

ICTR-99-54-T
05-10-2009
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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: 5 October 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS SECTION
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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER DECISION DATED 17 SEPTEMBER 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

[Handwritten signature]

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 dated 17 September 2009" filed on 23 September 2009 (the "Motion");

CONSIDERING the:

- (a) "Prosecution's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision Dated 17 September 2009 filed on 25 September 2009 (the "Response")";
- (b) "Defence's Reply to the Prosecution's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision Dated 17 September 2009 filed on 28 September 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 (B) 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 On 7 July 2009, the Defence moved for reconsideration of the 12 June Decision.
3. On 15 July 2009, the Chamber granted reconsideration of the 12 June Decision, and ordered the trial to begin on 23 September 2009.⁴ On 21 July 2009, the Defence moved

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", 1 July 2009.

⁴ Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009 (the "15 July Decision").



for certification to appeal the 15 July Decision under Rule 73(B). The Chamber denied the motion on 10 August 2009.⁵

4. The Defence further moved for reconsideration of the 15 July Decision on 11 September 2009, and the Chamber denied reconsideration on 17 September 2009 (the "Impugned Decision").⁶ The Defence filed the instant motion, seeking certification to appeal the Impugned Decision, on 23 September 2009.

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence asserts that the Chamber did not "consider and discuss" the Defence argument, raised in the motion for reconsideration, that the trial needed to be postponed because of pending Defence attempts to obtain the cooperation of a variety of states. The Defence argues that it requires such cooperation in order to effectively cross-examine Prosecution witnesses regarding the allegation that the Accused diverted funds to which he had access, in his capacity as Minister of Planning, to support the genocide in Rwanda.⁷

6. The Defence asserts that the Chamber never considered this issue, and that it provided relevant correspondence in the annexes to the original Motion.⁸ Moreover, while noting that the Chamber addressed the argument related to the Kingdom of Belgium⁹, the Defence asserts that this discussion is inadequate in three respects:

- It does not discuss the fact that the Defence requires access to foreign nationals in order to access documents related to the diversion of funds;
- The Impugned Decision does not use the words "diversion of funds;"
- The Impugned Decision does not mention by name the states with which the Defence is seeking cooperation, other than the Kingdom of Belgium.¹⁰

7. The Defence submits that the Chamber's alleged omission could have a significant impact on the fair conduct of the proceedings and even the outcome of the trial. Meetings with potential witnesses are necessary to properly cross-examine Prosecution witnesses on the issue of diversion of funds, as contemplated by Rule 90 (G)(ii), and thus ensure the Accused is able to offer a full and proper Defence. The Defence avers that recalling witnesses where it is necessary to put newly discovered

⁵ Decision on 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 15 July 2009, 10 August 2009.

⁶ Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009.

⁷ Motion, paras. 17-23.

⁸ Motion, paras. 17-18.

⁹ See Impugned Decision, para. 41.

¹⁰ Motion, paras. 20-23.

evidence to them on cross-examination would be inadequate because it would be against the interests of justice and poor case management, and implies that to continue to act under such circumstances would cause Defence Counsel professional embarrassment.¹¹

8. The Defence avers that it cannot file a notice of alibi fulfilling the requirements of Rule 67 (A)(ii), to wit, one which includes the “names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi,” in the absence of cooperation from the various states.¹² The Defence suggests that the Chamber, as well as the Appeals Chamber, would view an eventual notice of alibi with greater skepticism if its filing was delayed by the requests for cooperation at issue here.¹³

9. The Defence further refers to the factors set forth by the Appeals Chamber governing the amount of preparation time appropriate for preparing a defence, and avers that the Accused will suffer significant and irreversible prejudice if certification is not granted.¹⁴ Thus, the Defence concludes, the raised issue significantly affects the fair and expeditious conduct of the proceedings. Moreover, the issues outlined above will only be considered if certification is granted, and the Chamber granted certification of a similar issue in a decision dated 15 April 2009.¹⁵ Thus, immediate resolution by the Appeals Chamber will materially advance the proceedings.

10. Accordingly, the Defence requests that the Chamber grant certification and stay the trial proceedings pending appeal.

