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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Taghrid Hikmet, Presiding  
Seon Ki Park  
Joseph Masanche

**Registrar:** Adama Dieng

**Date:** 16 September 2009

**THE PROSECUTOR**

v.

**Gaspard KANYARUKIGA**

*Case No. ICTR-2002-78-T*

2009 SEP 16 A 9:30  
JUDICIAL RECORDS ARCHIVES  
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**DECISION ON THE DEFENCE MOTION FOR CERTIFICATION TO APPEAL  
THE TRIAL CHAMBER'S DECISION ON THE EXTREMELY URGENT  
DEFENCE MOTION FOR A STAY OF THE PROCEEDINGS**

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

**Office of the Prosecutor:**

Holo Makwaia  
Althea Alexis Windsor  
Cheikh Tidiane Mara  
Lansana Dumbuya

**Defence Counsel:**

David Jacobs  
Claver Sindayigaya  
Marc Nerenberg

## INTRODUCTION

1. The trial in this case commenced on 31 August 2009.
2. On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("the Rules"), requesting that the Prosecution disclose and return exculpatory documents seized from the Accused during his arrest in South Africa in June 2004.<sup>1</sup> The Defence contended that, at the time of his arrest, the Accused possessed three Rwandan laissez-passers, which were seized by officers of the Tribunal and are currently in the custody of the Prosecution.<sup>2</sup>
3. On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecutor to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused's possessions.<sup>3</sup>
4. The Prosecutor filed a response to the Chamber's Interim Order on 21 August 2009.<sup>4</sup> The Prosecutor concedes that the Accused made notations on the 10 September 2004 inventory, indicating that certain seized items were missing.<sup>5</sup> The Prosecutor also acknowledges that certain items included in the 19 July 2004 inventory are not accounted for in the 10 September 2004 inventory.<sup>6</sup> The Prosecution provided several possible explanations regarding the inconsistencies in the two inventories.<sup>7</sup> Finally, the Prosecution indicates that it has contacted authorities in South Africa regarding the items seized from the Accused at the time of his arrest.<sup>8</sup>
5. On 25 August 2009, the Defence for Gaspard Kanyarukiga filed an extremely urgent motion for a stay of the proceedings, arguing that a fair trial would not be possible in this case due to the disappearance of the three laissez-passers seized from the Accused at the time of his arrest.<sup>9</sup>
6. On 28 August 2009, the Chamber denied the Defence motion for a stay of the proceedings but indicated that it remained seized of the matter.<sup>10</sup>
7. On 31 August 2009, the Defence filed a motion for certification to appeal the decision of the Trial Chamber ("Impugned Decision").<sup>11</sup> The Defence submits that certification is warranted because the issue addressed in the Impugned Decision is one

<sup>1</sup> Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009.

<sup>2</sup> Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009, paras. 2, 4-6.

<sup>3</sup> Interim Order Concerning the Defence Request for Rule 68 Disclosure (TC), 18 August 2009.

<sup>4</sup> Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009.

<sup>5</sup> *Ibid*, para. 12.

<sup>6</sup> *Ibid*, para. 14.

<sup>7</sup> *Ibid*, para. 11.

<sup>8</sup> *Ibid*, para. 5.

<sup>9</sup> Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009, para. 1.

<sup>10</sup> Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009.

<sup>11</sup> Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 31 August 2009.

which affects both the fair and expeditious conduct of the proceedings and the outcome of the trial and that an immediate resolution by the Appeals Chamber would materially advance the proceedings.<sup>12</sup>

8. On 3 September 2009, the Prosecution filed a response, in which it argues that the Defence has merely repeated the submissions made in the motion that gave rise to the Impugned Decision and has not satisfied the criteria for certification under Rule 73(B) of the Rules of Procedure and Evidence ("the Rules").<sup>13</sup>

9. The Defence filed a reply on 7 September 2009.<sup>14</sup>

### DELIBERATIONS

10. According to Rule 73(B), the Trial Chamber may grant certification to appeal a decision of the Chamber "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." Certification to appeal may be granted only if both criteria are satisfied.<sup>15</sup>

11. As recognised by the Appeals Chamber, certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.<sup>16</sup>

12. In deciding whether to grant certification to appeal, the Trial Chamber need not consider the merits of the Impugned Decision but rather whether the moving party has satisfied the criteria set forth in Rule 73(B).<sup>17</sup> The Trial Chamber may, however, revisit

<sup>12</sup> Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 31 August 2009, paras. 14-15.

