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(5813-5813)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Adama Dieng

**Date:** 9 February 2010

**THE PROSECUTOR**

v.

**Gaspard KANYARUKIGA**

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

JUDICIAL RECORDS ARCHIVES  
2010 FEB -9 P 2:51

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE  
TRIAL CHAMBER'S 15 JANUARY 2010 DECISION ON STAY OF  
PROCEEDINGS OR EXCLUSION OF EVIDENCE**

*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. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence case began on 18 January 2010 and is scheduled to conclude on 12 February 2010.<sup>1</sup>
2. On 18 December 2009, the Defence filed a motion for a stay of proceedings or exclusion of evidence.<sup>2</sup>
3. On 15 January 2010, the Chamber issued a decision which, *inter alia*, denied the Defence's request for a stay of proceedings, granted the request that evidence be excluded regarding the Accused allegedly being at roadblocks and allegedly retrieving a bulldozer with an *Interahamwe*, reserved its decision with regard to evidence that the Accused allegedly attended various meetings and denied the other Defence requests for exclusion of evidence ("Impugned Decision").<sup>3</sup>
4. On 21 January 2010, the Defence filed a motion for certification to appeal the Chamber's 15 January 2010 decision.<sup>4</sup> The Defence argues that the Chamber made various errors of law in its Impugned Decision.<sup>5</sup> The Defence further argues that the test for certification to appeal these issues has been met.<sup>6</sup>
5. On 26 January 2010, the Prosecutor filed a response, arguing that the Defence has not shown any error made by the Chamber with respect to exclusion of evidence or stay of proceedings.<sup>7</sup>
6. On 1 February 2010, the Defence filed a reply, submitting that the Prosecution has mischaracterised the purpose of the Defence Motion and has prematurely engaged in the merits of the issues requested to be certified for appeal.<sup>8</sup> The Defence also argues that the Prosecution has "either misstated or misunderstood some of the issues raised in the Defence Motion" and the Defence "seek[s] to bring greater clarity to th[o]se issues".<sup>9</sup>

<sup>1</sup> Scheduling Order Following the Status Conference held on 17 September 2009 (TC), 28 September 2009, Order I.

<sup>2</sup> Motion for a Stay of Proceedings, or Exclusion of Evidence outside the Indictment, filed on 18 December 2009.

<sup>3</sup> Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence outside the Scope of the Indictment (TC), 15 January 2010 ("Impugned Decision").

<sup>4</sup> Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Exclusion of Evidence, filed on 21 January 2010 ("Defence Certification Motion").

<sup>5</sup> Defence Certification Motion, para. 1.

<sup>6</sup> Defence Certification Motion, paras. 4-7.

<sup>7</sup> Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Exclusion of Evidence, filed on 26 January 2010.

<sup>8</sup> Reply to "Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Exclusion of Evidence", filed on 1 February 2010, para. 1.

<sup>9</sup> Reply to "Prosecutor's Response to Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Exclusion of Evidence," filed on 1 February 2010, para. 13.

## DELIBERATIONS

### *i) Applicable Law*

7. Pursuant to Rule 73(B), the Trial Chamber may grant certification to appeal a decision of that 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 is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.<sup>10</sup>

8. 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). The Trial Chamber may, however, revisit the substance of the Impugned Decision within the context of determining whether the Rule 73(B) criteria are met.<sup>11</sup>

### *ii) Stay of Proceedings*

9. The Defence requests certification to appeal of the Chamber's decision denying their motion for stay of proceedings. The Defence submits that the Trial Chamber erred in finding that pre-trial misconduct or delay are the only bases for a stay and that there was no pre-trial impropriety.<sup>12</sup> The Chamber notes that the arguments put forward by the Defence closely resemble those arguments used in the underlying motion for a stay of proceedings.<sup>13</sup> The Chamber therefore considers that the Defence Certification Motion is tantamount to re-litigation of issues already decided by the Chamber.<sup>14</sup>

10. The Defence request is dismissed.

### *iii) Exclusion of Evidence*

11. The Defence requests certification to appeal the Chamber's finding that the Prosecutor provided sufficient notice with respect to particular pieces of evidence.<sup>15</sup> The

<sup>10</sup> 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 (TC), 16 September 2009 ("16 September 2009 Decision"), para. 11 (with further references).

