

ICTR-00-61-7
19-08-2009
(2499 - 2495)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 19 August 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-I

JUDICIAL
ADMINISTRATIVE
SERVICES
2009 AUG 19 14:12

**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL
THE CHAMBER'S DECISION ON DEFECTS IN THE INDICTMENT**

Office of the Prosecutor:

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For the Accused:

Marie-Pierre Poulain
Kate Gibson

INTRODUCTION

1. On 22 May 2009, the Defence brought a preliminary motion¹ pursuant to Rule 72 (A)(ii) of the Rules of Procedure and Evidence ("Rules") alleging defects in the amended Indictment filed on 10 May 2005. The Defence submitted in particular that the amended Indictment of 10 May 2005 lacked specificity with respect to locations, perpetrators and victims, dates and alleged criminal acts, and that the allegation of a joint criminal enterprise was not properly pleaded. On 3 July 2009, Trial Chamber I issued a Decision granting the Defence motion in part ("Impugned Decision") and ordering the Prosecution to supplement the amended Indictment with further particulars.² The Prosecution complied with the Decision and filed a Second Amended Indictment on 7 July 2009.³
2. On 6 July 2009, the President changed the designated Pre-Trial Chamber and reassigned the case to this Chamber.⁴
3. On 9 July 2009, the Defence filed an application before this Chamber seeking certification to appeal the Impugned Decision.⁵
4. The Prosecution replied that it did not consider the application meritorious and that it would accordingly not file a substantive response.⁶

DISCUSSION

The Applicable Law on Certification to Appeal

5. Rule 72 (B)(ii) provides that decisions on preliminary motions are without interlocutory appeal, except where certification has been granted by the Trial Chamber. The rule confers a discretion on the Chamber to grant certification to appeal if the applicant demonstrates that the following two conditions are fulfilled: (i) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and (ii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The aforementioned conditions must be demonstrated specifically and are not met through a general reference to the

¹ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Defence Preliminary Motion Alleging Defects in the Form of the Amended Indictment, 22 May 2009.

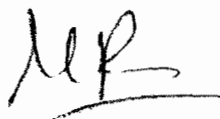
² Decision on Defence Motion concerning Defects in the Amended Indictment, 3 July 2009.

³ The Prosecutor's Submissions complying with the Decision on Defence Motion concerning Defects in the Amended Indictment dated 3 July 2009, 7 July 2009.

⁴ Interoffice Memorandum from the Office of the President, Notice of Designation in the case *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61, 6 July 2009.

⁵ Application for Certification to Appeal Decision on Preliminary Motion, 9 July 2009 ("Application for Certification").

⁶ Prosecutor's Reply to the Defence "Application for Certification to Appeal Decision on Preliminary Motion" dated 9 July 2009, 10 July 2009.



submissions on which the impugned decisions were rendered.⁷ Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.⁸

6. The decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.⁹ Certification is not determined on the merits of the appeal against the impugned decision.¹⁰ The correctness of the decision is a matter for the Appeals Chamber. Hence, Trial Chambers need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 72 (B)(ii) have been met.¹¹ Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so strictly to the extent of determining whether the criteria set out in Rule 72 (B)(ii) are met.¹²

⁷ *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 7.

⁸ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

⁹ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 15; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-T, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 bis Admission of Faustin Nyagahima's Written Statement, 22 August 2007, para.3 (citations omitted); *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October 2007, para. 6; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 3.

¹⁰ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5.

¹¹ *Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009, para. 6; *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame, 15 May 2008, para. 2; *Niyitegeka*, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 17; *Prosecutor v. Theoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4.; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-T, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 bis Admission of Faustin Nyagahima's Written Statement, 22 August 2007, para. 4; *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para. 6 (citations omitted).

¹² *Nshogoza*, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, para. 6; *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para 5; *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para 11; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

Should the Chamber Certify the Impugned Decision for Appeal?

7. With regard to the first requirement under Rule 72 (B)(ii), the Defence submits that the Impugned Decision involves an issue which would significantly affect the fairness of the proceedings. The Defence contends that since the Impugned Decision directly concerns issues of sufficient notice in relation to the indictment, it necessarily affects the Accused's right to a fair trial and thus the fairness of the proceedings against him.¹³ The Defence further asserts that the issues raised in the Impugned Decision significantly affect the expeditious conduct of the trial because they pertain to the sufficient specificity of the Indictment¹⁴ and claims that decisions regarding an indictment's content and form necessarily impact the outcome of the trial.¹⁵

8. The Chamber recalls that issues pertaining to the sufficiency of the Indictment do relate to the accused's right to a fair trial.¹⁶ However, while the issue of specificity of the charges *may* affect the accused's rights, the onus is on the moving party to specifically demonstrate how the issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial, as the test for certification requires.¹⁷ In view of this requirement, and bearing in mind that the decision to certify should remain exceptional, the Chamber considers that the Defence cannot merely rely on the argument that since the Impugned Decision concerns issues of sufficient notice in the Indictment, the Accused's rights, and thus the fair and expeditious conduct of the proceedings, are necessarily affected.

9. According to the established jurisprudence of the Tribunal, and of the International Criminal Tribunal for the Former Yugoslavia, where a charge in an indictment is not sufficiently specific, such defects may be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges against an accused.¹⁸ Where a defect is found not to be cured, a Chamber cannot base a conviction on it. Thus, the Defence has not shown that the Impugned Decision may affect the outcome of the trial.

10. Accordingly, the Chamber finds that the Defence has failed to demonstrate how the issues in the Impugned Decision affect the fair and expeditious conduct of proceedings or outcome of the trial. Since the Chamber finds that the first criterion for certification is not

¹³ Application for Certification, para. 7.

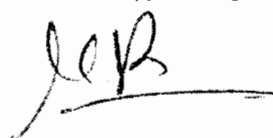
¹⁴ *Id.*, para. 8.

¹⁵ *Id.*, para. 9.

¹⁶ *Prosecutor v. Ndingiyimana*, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 5 citing *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 88 and *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007 (AC), 5 March 2007, para. 15.

¹⁷ See for example, *Prosecutor v. Siméon Nchamihigo*, Decision on Request for Certification of Appeal on Trial Chamber I's Decision granting Leave to amend the Indictment, 13 September 2006, para. 7: "Although an issue with the Indictment could be considered to significantly affect the fair conduct of the proceedings, the Chamber finds that the solutions to the errors alleged by the Defence will not expedite the conduct of the proceedings, nor will an immediate resolution be likely to materially advance the proceedings."

¹⁸ *Muvunyi* Appeal Judgement, para. 20 (citations omitted); *Kupreskić et al.*, Appeal Judgement, para. 114; *Naletilić & Martinović* Appeal Judgement, para. 26.



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met, it need not proceed to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.


11. The Chamber therefore finds that the Defence has failed to meet the criteria for certification under Rule 72 (B)(ii).


FOR THESE REASONS, the Chamber

DENIES the Motion.

19 August 2009


Khalida Rachid Khan
Presiding Judge

For and with the consent of 
Lee Gacuiga Muthoga
Judge

For and with the consent of 
Aydin Sefa Akay
Judge

[Seal of the Tribunal]

