



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 4 June 2012

ICTR-99-54-T
4th June 2012
(11176-11172)

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE DECISION GRANTING LEAVE
TO REOPEN THE PROSECUTION REBUTTAL CASE

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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 of 18 May 2012 on the Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case”, filed on 25 May 2012 (the “Defence Motion”);

CONSIDERING:

- (a) The “Prosecution’s Consolidated Response to Defence Motion for 1) Certification to Appeal the Trial Chamber’s Decision on the Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case; 2) Defence Motion for Certification to Appeal and/or Reconsider the Trial Chamber’s Decision on the Defence Motion for Leave to Present Rejoinder Evidence; and 3) Defence Extremely Urgent Motion to Authorize Lead Counsel to Do Oral Pleadings via Video-Link”, filed on 29 May 2012 (the “Prosecution Response”); and
- (b) The “Defence Reply to the Prosecution’s Consolidated Response to Defence Motion for 1) Certification to Appeal the Trial Chamber’s Decision on the Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case; 2) Defence Motion for Certification to Appeal and/or Reconsider the Trial Chamber’s Decision on the Defence Motion for Leave to Present Rejoinder Evidence; and 3) Defence Extremely Urgent Motion to Authorize Lead Counsel to Do Oral Pleadings via Video-Link”, filed on 1 June 2012 (the “Defence Reply”);

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Defence Motion pursuant Rule 73 of the Rules.

INTRODUCTION

1. On 14 November 2011, the Chamber granted the Prosecution request to call 8 rebuttal witnesses, including Witness PRVIII.¹
2. The Prosecution commenced its case-in-rebuttal on 6 March 2012, and closed it on 2 April 2012. Over the course of 12 trial days, the Prosecution called 6 rebuttal witnesses and tendered 23 exhibits. Witness PRVIII did not testify.
3. On 18 May 2012, the Chamber rendered a Decision (the “Impugned Decision”) granting the Prosecution request to reopen its case-in rebuttal and ordering that Witness PRVIII testify no

¹ Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 (“Decision of 14 November 2011”), p. 14.

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later than 6 June 2012.² Also on 18 May 2012, the Chamber denied the Defence request for leave to present rejoinder evidence.³

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence seeks certification to appeal the Impugned Decision, and an order staying the testimony of Witness PRVIII as well as staying the presentation of Closing Arguments.⁴

5. The Defence submits that the Impugned Decision provides an unfair advantage to the Prosecution while the Defence has been prevented from adducing further evidence in rejoinder, or through other means. The Defence asserts that the fairness of the proceedings will be further affected by the unprecedented situation of a witness testifying with diplomatic immunity. Finally, the Defence submits that it will not be expeditious for the Parties to reconvene in Arusha for an additional trial session to hear Witness PRVIII's testimony. This will affect the outcome of the trial because the Defence will be precluded from adequately assessing and addressing Witness PRVIII's evidence in its closing submissions.⁵

6. In the Defence's view, an immediate resolution by the Appeals Chamber will advance the proceedings, as it would not require the Chamber to "sit for an undetermined amount of time to hear the testimony of a witness", which may risk delaying the proceedings. Moreover, the Defence contends that it would ensure that the trial continues under the correct legal footing without jeopardizing the entire case.⁶

Prosecution Response

7. The Prosecution submits that the Defence Motion should be dismissed.⁷

8. The Prosecution disputes that the Impugned Decision amounts to unfair advantage for the Prosecution. This Decision's outcome cannot be combined and confounded with the outcomes of other decisions, as every motion is determined on its own merits. The expeditiousness of proceedings will not be affected by the testimony of one witness lasting less than a day before 6 June 2012, and this will still allow the Defence to address Witness PRVIII's evidence in Closing Arguments. Given this time frame, the Prosecution submits that a resolution by the Appeals Chamber will delay, rather than advance, the proceedings.⁸

² Decision on Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case (TC), 18 May 2012, p. 7.

³ Decision on Defence Motion for Leave to Present Rejoinder Evidence (TC), 18 May 2012, p. 10.

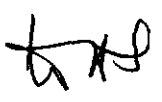
⁴ Defence Motion, paras. 11, 36.

⁵ *Id.*, paras. 15-27.

⁶ *Id.*, paras. 28-35.

⁷ Prosecution Response, paras. 2-3, 29, p. 17.

⁸ *Id.*, paras. 35-47, 49-50. See also *id.*, para. 48

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Defence Reply

9. The Defence submits that the Impugned Decision by itself demonstrates the necessity to obtain certification to appeal, but that its joint effect with the rejoinder decision further impacts the fairness and expeditiousness of the proceedings and the outcome of trial. In relation to the Impugned Decision, the Defence notes that it will not be able to address Witness PRVIII's testimony in its Closing Brief, that the Prosecution has discussed his anticipated testimony in its own Closing Brief, and that the time for Closing Arguments will not be unlimited.⁹

10. Regarding the value of an immediate resolution by the Appeals Chamber, the Defence states that the Prosecution's estimation on the length of Witness PRVIII's testimony is unreliable. In any event, the necessity of advancing the proceedings must not be done against the interests of justice and the rights of the accused, and the Chamber's discretion is limited by these rights.¹⁰

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: (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.

