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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: 22 February 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS SECTION
2010 FEB 22 1 P 3:44

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON VARIATION OF PROSECUTION WITNESS LIST**

Office of the Prosecutor

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

Defence Counsel

Mr. Peter Herbert O.B.E.
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 Prosecution Motion for Leave to Vary its Witness List” filed on 1 February 2010 (the “Motion”);

CONSIDERING the:

- (a) “Prosecutor’s Response to defence Motion for Certification to Appeal the Trial Chamber’s Decision on Prosecution Motion for Leave to Vary its Witness List” filed on 3 February 2010 (the “Response”);
- (b) “Defence Reply to Prosecutor’s Response to Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Prosecution Motion for Leave to Vary its Witness List” filed on 8 February 2010 (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 14 September 2009, the Prosecution filed a list of 17 Prosecution witnesses to be heard over the course of five weeks. The trial started on 23 September 2009. It adjourned on 22 October 2009 after hearing six Prosecution witnesses and the remaining witnesses were scheduled to be heard from 25 January 2010 until such time as the Prosecution case would close. On 22 December 2009, the Prosecution filed a Motion to vary the list of witnesses which was granted by the Chamber on 28 January 2010 (the “Impugned Decision”).¹ The proceedings resumed on 25 January 2010.

SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence submits that the addition of five Prosecution witnesses without adjourning the trial will seriously affect the expeditiousness of the proceedings by lengthening the Prosecution’s case,² and will significantly affect the fairness of the

¹ Decision on Prosecution Motion for Leave to Vary it Witness List, 28 January 2010 (the “Impugned Decision”).

² Motion, paras. 17 and 18.

proceedings by forcing the Defence to cross-examine these witnesses unprepared, which is prejudicial to the Defence.³

3. The Defence submits that it will need to cross-examine four of the new witnesses on their judicial records thus affecting the expeditiousness of the trial despite the shortness of their statements.⁴ It received from the Prosecution 65 pages of *gacaca* records on 29 January 2010 which require translation from Kinyarwanda.⁵ The Defence needs an adjournment to investigate the new witnesses and to prepare to put the Defence case to the witnesses during cross examination.⁶

4. The Defence argues that the new Prosecution witnesses bring new allegations amounting to new charges falling outside the scope of the Indictment and the Pre-Trial Brief, namely, several meetings and killings.⁷ It will thus need to revisit all of its potential witnesses to conduct new investigations on the new elements and possibly find new potential Defence witnesses.⁸ The new allegations could result in a conviction and thus seriously affect the outcome of the trial.⁹ A favorable decision of the Appeals Chamber reversing the Impugned Decision would spare the Accused having to face these new allegations¹⁰ and, in the alternative, were an adjournment granted, the Defence would be able to meet the Prosecution's case being prepared to challenge the new witnesses and thus would have a chance to prevail. Such a decision would thus impact the outcome of trial.¹¹

5. The Defence submits that the issue at stake cannot be raised at a later stage and thus requires an immediate resolution as the Prosecution's case is due to end in March 2010.¹²

6. Lastly, the Defence argues that if certification were granted and the Appeals Chamber were to reverse the Impugned Decision, the proceedings would be significantly and materially advanced because the Defence would not be burdened with challenging the evidence of these five new witnesses or would alternatively be granted enough time to prepare.¹³

³ Motion, para. 17.

⁴ Motion, para. 19.

⁵ Motion, para. 20.

⁶ Motion, para. 25.

⁷ Motion, paras. 27-28.

⁸ Motion, para. 29.

⁹ Motion, para. 31.

¹⁰ Motion, para. 33.

¹¹ Motion, para. 34.

¹² Motion, para. 35.

¹³ Motion, para. 36.

Prosecution Response

7. The Prosecution avers that the Defence is repeating the arguments set out in its submissions on the Impugned Decision,¹⁴ that the Chamber has already addressed the issue of prejudice¹⁵ and that errors of fact and law concern the Appeals Chamber.¹⁶

8. The Prosecution submits that certification would impair the expeditiousness of the trial.¹⁷ It recalls that the Chamber exercises control over the mode and order of presentation of the evidence in the interests of justice.¹⁸ The Impugned Decision is in line with the principles of expeditiousness and fairness and the denial of the Motion will thus not affect the outcome of the trial.¹⁹ The Prosecution states it has complied with the Chamber's direction to call the added witnesses at the end of its case to afford the Defence time to prepare and defeating the Defence submission that granting certification will have a significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial.²⁰

9. The Prosecution argues that the Defence submission that the outcome of the trial is at stake is misleading and that the cited decision in the *Prosecutor v. Bagosora et al.* case²¹ stemmed from a different factual context.²² That decision was linked to procedural matters relating to scheduling and severance of cases, which is distinct from the present case where the issue at stake is substantive and goes to evidence and its relevance and admissibility.²³

10. The Prosecution recalls that the Trial Chamber exercises a discretionary power over the admission of evidence and has stated it is alive to issues of relevance and would not enter a conviction on the basis of facts not pleaded in the Indictment. Issues relating to evidence and any objection to this effect will be considered upon the presentation of the said evidence.²⁴ The Trial Chamber is responsible, as the trier of fact, for determining the admissibility of evidence and unless the Trial Chamber has abused its discretion, there is no need for appellate review.²⁵

¹⁴ Response, paras. 11, 12 and 14.

