



**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: 10 May 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON EXCLUSION OF MATERIAL FACTS
NOT CHARGED IN THE INDICTMENT AND/OR IN THE PRE-TRIAL BRIEF**

Office of the Prosecutor

Mr. Wallace Kapaya
Ms. Veronic Wright
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
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’s Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief Rendered on 14 February 2011”, filed on 21 February 2011 (the “Defence Motion”);

CONSIDERING:

- (a) The “Prosecution’s Response to Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief Rendered on 14 February 2011”, filed on 28 February 2011 (the “Prosecution Response”); and
- (b) The “Defence Reply to Prosecution’s Response to Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief Rendered on 14 February 2011”, filed on 7 March 2011 (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 of the Rules.

INTRODUCTION

1. On 20 September 2010, the Defence filed confidentially a Motion to exclude 42 Items testified to by 15 witnesses, arguing that these were not charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief and yet were admitted during the course of the Prosecution’s case over Defence objections (“Original Defence Motion”). The Defence divided these 42 Items into three categories: 11 that might support a conviction themselves, 20 that involve the alleged acts and conduct of the Accused, and 27 pertaining to his alleged subordinates or to members of the alleged joint criminal enterprise.¹

2. On 14 February 2011, the Chamber issued its Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (“Impugned Decision”) partially granting the Original Defence Motion with respect to four Items that both Parties appeared to agree were not part of the Prosecution’s case against the Accused, but denying the rest thereof.²

¹Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (Rule 73 of the Rules of Procedure and Evidence), 20 September 2010, paras. 1, 34, 36-44, 51. These three categories did not include six items, but listed some items multiple times.

² Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (TC), 14 February 2011 (“Impugned Decision”), paras. 17-19.

3. The Defence files the present Motion, seeking certification to appeal the Impugned Decision.

SUBMISSIONS OF THE PARTIES

Defence Motion

4. In support of its Motion, the Defence cites a *Bagosora et al.* Trial Decision granting certification to appeal a Decision involving the admissibility of evidence not pleaded in the Indictment. The Trial Chamber noted therein that it would be relatively straightforward to quash on final appeal any specific and distinct factual findings based uniquely on improperly considered evidence, but it would be difficult to do so with findings based on both properly and improperly admitted evidence. At such stage, the Appeals Chamber would be hard-pressed to determine to what extent evidence which should have been excluded informed the decision of the Trial Chamber on the findings.³

5. The Defence acknowledges that a motion for certification to appeal neither seeks to reconsider the merits of the Impugned Decision nor to present the grounds on which the appeal is sought. The Defence understands that the only relevant considerations in such a motion are the two criteria in Rule 73(B).⁴

6. As regards the first prong of Rule 73(B), the Defence contends that the admitted Items have led to a radical transformation of the Prosecution's case against the Accused, resulting in serious prejudice to the Accused, as there is an almost 50 percent increase in the allegations against him. Echoing the words of the *Bagosora et al.* Trial Chamber, the Defence submits that this "has a bearing on the nature of the case which the Defence must confront; the range of evidence which the Chamber should hear; and the scope of circumstances relevant to the crimes charged" and therefore merits certification. Accordingly, the non-exclusion of the 38 Items significantly affects the fair and expeditious conduct of the proceedings.⁵

7. The Defence further argues that the non-exclusion of the 38 Items significantly affects the outcome of the trial, as it potentially leads to convictions for crimes for which he should not be standing trial. The Defence notes that while the Chamber ruled in the Impugned Decision that the Items can be relevant to other paragraphs in the Indictment, it does not specify therein that the Accused cannot be convicted thereof.⁶

8. As regards the second limb of Rule 73(B), the Defence argues that an immediate resolution by the Appeals Chamber of the issue of non-exclusion of the 38 Items will materially advance the proceedings. Should the Appeals Chamber strike out these Items, the Defence will no longer be required to call additional witnesses to refute such allegations. A clarification by the Appeals Chamber that the Accused cannot be convicted for any of the 38

³ Defence Motion, paras. 8-9, referring to *The Prosecutor v. Théoneste Bagosora et al.* ("*Bagosora et al.*"), Case No. ICTR-98-41-T, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006 ("*Bagosora et al.* Trial Decision of 14 July 2006"), paras. 4, 6.