<sup>11</sup> 16 September 2009 Decision, para. 12 (with further references).

<sup>12</sup> Defence Certification Motion, points (vii) and (viii).

<sup>13</sup> Motion for a Stay of Proceedings, or Exclusion of Evidence outside the Indictment, filed on 18 December 2009.

<sup>14</sup> Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Oral Decisions of 31 August 2009 (TC), 17 September 2009, para 20; *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Request for Certification to Appeal or in the Alternative Reconsideration of the Chamber's Decision of 30 November 2007 (TC), 14 December 2007, para. 10.

<sup>15</sup> Defence Certification Decision, points (i) to (iv). The Defence requested that the following evidence be excluded: the Accused allegedly being present at various meetings in and around Nyange parish (one where the Accused had a pistol in his belt); the Accused allegedly being present at roadblocks; the killing of Muhigirwa; the Accused allegedly being involved in disarming people taking refuge in the Nyange parish; the Accused allegedly meeting and making a speech about Mushubati to assailants on 14 April 1994; the Accused allegedly going to get a Caterpillar with an *Interahamwe*; medical treatment for assailants being dispensed at the Accused's pharmacy in Nyange; Father Kayiranga arriving on a bus and allegedly meeting with a group including the Accused and the Accused allegedly pouring food meant for those taking refuge

Defence submits that the issues considered in the Chamber's finding will substantially lengthen the Defence case and will, in turn significantly affect the fair and expeditious conduct of the trial.<sup>16</sup> The Defence also argues that certification to appeal this finding may materially advance the proceedings as it would shorten the Defence case and their closing brief and arguments.<sup>17</sup>

12. The Chamber notes that the Appeals Chamber has provided extensive guidance with respect to notice.<sup>18</sup> In particular, jurisprudence provided by the Appeals Chamber is clear and plentiful regarding the allegations and material facts that are to be included in an indictment and the manner in which deficiencies in an indictment can be cured.<sup>19</sup> The Chamber is therefore not of the opinion that consideration of these issues again by the Appeals Chamber would materially advance the proceedings. The Chamber denies the Defence request with respect to points (i) to (iv) of the Defence Certification Motion.

13. The Defence also requests certification to appeal the Chamber's finding that facts that go to prove *mens rea* are not material facts.<sup>20</sup> The Defence submits that an immediate resolution by the Appeals Chamber on this issue will materially advance the proceedings because the Defence case and the Defence closing brief and arguments will be shortened. Similarly, the Defence argues that inclusion of such evidence will increase the length of the case, and therefore, this issue is one that will significantly affect the fair and expeditious conduct of the trial.<sup>21</sup>

14. The Chamber notes that there is less jurisprudential guidance with respect to whether facts that assist in proving *mens rea* are material facts and, as a consequence, whether they ought to be pleaded in the indictment and in what manner. With this in mind, the Chamber finds that this issue is one that significantly affects the fair and expeditious conduct of the proceedings for the reason that *mens rea* forms an essential part of the crimes the Accused is alleged to have committed. Further, if certification is granted, the resolution of this issue by the Appeals Chamber is likely to occur prior to the finalisation of the judgement and may therefore materially advance the proceedings. For these reasons, the Chamber grants the request for certification to appeal with respect to paragraphs 38 to 40 of the Impugned Decision.

