ICTR-99-54-T
25-11-2011
(106026 – 106012)

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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: 25 November 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S RULE 92*BIS* DECISION OF 22 SEPTEMBER 2011

Office of the Prosecutor
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rachid Rachid
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel
Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman

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 Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 22 September 2011 on Admission of Written Statements Pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence", filed on 28 September 2011 (the "Defence Motion");

CONSIDERING:

(a) The "Prosecution's Response to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 22 September 2011 on Admission of Written Statements Pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence", filed on 3 October 2011 (the "Prosecution Response"); and

(b) The "Defence Reply to Prosecution's Response to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 22 September 2011 on Admission of Written Statements Pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence", filed on 7 October 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 11 and 12 April 2011, the Chamber denied two Defence Motions for admission of written statements pursuant to Rule 92*bis* of the Rules[1].

2. On 22 September 2011, the Chamber rendered a Decision (the "Impugned Decision") denying a Defence motion to reconsider the Decisions of 11 and 12 April 2011, and to have eight written statements admitted pursuant to Rule 92*bis*.[2]

[1] Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements By a Presiding Officer (TC), 11 April 2011, p. 6; Decision on Defence Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements By a Presiding Officer (TC), 12 April 2011, p. 7.

[2] Decision on Defence Motion to Declare Written Statements Admissible, for Leave for Certification By a Presiding Officer of These Written Statements and/or Reconsideration of the Trial Chamber's Decisions Rendered on 11 and 12 April 2011 (TC), 22 September 2011 ("Impugned Decision"), p. 11.

SUBMISSIONS OF THE PARTIES

Defence Motion

3. The Defence requests that the Chamber reconsider, or grant certification to appeal, the Impugned Decision.[3]

4. Regarding reconsideration, the Defence submits that there is reason to believe that the Impugned Decision was erroneous or constituted an abuse of power, resulting in an injustice. Although the Chamber quoted the applicable law concerning "acts and conduct of the Accused", the Chamber erred when it applied this statement to other persons as well. Instead, the Chamber improperly considered that this phrase encompassed anything that had an indirect link to the Indictment or a Prosecution witness, regardless of whether they plainly pertained to the Accused's actions as alleged in the Indictment.[4]

5. The Defence also submits that the Chamber failed to consider that the statements could be admitted subject to the cross-examination of their authors, whether the statements could be admitted in part, and whether they dealt with issues peripheral or central to the case. Finally, the Defence contends that the Chamber abused its discretion in failing to recall its duty to ensure a fair trial.[5]

6. As for certification to appeal, the Defence submits that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial. The Impugned Decision has unjustifiably limited the Accused's ability to defend himself, and will thus prejudicially affect the proceedings. This Decision, combined with the Chamber's Order for the Defence to reduce its witness list, will enhance the risk that the Accused will face a conviction on the events addressed by the written statements, and thus will significantly affect the outcome of trial. Other Trial Chambers have granted certification, according to the Defence, in similar situations.[6]

7. Moreover, in the Defence's view, an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings because the Defence has not closed its case and because the trial is still ongoing. Additionally, it will not be possible to have this issue reviewed at a later stage of the proceedings. Only an immediate resolution of this issue will ensure that the trial continues on the correct legal footing.[7]

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[3] Defence Motion, para. 74.
[4] *Id.*, paras. 15-37, 45.
[5] *Id.*, paras. 38-49.
[6] *Id.*, paras. 52-63, citing *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2011-55C-PT, Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit Into Evidence the Statement of General Marcel Gatsinzi (TC), 2 December 2010; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's Decision on the Admission of Evidence Pursuant to Rule 92 *bis* (TC), 8 June 2009; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Certificate Pursuant to Rule 73 (C) in Respect of Decisions of the trial Chamber on the Admission into Evidence of Written Statements Pursuant to Rule 92*bis* (C) (TC), 25 April 2002.
[7] Defence Motion, paras. 64-73.

