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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: 24 August 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE DECISION ON RECONSIDERATION OF
ORAL DECISIONS RENDERED ON 23 SEPTEMBER 2009**

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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 “Chamber”);

BEING SEIZED of the “Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Defence Urgent Motion for Reconsideration of the Trial Chamber’s Oral Decisions Rendered on 23 September 2009”, filed on 13 July 2010 (the “Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Response to Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Defence Urgent Motion for Reconsideration of the Trial Chamber’s Oral Decisions Rendered on 23 September 2009”, filed on 15 July 2010 (the “Response”); and
- (b) The “Defence Reply to Prosecution Response to Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Defence Urgent Motion for Reconsideration of the Trial Chamber’s Oral Decisions Rendered on 23 September 2009”, filed confidentially on 19 July 2010 (the “Reply”);

CONSIDERING also 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 23 September 2009, the trial commenced and Prosecution Witness André Delvaux, who works for the Prosecution as an Investigator,¹ testified before this Chamber.

2. During the course of Delvaux’s examination-in-chief on 23 September 2009, the Chamber admitted, over Defence objections, several documents into evidence. These documents included Prosecution Exhibit 2,² which appears to be a 1996 preliminary report entitled “Use of Rwanda’s External Debt (1990/1994) The Responsibility of Donors: Analysis and Recommendations”, authored by two persons initially scheduled to testify as Prosecution Witnesses ANAB and ANAC.³ The Chamber also admitted two sets of documents as Prosecution Exhibits 3 and 4 that Delvaux said he received from

¹ T. 23 September 2009, p. 20; Prosecution Exhibit 1 (Curriculum Vitae of André Delvaux).

² T. 23 September 2009, pp. 24-28; Prosecution Exhibit 2 (preliminary report).

³ The Prosecutor’s Revised Pre-Trial Brief (Filed pursuant to Court Order dated 19 May 2009 and Rule 73 (B) (i) *bis* of the Rules of Procedure and Evidence), 25 May 2009, Annex 1, pp. 1-2.

2 

Witness ANAC.⁴ Prosecution Exhibit 5 consists of documents that Delvaux found at the National Bank of Rwanda and that he thought might be relevant to Prosecution Exhibit 2.⁵

3. On 28 January 2010, the Chamber granted the Prosecution's request to drop Witness ANAB from its witness list.⁶

4. On 24 May 2010, the Chamber granted the variation of the Prosecution's witness list by dropping Witness ANAC from it.⁷

5. In its Decision of 7 July 2010 (the "Impugned Decision"), the Chamber denied the Defence Motion to both reconsider its oral decisions rendered on 23 September 2009, and order the withdrawal of Prosecution Exhibits 2, 3, 4 and 5.⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

6. The Defence requests certification to appeal the Impugned Decision, and submits that the issues at stake warrant certification pursuant to Rule 73 (B) of the Rules.⁹

7. In the Defence's view, the continued inclusion of Prosecution Exhibits 2, 3, 4, and 5 would significantly affect both the fairness and expeditiousness of the proceedings. The Impugned Decision violates Ngirabatware's rights by maintaining evidence not brought by any witness, and thus not subject to cross-examination. Furthermore, if the impugned exhibits remain in evidence, the Defence would need to present additional evidence to challenge their allegations, which would require a significant amount of judicial time and resources.¹⁰

8. The Defence also contends that the Impugned Decision involves an issue that would significantly affect the outcome of the trial. The Impugned Decision denies the right to challenge evidence through cross-examination, and may lead to a conviction based on facts alleged in these exhibits. A reversal by the Appeals Chamber would preclude this possibility.¹¹

⁴ T. 23 September 2009, pp. 30, 33, 36-37; Prosecution Exhibit 3 ("Annexes given by ANAC during his interview on 27/02/08 by the Brussels Federal Police"); Prosecution Exhibit 4 ("Annexes given by ANAC to the Brussels Federal Police and transmitted by Procés-Verbal subsequent on 01/04/08").

⁵ T. 23 September 2009, pp. 30, 40-41, 44, 46, 51; Prosecution Exhibit 5 ("Documents found in The National Bank of Rwanda (NBR) Searching carried out in July 2009").

⁶ Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010, para. 4, p. 15.

⁷ Decision on Prosecution Motion to Vacate the Trial Date (TC), 24 May 2010, p. 9.

⁸ Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 (the "Impugned Decision"), p. 6.

⁹ Motion, paras. 19, 29, 43-44, 68-69.

¹⁰ *Id.*, paras. 29-30, 35-38.

¹¹ *Id.*, paras. 39-40.

9. The Defence argues that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings. As the Defence would not need to challenge the exhibits, its case could be shortened. A resolution of this matter at a later stage of the proceeding would impact the Accused's right to a fair and expeditious trial.¹²

10. The Defence also considers an immediate resolution necessary because, in its view, the Chamber erred in law and abused its discretion when it rendered the Impugned Decision. The Defence contends that the Chamber should have proceeded to a prima facie evaluation of the exhibits' probative value. Furthermore, the Defence submits that the Chamber did not address "the great majority" of the Defence arguments, specifically those relating to the fact that the documents were not admitted for their contents.¹³

11. The Defence acknowledges that questions of admissibility of evidence must only be certified in exceptional circumstances, but submits that Prosecutions Exhibits 2, 3, 4, and 5 represent a substantially broad category of evidence, and thus should constitute an exception.¹⁴

12. Finally, the Defence posits that the Chamber did not delve into the details unique to Prosecution Exhibits 2, 3, 4 and 5 in its Impugned Decision, and that this alone warrants certification to appeal.¹⁵

Prosecution Response

13. The Prosecution submits that the Defence has failed to meet either prong of Rule 73 (B), and requests that the Chamber dismiss the Defence motion in its entirety.¹⁶

14. The Prosecution argues that the Chamber acted appropriately in admitting the exhibits into evidence under Rule 89 (C). This Rule does not require the Chamber to pronounce itself on the probative value of the exhibits during trial.¹⁷

15. In the Prosecution's view, the Motion appears similar to previous motions by the Defence pertaining to Rule 98*bis*. The Prosecution submits that these arguments have been adequately addressed by the Chamber elsewhere.¹⁸

¹² *Id.*, paras. 44-47.