Prosecution Response

11. In response, the Prosecution opposes the Motion on the grounds that it does not satisfy the requirements of Rule 73 (B).¹⁶

12. The Prosecution notes that the Chamber addressed the issues raised by the Defence in the Impugned Decision and provided a remedy.¹⁷

Defence Reply

13. In reply, the Defence submits that the Prosecution has not substantiated the arguments raised in the Response.¹⁸ Moreover, the Prosecution alleges that the Chamber addressed the issue referred to by the Defence, but does not cite a specific paragraph. This, the Defence argues, is because the Chamber did not in fact address the argument.¹⁹

¹¹ Motion, paras. 25-27, 29.

¹² Motion, paras. 35-38.

¹³ Motion, para. 40.

¹⁴ Motion, paras. 41-43.

¹⁵ Motion, paras. 44-45 (citing Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary the Trial Date, 15 April 2009 (“15 April Decision”).

¹⁶ Response, para. 2.

¹⁷ Response, para. 3.

¹⁸ Reply, para. 4.

¹⁹ Reply, paras. 5-6.

14. The Defence reiterates its contention that the Motion satisfies the criteria for certification and its request for relief.²⁰

DELIBERATIONS

15. As a preliminary matter, the Chamber notes that the Defence requested that the Chamber stay the trial pending the adjudication of the Motion. The Chamber denied that request orally on 23 September 2009, instead proceeding with the trial without prejudice to the evaluation of the Motion.

16. 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.²¹

17. Where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber.²² Moreover, "even [when both factors are present], certification to appeal must remain exceptional."²³

18. In the context of a motion for certification, the Chamber is not concerned with the legal merit of the arguments raised by the Defence, except to the limited extent that permitting an interlocutory appeal based on frivolous arguments will not materially advance the proceedings.²⁴ However, the Chamber recalls that it did consider all the Defence requests for state co-operation in paragraph 41 of the Impugned Decision, writing:

The Chamber recalls its Decision of 16 September 2009 and reiterates that it does not consider that the Defence needs to contact the named Belgians to determine whether to file a notice of alibi, as information about where the Accused was at the times specified in the Indictment should be within the personal knowledge of the Accused.²⁵ In any event, this issue has no

²⁰ Reply, paras. 7-9.

²¹ 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.

²² 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.

²³ *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).

²⁴ 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.

²⁵ Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute, 16 September 2009, para. 11.

bearing on the date of trial. Accordingly, the issue does not justify reconsideration.²⁶

19. The Chamber further stated that it had considered “the totality of the parties’ submissions,” thus including arguments related to state cooperation.²⁷ The Chamber rejects the Defence argument that the omission of the words “diversion of funds” and the names of the contacted states suggests that these Defence arguments were not considered. The Chamber further considered those factors which the Appeals Chamber has held bear on the proper date for commencement of trial.²⁸

20. Finally, the Chamber notes that, while the Defence relies on its 15 April Decision certifying for appeal an issue regarding the commencement of trial, issues regarding the appropriate date for commencement of trial are not automatically appropriate for interlocutory appeal, but rather must be considered on a case-by-case basis.²⁹ The issues raised in the current Motion are different from those raised prior to the 15 April Decision, and the Chamber will consider those issues on their own merits.

21. The Chamber considers that the Defence has not satisfied the requirements of Rule 73(B). The Defence concedes alternative remedies are available as needed, and any such necessity remains hypothetical. As alternative remedies are available, this allegation does not affect the fair and expeditious conduct of the proceedings. Moreover, the immediate appellate consideration of an unsubstantiated allegation would not materially advance the process.

22. Regarding the Defence argument that the credibility of its alibi defence might be affected by a delay in filing a thorough and complete notice of alibi, the Chamber notes that the Defence has not substantiated this allegation, so it remains purely hypothetical. The Chamber otherwise takes note of the nature of the alibi filed by the Defence on 23 September 2009.

23. Accordingly, after considering all the arguments raised by the parties in light of the circumstances of this case, the Chamber considers that the issues raised by the Defence do not significantly impact the fair and expeditious conduct of the proceedings and immediate appellate consideration would not materially advance the proceedings.

²⁶ Impugned Decision, para. 41.

²⁷ Impugned Decision, para. 52.

²⁸ See Impugned Decision, para. 37, note 49.

²⁹ See Decision on 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 15 July 2009, 10 August 2009, para. 31.

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**FOR THE ABOVE REASONS, THE TRIBUNAL
DENIES** the Motion in its entirety.

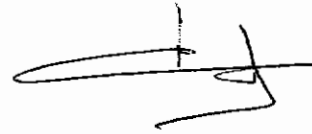
Arusha, 5 October 2009



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