¹⁵ Response, para. 13, referring to the Impugned Decision, paras. 51 and 54.

¹⁶ Response, paras. 15 and 16.

¹⁷ Response, paras. 18 and 19.

¹⁸ Response, para. 20.

¹⁹ Response, para. 21.

²⁰ Response, paras. 22-23.

²¹ *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses", 11 September 2003.

²² Response, paras. 24-26, the Prosecution submits the *Bagosora* Decision was rendered before the trial started and, thus did not necessitate to strike a balance between expeditiousness of the proceedings and the need to have all the available evidence heard.

²³ Response, para. 27.

²⁴ Response, para. 28.

²⁵ Response, para. 29, citing to *Pauline Nyiramasuhuko v. the Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Nyiramasuhuko's Appeal in the Admissibility of Evidence, 4 October 2004, paras. 5 and 6.

11. The Prosecution draws an analogy to a decision in the *Prosecutor v. Ndingiliyimana et al.* case in which it submits a similar situation occurred. That Chamber held that adjournment every time a new witness is called to testify or certification of a decision denying such an adjournment would significantly impair the expeditious conduct of the proceedings.²⁶ It found that any prejudice to the Defence is minimized considerably if the Defence is given the opportunity to cross-examine each witness on the basis of the same documents on which the Prosecution relies for its examination-in-chief, which have been disclosed in the present case.²⁷

12. The Prosecution argues that the Defence argument that certification would materially advance the proceedings is erroneous. It is based on the merits of the Impugned Decision, and is speculative.²⁸ The Chamber has ensured the Defence adequate time and remains alive to issues of notice, thus, the resolution of the issue on appeal will not materially advance the proceedings.²⁹

Defence Reply

13. The Defence avers that the Prosecution is mistaken on the law of certification because it is the Impugned Decision which ought to be considered when assessing the impact on the outcome of the trial.³⁰ It is sufficient to demonstrate the effect on the outcome of trial because it is an alternative criteria and not cumulative with that of the fairness and expeditiousness of the proceedings.³¹ The Motion never addressed the merits of the Impugned Decision, or any other error of law or fact, and stayed well within the scope of Rule 73 (B).³²

14. The Defence states it has demonstrated prejudice to the Accused and no argument submitted by the Defence was outside the scope of Rule 73 (B).³³ It reiterates its submissions regarding the outcome of the trial, and states the Prosecution has failed so far to address this submission of the Defence.³⁴ The Defence submits that this alone is enough to grant certification if an immediate resolution by the Appeals Chamber materially advances the proceedings.³⁵

²⁶ Response paras. 31-32, citing to *Prosecutor v. Ndingiliyimana et al.*, Case No. ICTR-2000-56-T, Decision on Bizimungu's Motion for Certification of Appeal from the Trial Chamber's Oral Decision of 10 May 2005, 10 June 2005.

²⁷ Response, para. 33.

²⁸ Response, para. 34.

²⁹ Response, para. 35.

³⁰ Reply, paras. 1-6.

³¹ Reply, para. 5.

³² Reply, para. 8.

³³ Reply, para. 9.

³⁴ Reply, para. 10.

³⁵ Reply, para. 11.

15. The Defence submits the Prosecution admits the issue has an impact on the outcome of the trial,³⁶ and that the Chamber itself acknowledged the impact on the outcome of trial.³⁷

16. The Defence submits that any discussion of prejudice to the Accused directly relates to the fairness of the proceedings.³⁸ The Defence further submits that the issue at stake is not admissibility of evidence but the prejudicial effect of the addition of five witnesses on the right of the Accused to be granted adequate time to prepare his defence.³⁹

17. The Defence submits that not adding the witnesses at all, like granting the Defence additional time, affects the fairness, the expeditiousness and the outcome of the trial; besides, an immediate resolution by the Appeals Chamber would materially advance the proceedings as it may save time discarding evidence.⁴⁰