Prosecution Response

8. The Prosecution requests that the Defence Motion be dismissed, and submits that the Chamber should sanction the Defence for its repetitive and frivolous motions for reconsideration.[8]

9. The Defence misinterprets the Impugned Decision, which was based on the relation between the written statements and the alleged acts and conduct of the Accused, not on the acts and conduct of other persons. This misinterpretation cannot be a basis for reconsideration or for certification to appeal.[9]

Defence Reply

10. The Defence disputes that its Motion is frivolous, and reiterates its prayer for relief.[10]

11. The Defence repeats that none of the written statements went to the alleged acts and conduct of the Accused, but instead concerned peripheral issues that involve other persons. Although the written statements "could still be considered inadmissible because of their proximity with the case, the Trial Chamber failed to do so and rather persisted in considering that all statements spoke to the acts and conducts of the Accused".[11] The Chamber abused its discretion in so finding, and this warrants reconsideration of the Impugned Decision.[12]

12. In the alternative, the current situation meets the standard for certification to appeal the Impugned Decision, and it is exceptional enough to merit such relief. This view is bolstered by what the Defence considers to be the Prosecution's inability to advance dispositive arguments to oppose certification to appeal.[13]

DELIBERATIONS

Reconsideration

13. The Chamber recalls the Tribunal's jurisprudence on reconsideration:[14]

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[8] Prosecution Response, para. 9, p. 10.
[9] *Id.*,, paras. 10-24.
[10] Defence Reply, paras. 5-13, 31.
[11] *Id.*, para. 16.
[12] *Id.*, paras. 14-20.
[13] *Id.*, paras. 21-30.
[14] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (*"Bagosora et al."*), Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)" (TC), 15 June 2004 (*"Bagosora et al.* Decision of 15 June 2004"), para. 7.

> ...the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.[15]

14. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision, (2) there has been a material change in circumstances since it made its original decision, or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.[16]

15. The Defence seeks reconsideration under the third ground, submitting that an injustice resulted from the Chamber's error and abuse of power in finding that the written statements pertained to the acts and conduct of the Accused as charged in the Indictment, resulting in the denial of the Defence request for admission of these written statements into evidence.

16. The Chamber recalls that written statements which go to proof of the acts and conduct of the Accused as charged in the Indictment cannot be admitted into evidence in lieu of oral testimony under Rule 92*bis* (A). This includes "any written statement which goes to proof of any act of conduct of the accused upon which the prosecution relies to establish . . . that he planned, instigated or ordered the crimes charged . . . or that he had participated in [a] joint criminal enterprise".[17]

17. Statements which go to proof of other matters may be admitted under this provision.[18] The Appeals Chamber has confirmed, however, that "[e]ven where a statement meets the formal requirements of Rule 92*bis* of the Rules, the decision to admit that statement into evidence remains discretionary."[19]

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[15] *Bagosora et al.* Decision of 15 June 2004, para. 7.

[16] *Id.*, para. 9; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4.

[17] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C) (AC), 7 June 2002, para. 10.

[18] Rule 92*bis* (A) of the Rules states, in part, that "[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Following this provision are a non-exhaustive list of factors in favor of admitting such evidence, and factors against admitting it.

[19] *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-AR73.2, Decision on Prosecutor's Interlocutory Appeal of Decision Not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92*bis* (AC), 8 March 2011, para. 7.

Written Statements of DWAN-5, DWAN-27, DWAN-52 and DWAN-84

18. In the Impugned Decision, the Chamber found that the statements of DWAN-5, DWAN-27, DWAN-52 and DWAN-84 provided that persons allegedly killed by a joint criminal enterprise member in 1994 instead survived beyond that year, and thus that the statements tended to disprove the Accused's acts or conduct as charged in paragraph 60 of the Indictment.[20]

19. As noted in the Impugned Decision,[21] whether the victims identified in paragraph 60 of the Indictment were exterminated as alleged goes to the acts and conduct of the Accused as charged in the Indictment. The Defence has not established that the Chamber should reconsider this aspect of the Impugned Decision, and the Chamber therefore denies the Defence Motion as it relates to this prayer for relief.

