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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: 11 November 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

UNICTR
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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON DEFENCE MOTION FOR JUDGEMENT OF ACQUITTAL**

Office of the Prosecutor

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Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

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 Decision Dated 15th October 2010 Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 21 October 2010 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chambers Decision Dated 15th October 2010 Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 26 October 2010 (the "Prosecution Response"); and
- (b) The "Defence Reply to the Prosecution Response to the Defence Motion for Certification to Appeal the Trial Chamber's Decision Dated 15th October Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 1 November 2010 (the "Defence 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. The Prosecution case commenced on 23 September 2009 and spanned three sessions: from 23 September through 22 October 2009, from 25 January through 18 March 2010, and from 23 through 31 August 2010. Over the course of 53 trial days, the Prosecution called 20 witnesses and tendered 28 exhibits.

2. On 14 October 2010, the Chamber rendered its Decision on Defence Motion for Judgement of Acquittal (the "Impugned Decision"). The Chamber denied the Defence Motion, but granted the Prosecution request to withdraw 15 paragraphs of the Indictment, and declared that the Defence has no case to answer in respect of these paragraphs.¹

¹ Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010 ("Impugned Decision"), p. 12. The Chamber notes that the Defence Motion misidentifies the date of the Impugned Decision.

SUBMISSIONS OF THE PARTIES

Defence Motion

3. The Defence requests certification to appeal the Impugned Decision, which it submits warrants certification pursuant to Rule 73 (B).²

4. In the Defence's view, the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings, as well as the outcome of the trial. The Defence will have to rebut allegations upon which no acceptable evidence has been led, which will unduly prolong the trial, and the high number of contested Indictment paragraphs shows the significance of an appropriate resolution. The Defence also expresses its concern that Ngirabatware may be convicted without the safeguards necessary for a fair trial.³

5. An immediate resolution by the Appeals Chamber would materially advance the proceedings, as Ngirabatware would know whether he must defend himself against various accusations.⁴

6. Moreover, the Defence submits that there is serious doubt that the Chamber applied the legal principles correctly, which also calls for immediate resolution at the appellate level.⁵ In particular, the Defence alleges that the Chamber erred by:

- (a) Failing to address whether the Indictment paragraphs were interdependent and, if so, whether exceptional circumstances existed to permit a paragraph-specific approach;⁶
- (b) Declining to entertain submissions on matters of law and precedent concerning the definition of "public" for the purposes of Direct and Public Incitement to Commit Genocide;⁷
- (c) Omitting references to the record that supported the Chamber's reasoning;⁸
- (d) Concluding that the evidence was insufficient to meet the Rule 98bis standard,⁹ and
- (e) Granting the Prosecution request to withdraw Indictment paragraphs 37 and 58, without also ordering the withdrawal of virtually identical allegations in paragraphs 60 and 33, respectively.¹⁰

² Defence Motion, paras. 8, 38, 41.

³ *Id.*, paras. 10-16, 39-40.

⁴ *Id.*, para. 18.

⁵ *Id.*, paras. 19-21, quoting *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), dated 16 February 2006, para. 4.

⁶ Defence Motion, paras. 23-26, 29.

⁷ *Id.*, paras. 30-31.

⁸ *Id.*, paras. 26, 28, 32-35.

⁹ *Id.*, paras. 10, 18, 26-27, 30-31.

Prosecution Response

7. The Prosecution asks the Chamber to dismiss the Defence Motion. The Defence has not met its burden of satisfying the Rule 73 (B) requirements and, even if it did, the Chamber should not exercise its discretion to grant certification to appeal the Impugned Decision.¹¹

8. According to the Prosecution, the Defence Motion represents an impermissible attempt to delve into grounds of appeal, and to relitigate issues that have already been decided.¹²

Defence Reply

9. The Defence repeats its prayer for certification to appeal the Impugned Decision, and states that the Prosecution has not addressed how the Defence Motion fails to establish the grounds for certification.¹³

10. The Defence does not seek to reargue the Impugned Decision on its merits, but instead submits that the Rule 73 (B) requirements have been met. Moreover, exceptional circumstances call for the Chamber to exercise its discretion to grant certification.¹⁴

DELIBERATIONS

11. 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.¹⁵

¹⁰ *Id.*, para. 22. The Defence Motion identifies the relevant withdrawn Indictment paragraphs as 37 and 38, and the paragraphs containing the virtually identical allegations as 60 and 63. Given the context, the Chamber considers that the Defence intends to refer to withdrawn Indictment paragraphs 37 and 58, and the allegedly similar paragraphs as 60 and 33. See, for example, Impugned Decision, paras. 16, 21.