⁴ Defence Motion, paras. 11-12.

⁵ *Id.*, paras. 15-19, citing *Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 3 November 2003.

⁶ Defence Motion, paras. 22-23.

allegations will likewise materially advance the proceedings. The Defence also proposes that the final deliberations will be shortened as the Chamber will not have to consider the 38 material facts should the Appeals Chamber choose to exclude them.⁷

9. The Defence adds that the Chamber should also consider, in assessing the second prong for certification, whether there is a serious doubt as to the correctness of the legal principles at issue. The Defence alleges that such doubt is present in the case at bar, as the Chamber failed to acknowledge that the relevance and probative value of evidence not pleaded in the Indictment and/or Pre-Trial Brief must be measured against the prejudicial impact thereof. The Defence argues that the Impugned Decision effectively provides that prior notice to the Accused of the charges against him is useless, as any evidence can be admitted if the Chamber deems it relevant regardless of any prejudicial effect thereof. Finally, the Defence points out that the Indictment and Pre-Trial Brief are meant to provide guidance as to what each Prosecution witness will testify on. With regard to the 38 material facts, however, the Chamber's analysis in paragraph 19 of the Impugned Decision does not provide any such guidance, and forces the Defence to rebut each and every of these facts.⁸

Prosecution Response

10. The Prosecution alleges that the Defence reiterates the arguments in the Original Defence Motion, rather than making a case for certification. Moreover, the Prosecution counters that the Defence miscited the *Bagosora et al.* Trial Decision as the Trial Chamber therein did not find that the admission of evidence not pleaded in the Indictment met the two limbs of Rule 73(B). Instead, the Trial Chamber granted certification on the basis of specific legal principles which could be clarified by the Appeals Chamber, and stressed that matters of admissibility of evidence are primarily for the Trial Chamber to determine. The Prosecution submits that the only issue at hand is whether the material facts meet the admissibility test under Rule 89(C). The Prosecution is not required to plead every piece of evidence it will present against the Accused.⁹

11. As regards the first limb of Rule 73(B), the Prosecution claims that the Defence fails to distinguish between evidence and "material facts". The Prosecution contends that the Chamber considered the Items to be mere pieces of evidence supporting material facts, and thus were admissible at this stage of the proceedings. Admissibility of evidence is regulated by the Rules and jurisprudence, and does not necessitate notice to the Accused through the Indictment or Pre-Trial Brief. As the Defence Motion is premised on a misinterpretation of the Impugned Decision, certification cannot materially advance the proceedings.¹⁰

12. With respect to the second prong of Rule 73(B), the Prosecution underscores that it is not appropriate for the Appeals Chamber to resolve the matter, as it is not in a position to assess the totality of evidence. The Defence has not established that the Chamber erred in admitting the subject evidence and in not considering the prejudicial effect thereof. The Prosecution submits that the Defence cites a *Bagosora et al.* Trial Decision regarding the evaluation of such prejudicial effect which is inapplicable in the case at bar. The Defence

⁷ *Id.*, paras. 24-28.

⁸ *Id.*, paras. 29-40.

⁹ Prosecution Response, paras. 6-11.

¹⁰ *Id.*, paras. 14-17.

failed to establish that the evidence was overly incriminating to the Accused and that the prejudicial effect thereof outweighed its probative value.¹¹

Defence Reply

13. The Defence stresses that contrary to the Prosecution's assertion, the Defence properly appreciated that the *Bagosora et al.* Trial Chamber deemed that issues of admissibility and proper notice of evidence outside the Indictment meet the two limbs of Rule 73(B).¹²

14. The Defence highlights that the Prosecution reference to the *Nyiramasuhuko et al.* Appeals Decision begs the question of how the Appeals Chamber was seised of such issue. The fact remains that the *Nyiramasuhuko et al.* Trial Chamber deemed that the issue of admissibility merited certification to appeal. Regardless of what the Appeals Chamber may eventually decide with respect to a potential appeal of the Impugned Decision, the Defence emphasizes that the only relevant consideration at present is whether the 38 Items fall within the purview of Rule 73(B).¹³