Written Statements of DWAN-48 and DWAN-78

20. The Impugned Decision found that the written statements of DWAN-48 and DWAN-78 tended to disprove the acts and conduct of the Accused, as they "indirectly contradict" Prosecution evidence that the Accused visited roadblocks, which is the subject of Indictment paragraphs 24, 41, 48 and 49.[22]

21. While the Chamber recognizes that the word "indirectly" may have been open to different interpretations, the Impugned Decision's reasoning was clear: the written statements tended to disprove the acts and conduct of the Accused as charged in the Indictment, and therefore are inadmissible under Rule 92*bis*(A). The Defence has not established that the Chamber should reconsider this aspect of the Impugned Decision, and the Chamber therefore denies this Defence request for reconsideration.

22. In any event, the Chamber recalls that the Impugned Decision stated that "[i]t would also be contrary to the public interest for serious allegations against [a Prosecution witness] to be admitted by way of written statements."[23]

Written Statements of DWAN-85 and DWAN-135

23. The Impugned Decision found that DWAN-85's written statement possibly refuted the existence of meetings allegedly convened by Ngirabatware at Kanyabuhombo school as alleged in Indictment paragraphs 22, 23 and 40, and thus tended to disprove the acts and conduct of the Accused.[24] Similarly, the Impugned Decision found that DWAN-135's written statement tended to disprove the acts and conduct of the Accused as

[20] Impugned Decision, paras. 36-37. See also Indictment, para. 60, pp. 12-13.
[21] Impugned Decision, para. 36 ("By stating that these individuals were in fact not killed during the period subject of the Indictment, the witnesses directly refute major charges against the Accused.").
[22] *Id.*, paras. 40-41. See also Indictment, paras. 24, 41, 48-49.
[23] Impugned Decision, para. 41.
[24] *Id.*, paras. 42-43. See also Indictment, paras. 22-23, 40.

charged in paragraph 39 of the Indictment, concerning alleged statements that Ngirabatware made at meetings in Nyamyumba commune.[25]

24. In the Chamber's view, the Defence has not satisfied its burden on demonstrating that sufficiently special circumstances exist to warrant reconsideration of the Impugned Decision insofar as it found that these written statements go to the acts and conduct of the Accused as charged in the Indictment. Accordingly, the Chamber denies this aspect of the Defence Motion.

Other Defence Submissions

25. The Defence also contends that the Impugned Decision was erroneous for failing to consider that the statements' authors could be ordered to attend cross-examination, and that any parts of the statements dealing with peripheral issues could be admitted into evidence. In the Defence's view, the Chamber's disregard of these possibilities was an erroneous exercise of its discretion.[26]

26. The Chamber considers that the Defence is mistaken in its understanding of the procedure under Rule 92*bis*. Having found that the statements at issue in this case did not meet the threshold of Rule 92*bis* (A) and were therefore inadmissible under this Rule, the question of discretion did not arise, and the Chamber was under no duty to address issues pertaining to this discretion. The Defence arguments in this regard are dismissed.

Certification to Appeal

27. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (1) 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 (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.

28. 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.[27]

29. 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

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[25] Impugned Decision, paras. 44-45. See also Indictment, para. 39.
[26] Defence Motion, paras. 38-49.
[27] *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; 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 Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 February 2008 on Disclosure (TC), 19 February 2009, para. 5.

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.[28]

30. The Chamber further recalls that the Appeals Chamber has stressed, in the context of Rule 89 (C) for admission of evidence, that:

> [i]t is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be *the absolute exception* when deciding on the admissibility of the evidence.[29]

31. As regards the first limb of Rule 73(B), the Defence has not established that the non-admission of the written statements, which the Chamber considers to go to the acts and conduct of the Accused as charged in the Indictment, involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Furthermore, the Chamber considers that the Accused's right to defend himself has not been unduly impacted by the non-admission of the statements. While the Defence contends that the Impugned Decision's prejudice is enhanced by the Chamber's Order to reduce the Defence witness list, the Chamber recalls that it has certified that Order for appeal.[30] Having failed to establish the first criterion under Rule 73(B), the Chamber denies the Defence prayer for certification to appeal the Impugned Decision.

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[28] *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, ICTY 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.

[29] *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, para. 5 (emphasis added).

[30] Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011, p. 10.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 25 November 2011

William H. Sekule
Presiding Judge

Solomy Balungi Bossa

[Seal of the Tribunal]

Mparany Rajohnson
Judge