18. The Defence argues that the circumstances of the *Ndindiliyimana* decision were different as the Defence in that case was seeking an adjournment for detained Prosecution witnesses that were not new and that decision had nothing to do with variation of witness list and addition of witnesses.⁴¹ The Defence states it is not seeking an adjournment each time a new witness is called upon to testify.⁴²

19. The Defence contends that a later resolution of the matter will impact on the Accused's right to a fair trial, denying him the necessary time to prepare,⁴³ and an immediate resolution by the Appeals Chamber will materially advance the proceedings in case of a reversal of the Impugned Decision.⁴⁴

20. The Defence argues that the Prosecution has not complied with the Impugned Decision since the new witnesses do not appear at the end of the Prosecution's case.⁴⁵ It concludes that it will have no time to prepare for cross-examination and conduct any investigation when both Counsels sit in court uninterruptedly and since the new witnesses will be heard without a break, and the Defence also needs its investigator to be present in court in order to assist the counsels for cross-examination.⁴⁶

³⁶ Reply, para. 12, citing "Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses to be Called and Extension of Witness Protection Order", filed confidentially on 22 December 2009, para. 36 in which the Prosecution stated that its case "stands to suffer irreparable damage and prejudice if [it] is denied to call [fiveadditional] Witness[es]"

³⁷ Reply, para. 13, citing the Impugned Decision, para. 52 in which it stated that "the witnesses might be relevant to disproving any alibi defence and supporting the Prosecution's assertion that the Accused was involved in a conspiracy and a joint criminal enterprise with Faustin Bagango, among others."

³⁸ Reply, para. 15.

³⁹ Reply, para. 17.

⁴⁰ *Ibid.*

⁴¹ Reply, paras. 20-21.

⁴² Reply, para. 22.

⁴³ Reply, para. 25.

⁴⁴ Reply, para. 26.

⁴⁵ Reply, para. 28.

⁴⁶ Reply, para. 29.

DELIBERATIONS

21. 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.⁴⁷

22. Where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber.⁴⁸ Moreover, “even [when both factors are present], certification to appeal must remain exceptional.”⁴⁹ The Chamber further recalls that the exercise of discretion is primarily a matter for the Trial Chamber and absent abuse, is not amenable to review by the Appeals Chamber.⁵⁰

23. 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.⁵¹ Such contentions will thus, to the extent that they have been made by the parties, not be considered by the Chamber.

24. When assessing whether the issues at stake pertain to the fairness of the proceedings, their expeditiousness, the impact on the outcome of the trial, and whether an immediate resolution by the Appeals Chamber would materially advance the proceedings, the issues to be assessed by the Trial Chamber are those addressed in the Impugned Decision and not the issue of the very certification.⁵²

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ *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).

⁵⁰ *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, “Decision on Certification of Appeal concerning admission of written statement of Witness XXO” (TC), 11 December 2003, para. 8.

⁵¹ 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.

⁵² See e.g. Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009, para. 19; 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, 10 August 2009, para. 10.

25. The Chamber recalls its Decision of 10 August 2009 in which it underscored 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.⁵³

26. The Chamber further recalls that it ordered that the additional witnesses testify at the end of the Prosecution's case, which, in the Chamber's view, would give the Defence sufficient time to investigate and to prepare for cross-examination.⁵⁴

27. Moreover, the Chamber finds it is not established that the issue at stake would affect the outcome of the trial because procedural measures are available and shall be used to ensure full respect of the rights of the Accused, should the Defence demonstrate a prejudice. Such measures include an application for a delay before conducting the cross examination or an application to re-call a witness for further cross-examination.⁵⁵ Therefore, the first limb of Rule 73 (B) is not established.

28. In addition, the Chamber considers that an immediate resolution by the Appeals Chamber in the present case would not materially advance the proceedings. The Chamber recalls that it took into account the proposed testimony of the said witnesses in relation to allegations in the Amended Indictment in the Impugned Decision and further stated that it "will not convict the Accused on the basis of a fact not pleaded in the Indictment, but may admit evidence not pleaded in the Indictment or Pre-Trial Brief to the extent it is relevant. The Chamber will consider specific notice allegations at the appropriate stage of trial."⁵⁶

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 22 February 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]

⁵³ "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", 10 August 2009, para. 19.

⁵⁴ Impugned Decision, para. 54. The additional witnesses are scheduled to be heard at the end of the Prosecution case, except for Witness ANAC, who is scheduled to testify from 15 to 19 March 2010, which the Defence did not oppose when raising issues related to the Revised Order of Appearance of Prosecution Witnesses, filed confidentially on 1 February 2010, *see* T. 1 February 2010, pp. 64-72.

⁵⁵ "Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial", 17 September 2009, para. 44.

⁵⁶ Impugned Decision, para. 56.