15. If certification were to be granted, the Appeals Chamber would determine whether the 38 Items constitute material facts which should have been pleaded in the Indictment or mere evidence relevant to the proof of the allegations therein. This does not entail an assessment of the totality of the evidence, in the same manner that the Appeals Chamber in *Nyiramasuhuko et al.* did not have to resort to such an assessment to determine that the Trial Chamber acted within its discretion to admit the evidence of witness RV.¹⁴

16. The Defence reiterates that an evaluation of the prejudicial impact of the Items must be carried out at the stage of their admission into evidence. The *Bagosora et al.* Trial Decision cited in the Defence Motion is applicable to the case at bar, even if it dealt with evidence of pre-1994 events, as the ruling therein concerning Rule 89(C) was not limited to evidence falling outside the temporal jurisdiction of the Tribunal. Moreover, the Defence recalls that the Chamber has previously taken the prejudicial impact of evidence into consideration when determining its admissibility.¹⁵

DELIBERATIONS

17. As a preliminary matter, the Chamber notes that the Parties' submissions concern a variety of issues that are tangential to the question of certification, such as whether the challenged Items constitute "material facts", and the circumstances under which other Trial Chambers have granted certification to appeal in possibly similar cases. The Chamber is mindful of these issues,¹⁶ but will only address below whether the Impugned Decision in this case meets the criteria for certification.

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

¹¹ *Id.*, paras. 18-23, citing *Bagosora et al.* Trial Decision of 14 July 2006.

¹² Defence Reply, paras. 8-17.

¹³ *Id.*, paras. 29-32.

¹⁴ *Id.*, paras. 36-40.

¹⁵ *Id.*, paras. 41-47, citing *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 17; and T. 9 February 2011, pp. 56-57.

¹⁶ See, for example, Defence Motion, paras. 8-10, 13, 29-30; Prosecution Response, paras. 7-9, 14, 21; Defence Reply, paras. 8-15, 31-34.

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.¹⁷

19. 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.”¹⁸

20. 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, the Trial Chamber will not consider them.¹⁹

21. As to the first requirement of Rule 73(B), the Defence contends that certification may prevent a prejudicial expansion of the case faced by the Accused. Certification may also impact the duration of the trial, as well as eliminate the possibility that the Accused might be convicted of crimes for which he is not charged.²⁰

22. The Chamber considers these arguments to be misguided. Rule 89(C) provides that the Chamber has the discretion to admit any relevant evidence which it deems to have probative value.²¹ Any evidence admitted by the Chamber, therefore, has already been deemed relevant to the allegations faced by the Accused. Because these allegations have not been expanded, certification to appeal would not address the issues of concern to the Defence.

23. The Chamber observes that the Defence, as it is entitled to do, may wish to call witnesses concerning Prosecution evidence, and that the length of their testimony may depend on the issues to be addressed. Logistical concerns *per se* cannot override the interests of justice. The Chamber considers that, in the present circumstances, this cannot be the basis for certification.

24. As to the final Defence concern, the Chamber notes that “[i]n reaching its [final] judgement, a Trial Chamber can only convict the accused of crimes that are charged in the

¹⁷ 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.

¹⁸ 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.

¹⁹ Decision of 29 June 2010, para. 20, citing Decision of 15 April 2009, para. 18; *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.

²⁰ See, for example, Defence Motion, paras. 15-23.

²¹ See generally Impugned Decision, para. 18.

indictment”.²² Moreover, as the Appeals Chamber has recently reaffirmed, “evidence in support of material facts not pleaded in an indictment may not form the basis for a conviction, but may be admitted to the extent that it is relevant to the proof of other allegations pleaded in the indictment”.²³

25. After considering the issues raised by the Defence Motion and the circumstances of the case, the Chamber considers that the first requirement for granting certification under Rule 73(B) has not been met. Accordingly, there is no need to assess the second requirement. The Chamber therefore denies the Defence Motion.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 10 May 2011

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]

²² *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement (AC), 1 April 2011, para. 19, citing *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008, para. 18; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 326; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 28; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 33.

²³ *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement (AC), 1 April 2011 (“*Renzaho Appeals Judgement*”), para. 71, citing *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible” (AC), 2 July 2004, para. 15. See also *Renzaho Appeals Judgement*, para. 90.