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.¹¹

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, the Trial Chamber will not consider them.¹² In this regard, the Chamber notes that the Defence

⁹ *Id.*, paras. 5-7, 36-39. See also *id.*, paras. 40-41.

¹⁰ *Id.*, paras. 28-35, 42-44, 46-47, 49-53. See also *id.*, paras. 45, 48.

¹¹ 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.

¹² *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*, 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 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.

appears to reargue issues that have already been litigated in the Impugned Decision, without explicating clearly the link, if any, to the standard for certification to appeal.¹³

14. The Defence Motion submits that the Impugned Decision gives “an unfair advantage to the Prosecution while [the Accused’s] own request for Rejoinder was dismissed by the same Trial Chamber”, and that “[t]his differential treatment runs against the principle of equality of arms”.¹⁴ The Chamber considers that these issues were decided on an individual basis and on their own merits. Therefore, the Defence lacks basis for linking these issues together for the purposes of certification to appeal the Impugned Decision.

15. The Defence also suggests that “enabl[ing] the Prosecution to bring additional evidence rebutting the Accused’s alibi, fundamentally affects the fairness of the proceedings”.¹⁵ The Chamber sees no merit in this contention. The Chamber recalls that Witness PRWIII was previously scheduled to testify during the rebuttal case,¹⁶ but that he was unable to testify as expected, for which the Prosecution provided sufficient explanation.¹⁷ The Chamber therefore does not consider that allowing Witness PRWIII to testify now amounts to “additional evidence” from that which the Chamber had previously granted.

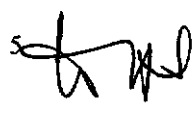
16. The Defence further submits that it will affect the expeditiousness of the proceedings to have to reconvene in Arusha for an additional trial session.¹⁸ In the Chamber’s view, the Defence has not substantiated how an additional trial session of limited time and on a very specific issue will affect expeditiousness.

17. The Defence’s final submission concerning the first prong of Rule 73 (B) is that hearing Witness PRWIII’s evidence will deprive the Defence of the opportunity to address his evidence in its Closing Brief in light of other rebuttal evidence, and that this may have an impact on the outcome of trial.¹⁹ The Chamber considers that the Defence remains able to adequately address Witness PRWIII’s evidence in its Closing Arguments, if it so wishes. The Chamber therefore considers that the Defence has not substantiated its arguments that the Impugned Decision involves an issue which may affect the outcome of trial.

18. Regarding the second prong of Rule 73 (B), the Defence Motion submits that an immediate resolution by the Appeals Chamber will materially advance the proceedings because it would avoid sitting for an undetermined amount of time, and because this is an important legal question that could not be resolved later by the Appeals Chamber without jeopardizing the entire case.²⁰

19. The Chamber considers that the Defence has not demonstrated how the time required to hear a single rebuttal witness is an issue for which appellate resolution may materially advance the case. In this regard, the Chamber recalls that the Impugned Decision noted that the

¹³ See, for example, Defence Motion, paras. 18-19, 24.
¹⁴ *Id.*, paras. 17, 20. See also, for example, *id.*, para. 23.
¹⁵ See *id.*, paras. 21-22.
¹⁶ Decision of 14 November 2011, p. 14.
¹⁷ See generally Impugned Decision.
¹⁸ Defence Motion, para. 25.
¹⁹ *Id.*, para. 27.
²⁰ See *id.*, paras. 28-35. See also Defence Reply, paras. 28-35, 42-44, 46-47, 49-53.



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anticipated testimony of Witness PRVIII is short and could be completed without causing any undue delay in the proceedings.²¹

20. As to the Defence submissions that an immediate resolution by the Appeals Chamber may avoid any prejudicial effect of not being able to address Witness PRVIII's testimony in its Closing Brief, the Chamber is of the view that this does not preclude the Defence from addressing his evidence in its Closing Arguments, if it wishes to do so. Consequently, the Defence's contention that this "would definitely jeopardize the Trial Chamber's judgement in its entirety"²² is unfounded.

21. Because the Defence has not substantiated that the Impugned Decision involves an issue meeting the criteria of Rule 73 (B), the Chamber denies the Defence Motion in its entirety.

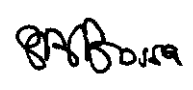
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

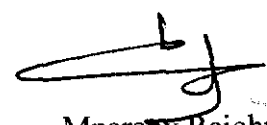
Arusha, 4 June 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



²¹ Impugned Decision, para. 27.

²² Defence Motion, para. 32.