¹³ *Id.*, paras. 23, 48-65.

¹⁴ *Id.*, paras. 22-26.

¹⁵ *Id.*, para. 32, citing *The Prosecutor v. Jadranko Prlić et al.*, Decision on Certification to Appeal Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence (TC), 16 July 2009 ("*Prlić et al.* Decision"). See also Motion, paras. 31, 33.

¹⁶ Response, paras. 10, 12, 28.

¹⁷ *Id.*, paras. 13-17, 25.

¹⁸ *Id.*, paras. 20-24, 26-27, referring to Decision on Defence Motion for Immediate Withdrawal of the Allegation of Diversion of Funds (TC), 3 June 2010.



Defence Reply

16. The Defence reiterates that the issues presented by its Motion fulfill the criteria of Rule 73 (B), and repeats its request for certification to appeal the Impugned Decision. It also submits that its previous motion for reconsideration should have been granted.¹⁹

17. The Defence notes that the Prosecution has not responded to the Motion's main arguments but has, instead, discussed issues not pertaining to the requirements for certification.²⁰

DELIBERATIONS

18. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (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

19. In applying Rule 73 (B), case law has emphasised the word "significantly," suggesting that an issue which may have only a small impact on the fair and expeditious conduct of the proceedings, or on the outcome of the trial, may not be appropriate for certification.²²

20. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, even when both factors are present, "certification to appeal must remain exceptional."²³

21. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision. All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted,

¹⁹ Reply, paras. 8-19.

²⁰ *Id.*, paras. 11, 15, 17.

²¹ Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Vacate the Trial Date (TC), 29 June 2010 ("Decision of 29 June 2010"), para. 17, citing Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date (TC), 15 April 2009 ("Decision of 15 April 2009"), para. 16.

²² Decision of 29 June 2010, para. 18, citing Decision on Defence Motion for Certification of the Chamber's Oral Rulings of 29 and 30 September (TC), 2 December 2009, para. 19; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (TC), 18 March 2004, para. 16.

²³ Decision of 29 June 2010, para. 19, citing 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 (TC), 10 August 2009, para. 11; *The Prosecution v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; Decision of 15 April 2009, para. 17.

and are therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments, the Trial Chamber will not consider them.²⁴

22. The Chamber also finds it instructive that the Appeals Chamber, in the *Nyiramasuhuko* case,²⁵ stated that:

[C]ertification of an appeal has to be *the absolute exception* when deciding on the admissibility of the evidence. Consequently, as the matters in the Appeal [regarding the admission of documentary evidence] are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified.

23. As for Prosecution Exhibits 2, 3, 4 and 5, the Chamber recalls that the Prosecution established a link between these documents and Prosecution Witness André Delvaux, and that this link formed the basis of the Chamber's decisions to admit these documents into evidence.²⁶ The Impugned Decision did not change this.²⁷ The Chamber further recalls that the Defence was afforded an opportunity to cross-examine Delvaux on any alleged links between him and the exhibits.²⁸ As such, the Defence arguments based not on the exhibits' links to Delvaux, but rather on the contents of these exhibits, are misplaced. These arguments do not satisfy the requirements of Rule 73 (B) for certification to appeal.

24. The Defence also identifies an ICTY Trial Decision in the *Prlić et al.* case as an example where a Trial Chamber granted certification after it did not go into the details of various tendered exhibits.²⁹ The context of the *Prlić et al.* case, however, was that the Defence opposed the rejection of certain exhibits.³⁰ Here, the Defence contests the admission of exhibits. These are different contexts. In this case, the Chamber does not see any basis for relying on the *Prlić et al.* Trial Decision in assessing the two criteria of Rule 73 (B).

25. After considering the issues raised by the Motion and the circumstances of the case, the Chamber considers that the criteria for granting certification under Rule 73 (B)

²⁴ Decision of 29 June 2010, para. 20, citing Decision of 15 April 2009, para. 18; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material." (TC), 4 February 2005, para. 28.

²⁵ *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004 ("*Nyiramasuhuko* Appeals Decision"), para. 5 (emphasis added).

²⁶ See T. 23 September 2009, pp. 23-24, 28-30, 33, 36-37, 40-41, 43-44, 46, 50-51.

²⁷ See Impugned Decision, paras. 18-19.

²⁸ See generally T. 24 September 2009, pp. 44-86 (Defence cross-examination of André Delvaux); T. 28 September 2009 (same); T. 29 September 2009 (same).

²⁹ Motion, paras. 32-33. See also paragraph 12 of this Decision. The Chamber does not necessarily adhere to the Defence's interpretation of the *Prlić et al.* Decision.

³⁰ See *Prlić et al.* Decision, pp. 2-4.

have not been met. Moreover, the Chamber does not deem the present circumstances to warrant “the absolute exception” for certification to appeal a decision on the admission of documentary evidence.³¹ Accordingly, the Chamber denies the motion.

26. Finally, the Chamber notes that “the admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted.” Instead, “[t]hese are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.”³²

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

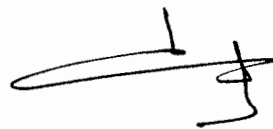
Arusha, 24 August 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

³¹ See generally *Nyiramasuhuko* Appeals Decision, para. 5.

³² *Id.*, para. 7.