111224

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: 21 June 2012

ICTR-99-54-T
21st June 2012
(111224 - 111220)

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE DECISION OF 14 MAY 2012 ON THE ADMISSION OF WRITTEN STATEMENTS

Office of the Prosecutor
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Kristian Douglas
Ms. Sonja Sun
Ms. Mankeh Fombang
Ms. Faris Rekkas

Defence Counsel
Ms. Mylène Dimitri
Mr. Claver Sindayigaya
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman
Mr. Philippe Plourde

111223

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 14 May 2012 on the Defence Motion for Admission of Written Statements", filed on 21 May 2012 (the "Defence Motion");

CONSIDERING:

(a) the "Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision of 14 May 2012 on the Defence Motion for Admission of Written Statements", filed on 24 May 2012 (the "Prosecution Response"); and

(b) the "Defence Reply to the Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision of 14 May 2012 on the Defence Motion for Admission of Written Statements", filed on 28 May 2012 (the "Defence Reply");

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

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

INTRODUCTION

1. On 14 May 2012, the Chamber rendered a Decision (the "Impugned Decision") declining to admit into evidence the written statements of DWAN-38, DWAN-109, DWAN-149 and DWAN-166 pursuant to Rule 92*bis*.[1]

SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence seeks certification to appeal the Impugned Decision.[2] The Defence submits that the Impugned Decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial as the rejection of these statements would lead to "a radical and unjustified limitation placed upon the Defence case". The Defence further argues that given the current procedural posture of the case it is likely that the Accused will have an enhanced risk of facing convictions on events addressed

[1] Decision on Defence Motion for Admission of Written Statements (TC), 14 May 2012 ("Impugned Decision"), p. 8.
[2] Defence Motion, paras. 3, 7, 31.

by these written statements, as the Accused has been prevented from defending himself by the admission of these statements.[3]

3. The Defence also argues that the immediate resolution of the issue will materially advance the proceedings. According to the Defence, it has been denied the possibility of calling new *viva voce* witnesses or to address issues raised in written statements and therefore have no other available avenue of relief so the Appeals Chamber must weigh in and guarantee the fairness of the proceedings and allow the case to continue on a correct legal footing.[4]

Prosecution Response

4. The Prosecution submits that the Defence has not advanced sufficient reasons to show why certification to appeal should be granted. It argues that the Defence has not been prevented from a fair opportunity to present its case and defending the Accused by the Chamber's refusal to admit written statements of additional witnesses. It further argues that the Defence submissions are factually inaccurate because witnesses have testified to issues which are addressed in the written statements.[5]

Defence Reply

5. The Defence replies that there are no alternative remedies available to the Accused in this instance and therefore the issue is clearly significant. It further argues that the Appeals Chamber decision concerning the number of *viva voce* witnesses did not indicate that no written statements under 92*bis* should be admitted. The Defence also submits that more than one Defence witness is usually required for corroboration in order to refute allegations, and that the cumulative nature of a 92*bis* statement to other evidence previously adduced at trial is a factor in favour of its admission pursuant to Rule 92*bis*. The Defence finally reiterates that the motion was filed during the presentation of the Defence case, and the Impugned Decision was not rendered until after the Defence case closed, thereby depriving it of an opportunity to alter its strategy if required.[6]

DELIBERATIONS

6. 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.

7. 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.[7]

---

[3] *Id.*, paras. 8-9, 11-15, 17. See also *id.*, paras. 10, 16.
[4] *Id.*, paras. 18, 22-24, 26-27, 29-30. See also *id.*, paras. 19-21, 25, 28.
[5] Prosecution Response, paras. 7, 15-28, p. 9. See also *id.*, para. 14. The Chamber notes that although the Prosecution Response is dated 25 May 2012, it was filed on 24 May 2012. See *id.*, p. 1.
[6] Defence Reply, paras. 8-12, 15-29. See also *id.*, paras. 4-7, 13-14.
[7] 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. Édouard Karemera et al.*, Case No. ICTR-98-44-T,

8. 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.[8]

9. 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.[9]

10. The Chamber notes that, despite Defence claims to the contrary, there has been no limitation on any Party's ability to admit written statements pursuant to Rule 92*bis* or any other relevant Rule. Where a Party has made an application for admission of written statements, the Chamber has considered that application on its own merits. The Chamber further recalls that the statements at issue were denied into admission because the authors of the statements were not on the Defence witness list at the time the original motion was filed and because all 35 Defence witnesses had been heard by that time. The Chamber further denied the admission of these statements because DWAN-38's statement lacked probative and corroborative value, and the statements of DWAN-109, DWAN-149 and DWAN-166 because they tended to disprove the acts or conduct of the Accused as charged in the Indictment and/or related to a serious matter of contention between the Parties.[10]

11. Preliminarily, the Chambers observes that the Defence has not identified the specific legal issue it wants certified for appellate review.

12. As regards the first limb of Rule 73(B), the Defence has not established that the non-admission of the written statements involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. 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 prejudice it has suffered is enhanced by the Chamber's Order to reduce the Defence witness list,[11] the

---

Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; *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.

[8] *The Prosecutor v. Théoneste 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 ("*Bizimungu et al.*"), 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.

[9] *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).

[10] Impugned Decision, paras. 13, 23-25, 27, 30-31, p. 8.

[11] Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011, p. 11.

Chamber recalls that it certified that Order for appeal and that the Appeals Chamber held that the Trial Chamber had the authority to order that reduction.[12]

13. The Chamber further notes that the second ground for denying the admission into evidence of these statements, as it relates to any probative and corroborative value of these statements as well as the acts and conduct of the Accused or a matter in serious contention between the Parties, remains unaddressed in the Defence Motion.

14. Having failed to establish the first criterion under Rule 73(B), the Chamber denies the Defence prayer for certification to appeal the Impugned Decision.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 21 June 2012

William H. Sekule Presiding Judge	Solomy Balungi Bossa Judge	Mparany Rajohnson Judge

[Seal of the Tribunal]

[12] Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses (AC), 20 February 2012, p. 6.