

ICTR-01-75-PT  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-01-75-0085

OR: ENG

**TRIAL CHAMBER III**

**Before:** Judge Dennis C.M. Byron, Presiding  
Judge Gberdao Gustave Kam  
Judge Vagn Joensen

**Registrar:** Mr. Adama Dieng

**Date:** 28 March 2011

Handwritten signature and date: 28/03/2011

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**THE PROSECUTOR**

v.

**Jean UWINKINDI**

Case No. ICTR-01-75-PT

**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL  
DECISION ON PRELIMINARY MOTION ALLEGING DEFECTS IN THE FORM  
OF THE AMENDED INDICTMENT**

**Office of the Prosecutor:**

Mr. Richard Karegyesa  
Mr. James J. Arguin  
Mr. Rashid Rashid  
Mr. Sharifah Adong

**For the Defence**

Mr. Claver Sindayigaya  
Mr. Iain Edwards  
Ms. Bettina Spilker

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## INTRODUCTION

1. On 9 March 2011, the Chamber denied the relief sought by Jean Uwinkindi in his preliminary motion alleging defects in the form of the Amended Indictment.<sup>1</sup> On the following day, the Chamber granted Uwinkindi an extension of time until 21 March 2011 to file an application, if any, for certification to appeal the Impugned Decision.<sup>2</sup> Uwinkindi now seeks certification to appeal the Impugned Decision.<sup>3</sup> The Prosecution opposes Uwinkindi's Motion.<sup>4</sup>

## DELIBERATIONS

2. As a preliminary matter, the Chamber notes that Uwinkindi filed his application for certification out of time. However, as the issue in question is important, the delay was a short one, and no other party has suffered any prejudice as a result of the delay, the Chamber considers it in the interests of justice to entertain Uwinkindi's submissions.

### *Applicable Law*

3. Pursuant to Rule 72 (B)(ii) of the Rules of Procedure and Evidence (the "Rules"), certification to appeal a ruling on a preliminary motion may only be granted if: (a) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) in the opinion of the Trial Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. Even when both factors are present, certification is not automatic, but at the Trial Chamber's discretion.<sup>5</sup> Moreover, certification to appeal must remain an exceptional measure.<sup>6</sup>

<sup>1</sup> *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Defence Preliminary Motion Alleging Defects in the Form of the Amended Indictment, 9 March 2011 ("the Impugned Decision").

<sup>2</sup> *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-I, Decision on Defence Motion for Extension of Time for Filing of a Request for Certification to Appeal the Decision of 9 March 2011, 10 March 2011.

<sup>3</sup> *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects in the Form of the Amended Indictment, 22 March 2011 (the "Motion").

<sup>4</sup> *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, Prosecution Response to Defence Motion for Certification Pursuant to Rule 73 (*sic*), 25 March 2011 (the "Response").

<sup>5</sup> 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.

<sup>6</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-NZ, Decision on Joseph Nizorera's Application for Certification to Appeal Decision on the 24<sup>th</sup> 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); *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Oral Decision on 26<sup>th</sup> Notice of Rule 66 Violation and 17<sup>th</sup> Notice of Rule 68 Violation, 25 November 2009, para. 2.

4. In considering whether to grant certification for appeal, the Chamber is not concerned with the legal merit of the arguments raised by the Parties or the correctness of the impugned decision, except to the extent that permitting an interlocutory appeal based on frivolous arguments will not materially advance the proceedings.<sup>7</sup> Rather, the Chamber must determine whether the issue is one that merits certification under the criteria set out in Rule 72 (B)(ii).

***Whether the issue involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial***

5. Uwinkindi submits that the issue involved in the Impugned Decision concerns his fundamental fair trial rights, including his right, under Article 20 (4)(a) of the Statute of the Tribunal, to be informed in detail of the charges against him. He argues that the Amended Indictment does not provide him with sufficient notice as to the exact nature of the charges against him or the material facts in support of those charges.<sup>8</sup> He further argues that since an indictment is “the foundational charging document upon which all proceedings are based” and upon which his own criminal liability or innocence will rest, any decision regarding the content and form of the indictment will necessarily impact the outcome of the trial.<sup>9</sup>

6. The Prosecution submits that the Defence has not demonstrated that the legal requirements for certification are satisfied in this case. It argues that the Defence has not shown the existence of “any exceptional measures” that would warrant the grant of certification to appeal the Impugned Decision.<sup>10</sup> The Prosecution disagrees with the Defence assertion that the indictment is the foundational charging document upon which all proceedings are based, and argues that “not all indictment-related decisions must qualify for certification.”<sup>11</sup>

7. In the Chamber’s view, the scope, content and clarity of an indictment are factors that can significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. A properly pleaded indictment should inform the accused of the charges against him and clearly delineate the scope of the charges.<sup>12</sup> If these criteria are not satisfied, for example

<sup>7</sup> 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.