<sup>13</sup> *Réponse à la Requête en Certification D'Appel de la Défense Suite à la Décision de la Chambre du 28 août 2009 Rejetant sa Requête en Arrêt des Procédures*, filed on 3 September 2009.

<sup>14</sup> Reply to the Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 7 September 2009.

<sup>15</sup> See *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis (TC), 24 April 2007, para. 5.

<sup>16</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case (AC), 14 May 2008, para. 4 ("The Appeals Chamber has recognised the discretionary powers of the Trial Chamber over Rule 73(B) procedures and regularly emphasizes that requests for certification to appeal are only warranted under exceptional circumstances."). See also *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 (TC), 13 May 2008, para. 15; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 22 May 2007, para. 6.

<sup>17</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007, para. 4; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame (TC), 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

the substance of the Impugned Decision within the context of determining whether the Rule 73(B) criteria are met.<sup>18</sup> The criteria for certification cannot be met by merely repeating the arguments advanced in the original motion.<sup>19</sup>

13. In the instant case, the Chamber does not believe that an immediate resolution by the Appeals Chamber would materially advance the proceedings.<sup>20</sup> Indeed, the Chamber recalls that it has not yet rendered a final decision on the issues underlying the Defence motion. As noted in the Impugned Decision, the Trial Chamber remains seised of the matters raised in the Defence motion for a stay of proceedings as well as the earlier motion for disclosure of exculpatory materials.<sup>21</sup> The Chamber has also instructed the Prosecution to continue its search for the items missing from the second inventory list and to report back to the Chamber. Meanwhile, the Defence is entitled to put its case to Prosecution witnesses in accordance with Rule 90(G)(ii) of the Rules.<sup>22</sup> Finally, as indicated in the Impugned Decision, the Chamber shall consider appropriate remedies as needed.<sup>23</sup> In light of these circumstances, the Chamber does not find that an appellate decision would materially advance the proceedings at this time.

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Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jerome Bicomungu's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 bis Admission of Faustin Nyagahima's Written Statement (TC), 22 August 2007, para. 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, 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 (TC), 23 July 2008, para. 6 (citations omitted).

<sup>18</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 31 July 2009 (TC), 14 August 2009, para. 6 with further references.

<sup>19</sup> *Prosecutor v. Nindiliyimana 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 (TC), 22 May 2008, para. 7.

<sup>20</sup> The question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings "requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue" (*Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, citing: *Bagosora et al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005, para. 7). This may include the Chamber committing an error as to the applicable law; making a patently incorrect conclusion of fact; or making a decision that was so unfair or unreasonable as to constitute an abuse of the Chamber's discretion (*Ibid.*, para 4).

<sup>21</sup> Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009. See also Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009; Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009.

<sup>22</sup> Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009, paras. 18-19.

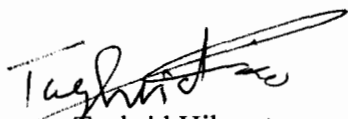
<sup>23</sup> Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009, para. 19.

14. Having found that the second criterion for certification to appeal has not been met, the Chamber need not consider whether the first requirement under Rule 73(B) has been satisfied.<sup>24</sup>

**FOR THESE REASONS**, the Chamber


**DENIES** the Defence motion for certification to appeal.

Arusha, 16 September 2009

  
Taghrid Hikmet  
Presiding Judge



Seon Ki Park  
Judge

  
Joseph Masanche  
Judge

[Seal of the Tribunal]

<sup>24</sup> See *Prosecutor v. Ndindiliyimana*, Case No. ICTR- 00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis (TC), 24 April 2007, para. 9.