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in the church on the ground. The Chamber excluded evidence regarding the Accused being at roadblocks and the Accused allegedly going with an *Interahamwe* to get a caterpillar as the Chamber found there was not sufficient notice given by the Prosecution for this evidence. The Chamber reserved its ruling with respect to the evidence regarding meetings but found there was sufficient notice for the other pieces of evidence and denied the Defence requests for exclusion of this evidence. Impugned Decision, paras. 15-40.

<sup>16</sup> Defence Certification Decision, paras. 4-6.

<sup>17</sup> Defence Certification Decision, para. 7.

<sup>18</sup> For an outline of this jurisprudence see Impugned Decision, paras. 11-14.

<sup>19</sup> See *Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on Ndingiyimana's Motion for Certification to Appeal the Chamber's Decision dated 15 June 2006, 14 July 2006 para. 9 and related footnotes.

<sup>20</sup> Defence Certification Motion, point (v). The Chamber found that evidence regarding the Accused allegedly pouring food on ground (which was meant for those seeking refuge in the Nyange church) was evidence that went to the state of mind of the Accused in April 1994 and was not excluded on that basis. Impugned Decision, paras. 29-32.

<sup>21</sup> Defence Certification Motion, paras 4-6.

*iv) Request to amend the disposition of the Chamber's decision of 15 January 2010*

15. The Defence requests that the Chamber clarify its decision and disposition with respect to its reserved ruling on evidence concerning the Accused allegedly attending various meetings in April 1994 at Nyange Parish or, in the alternative, grant certification on this issue.<sup>22</sup>

16. The Defence submits that the Chamber's disposition in its 15 January 2010 decision is ambiguous.<sup>23</sup> The substance of the Chamber's decision is clear; its ruling is reserved with regard to the evidence that the Accused allegedly attended various meetings.<sup>24</sup> The Chamber concedes, however, that it should have included words to this effect in the disposition. Therefore, the Chamber hereby amends the disposition of its 15 January 2010 decision to reflect that its ruling is reserved concerning evidence that the Accused allegedly participated in various meetings in April 1994 in or around Nyange Parish.

17. The Chamber notes, based on the Defence's submission that the above amendment of the disposition would remove their request for certification of this issue, that the request for certification to appeal on this point is moot.

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<sup>22</sup> Defence Certification Motion, point (vi).

<sup>23</sup> Defence Certification Motion, section (vi), pp. 5-6.

<sup>24</sup> Impugned Decision, paras. 15-17.

**FOR THESE REASONS**, the Chamber

**DISMISSES** the Defence's request for certification to appeal the Chamber's decision denying a stay of proceedings;

**GRANTS** in part, the Defence Certification Motion and certifies for appeal:

whether the Chamber erred in denying the Defence request to exclude the evidence Witness YAU gave regarding the Accused allegedly pouring food intended for those taking refuge in the Nyange church on the ground on the basis that it informs the *mens rea* of the Accused and may assist the Chamber in assessing the Accused's state of mind;

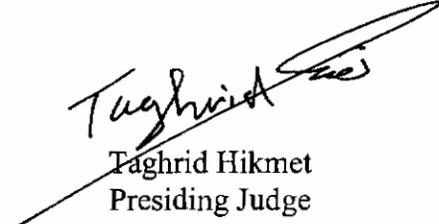
**AMENDS** the disposition of its 15 January 2010 decision to include that it reserves its ruling with respect to evidence listed in paragraph 15 of that decision;

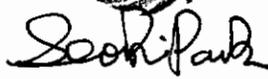
**CONSIDERS** the Defence request for certification on this issue to be moot; and

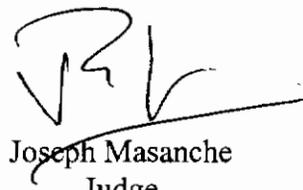
**DENIES** the remainder of the motion.

Arusha, 9 February 2010



  
Taghrid Hikmet  
Presiding Judge

  
Seon Ki Park  
Judge

  
Joseph Masanche  
Judge

[Seal of the Tribunal]