Impugned Decision, the issue of translation was addressed. The Chamber "reiterate[d] its call to the Registry to complete translations of the documents requested as soon as possible," and "remind[ed] the Parties that they ought to use their available resources in order to prepare for the trial."³⁸

19. The Chamber underscores that while issues relating to the trial date may affect the fair trial of an accused person, this determination is examined on a case-by-case basis. In the instant case, after considering the issues raised in the Motion and all the circumstances of the case, the Chamber does not consider that granting certification would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceeding within the meaning of Rule 73(B).³⁹

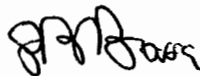
FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

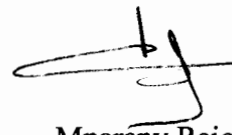
Arusha, 10 August 2009



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

³⁴ See Motion, para. 36.

³⁵ *Nshogoza*, *supra* note 29, para. 6 (citing *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3).

³⁶ See *The Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on (Second) Defence Motion for Adjournment, 4 March 2005, para.9.

³⁷ Impugned Decision, para. 35.

³⁸ Impugned Decision, para. 33.

³⁹ See *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals, 16 February 2006, para. 4.

3411

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T