¹¹ Prosecution Response, paras. 7, 9, 12-15, 19-21.

¹² *Id.*, paras. 4-10, 13, 18-19.

¹³ Defence Reply, paras. 8, 17-19.

¹⁴ *Id.*, paras. 5-7.

¹⁵ 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.



12. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, "certification to appeal must remain exceptional."¹⁶

13. 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, and are therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments,¹⁷ the Trial Chamber will not consider them.¹⁸

14. As to the first requirement of Rule 73 (B), the Defence contends that certification may avoid undue delay, prevent the Accused from facing unsupported allegations, and guarantee that no unfair conviction results.¹⁹

15. The Chamber recalls that the Impugned Decision requires the Accused to face the same case he has confronted since the start of trial, less 15 paragraphs of the Indictment. In the Chamber's view, the Defence has not demonstrated that this would significantly affect the fair and expeditious conduct of the proceedings.²⁰ This aspect of Rule 73 (B) has therefore not been satisfied.

16. Nor does the Impugned Decision affect the outcome of the trial. In this regard, the Chamber recalls that the test under Rule 98bis "is not whether the trier [of fact] would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted), but whether it could."²¹ Indeed, the Impugned Decision made clear that it was not a final determination on whether the Prosecution has proved guilt beyond a reasonable doubt: "[t]he Chamber may find the Prosecution evidence to be sufficient to sustain a conviction *and still acquit the Accused at the end of trial*, even if the Defence

¹⁶ 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.

¹⁷ See, for example, Defence Motion, paras. 10, 25, 27.

¹⁸ 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 Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material." (TC), 4 February 2005, para. 28.

¹⁹ See, for example, para. 4 of this Decision.

²⁰ See *The Prosecutor v. Augustin Ndingiyimana et al.*, 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. 8 (reaching a similar conclusion).

²¹ Impugned Decision, para. 23, quoting *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement (AC), 5 July 2001 ("*Jelisić Appeals Judgement*"), para. 37.

adduces no additional evidence.”²² Accordingly, the Chamber considers that the Defence has not satisfied the first requirement of Rule 73 (B).

17. As to the second requirement,²³ the Defence submits that an immediate resolution by the Appeals Chamber is warranted because there is serious doubt that the Chamber applied the legal principles correctly, and because it would permit the Accused to know what accusations to defend against.²⁴


18. In the opinion of the Chamber, these submissions do not demonstrate that an immediate resolution may materially advance the proceedings. The Chamber again recalls that the correctness of the Impugned Decision is irrelevant to whether certification should be granted.²⁵ Moreover, the Defence has not demonstrated how an immediate resolution by the Appeals Chamber may clarify further the allegations it faces, which remain the same. As a result, the Chamber concludes that the Defence has not satisfied the second requirement of Rule 73 (B).

19. Because the Defence has not satisfied either of the Rule 73 (B) requirements for certification to appeal the Impugned Decision, the Chamber denies the Defence Motion.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 11 November 2010


William H. Sekule
Presiding Judge


Solomy Balungi Bossa
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

²² Impugned Decision, para. 25 (emphasis added), citing *Jelisić Appeals Judgement*, para. 37.

²³ The Chamber notes that because the first requirement has not been met, it need not address the second requirement. See Rule 73 (B) of the Rules of Procedure and Evidence (“ . . . may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”) (emphasis added).

²⁴ See, for example, paras. 5-6 of this Decision.

²⁵ See *id.*, para. 13.