<sup>8</sup> The Motion, para. 9.

<sup>9</sup> The Motion, para. 11.

<sup>10</sup> The Response, para. 9.

<sup>11</sup> The Response, para. 12.

<sup>12</sup> *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2001-55C-PT, Decision on Ildephonse Nizeyimana’s Motion for Certification (Rule 73), 12 August 2010; *The Prosecutor v. André Ntagerura*,

if material facts are not pleaded with sufficient specificity, then the indictment could be defective.<sup>13</sup> There is no doubt that a defective indictment will significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. Therefore, the Chamber is satisfied that Uwinkindi has satisfied the first prong of the certification test.

***Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings***

8. Uwinkindi further submits that “there may be serious doubts as to the legal conclusions at issue” in the Impugned Decision.<sup>14</sup> He raises several points as being “appropriate for an interlocutory appeal,” including his view that the Chamber’s reasoning with regard to the specificity of the allegations contained in paragraph 10 of the Amended Indictment “appears to be contradictory” and that the Chamber’s conclusion “does not seem to be in any way supported by the evidence.”<sup>15</sup> Uwinkindi characterises the Chamber’s approval of the pleading of joint criminal enterprise in the Amended Indictment as “a pragmatic approach... [which] ...appears to be quite contrary to settled Appeals Chamber jurisprudence on this important matter.”<sup>16</sup> According to Uwinkindi, should the Appeals Chamber conclude that the Amended Indictment was not properly pleaded, this would materially advance the proceedings.<sup>17</sup>

9. The Prosecution does not make any specific submissions in relation to the second prong of the certification test. Rather, it argues that Uwinkindi is relying on the same arguments made in his earlier submissions and “merely seeks to re-litigate the matter.”<sup>18</sup> The Prosecution concludes that the Amended Indictment has sufficiently particularised the material facts underpinning the charges against Uwinkindi, that it provides Uwinkindi with adequate notice, and that it is not unduly vague.<sup>19</sup>

10. The Chamber considers that the alleged deficiencies in the Amended Indictment could directly affect Uwinkindi’s rights and thus should be resolved before the trial commences.

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*Emmanuel Bagambiki and Emmanuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, Judge Schomburg’s Dissenting Opinion, para. 2.

<sup>13</sup> *Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment (AC), 28 November 2007, para. 324.

<sup>14</sup> The Motion, para. 15.

<sup>15</sup> The Motion, para. 16 (ii).

<sup>16</sup> The Motion, para. 16 (iv).

<sup>17</sup> The Motion, para. 18.

<sup>18</sup> The Response, paras. 13-14.

<sup>19</sup> The Response, para. 15.

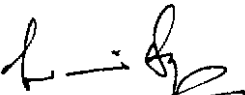
Although the jurisprudence of this Tribunal allows the Prosecution to “cure” a defective indictment during the trial, this remedy should be used sparingly<sup>20</sup> and is only available if the Prosecution has previously given “timely, clear, and consistent” information to the Defence.<sup>21</sup> As this is a pre-trial motion and the trial has not yet commenced, “curing” will not resolve the issue as to whether the Prosecution has pleaded the case with sufficient particularity to put Uwinkindi on notice. Therefore, the Chamber considers that an immediate resolution by the Appeals Chamber will materially advance the proceedings.

**FOR THESE REASONS, THE CHAMBER**

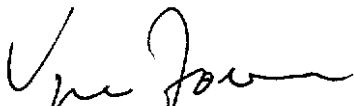
**GRANTS** the Motion in its entirety and

**CERTIFIES** Uwinkindi’s appeal of the Impugned Decision.

Arusha, 28 March 2011, done in English.

  
Denis C.M. Byron  
Presiding Judge

  
Gbercho Gustave Kam  
  
[Seal of the Tribunal]

  
Vagn Joensen  
Judge

<sup>20</sup> *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, para. 55.

<sup>21</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-A, Appeal Judgment, 29 August 2008, paras. 20, 121; *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 14.