



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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
29th June 2012
(111235 - 111225)

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS SECTION
UNICTR
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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF OR
CERTIFICATION TO APPEAL THE DECISION ON LEAVE TO PRESENT
REJOINDER EVIDENCE**

Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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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 and/or for Reconsideration of the Trial Chamber's Decision on 18 May 2012 on the Defence Motion for Leave to Present Rejoinder Evidence", 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 Motion pursuant to Rules 54 and 73 of the Rules.

INTRODUCTION

1. On 18 May 2012, the Chamber rendered a Decision (the "Impugned Decision") denying the Defence leave to present rejoinder evidence or, in the alternative, to admit documents into evidence or to recall Prosecution Rebuttal Witness PRWVII for further cross-examination.¹

¹ Decision on Defence Motion for Leave to Present Rejoinder Evidence (TC), 18 May 2012, paras. 4, 12, p. 10.



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SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence requests the Chamber to reconsider the Impugned Decision in its entirety and to allow the Defence to present rejoinder evidence, or to grant certification to appeal the Impugned Decision in its entirety and to order a stay of the Closing Arguments.²

Reconsideration

3. The Defence contends that there is reason to believe that the Impugned Decision was an abuse of power or discretion that resulted in an injustice.³ In particular, the Defence submits that the Impugned Decision committed numerous errors in law and in fact, and that the Chamber abused its discretion in various instances.⁴

4. The Defence submits that the Chamber misinterpreted and misapplied the requirements for admission of rejoinder evidence. Contrary to the Impugned Decision, the Defence submits that the proposed rejoinder evidence deals with new matters arising out of the Prosecution rebuttal case that are not collateral issues, and that the Defence could not have foreseen these new matters. The Defence implies that the Chamber rejected the proposed rejoinder evidence because it deals with the Accused's alibi, and that this was an error. The Defence further submits that the Chamber needed to review the rebuttal evidence piece-by-piece and as fresh evidence, that the Chamber erred in not providing the same relief as that provided in the *Nizeyimana* case, and that the Chamber failed to consider that the Accused will be prejudiced if he cannot bring evidence in rejoinder. The Defence also asserts the Chamber failed to take into account the late disclosure of rebuttal witness statements, the "drastic" limitation on the number of Defence witnesses and that the witnesses were therefore "irreplaceable".⁵

5. Regarding the admission of documentary evidence, the Defence submits that the Chamber erred in "requiring an additional requirement" that the evidence not be

² Defence Motion, paras. 7, 88.

³ *Id.*, paras. 10, 23, 24, 42, 47, 53, 62, 65, 66.

⁴ See, for example, *id.*, paras. 10 (alleged errors in law and in fact, and alleged abuse of discretion), 13 (alleged error in law), 17 (alleged error in fact), 18 (alleged abuse of discretion), 20 (alleged error in law), 23 (alleged abuse of discretion), 24 (alleged errors in law and in fact, and alleged abuse of discretion), 27 (alleged error in law), 28 (alleged error in fact), 30 (alleged errors in law and in fact, and alleged abuse of discretion), 31 (alleged error in law, and alleged abuse of discretion), 33 (alleged abuse of discretion), 34 (alleged errors in law and in fact, and alleged abuse of discretion), 35 (alleged error in law, and alleged abuse of discretion), 42 (alleged abuse of discretion), 44 (alleged abuse of discretion), 47 (alleged error in law and in fact, and alleged abuse of discretion), 50 (alleged error in law, and alleged abuse of discretion), 53 (alleged abuse of discretion), 56 (alleged abuse of discretion), 59 (alleged error of fact), 62 (alleged abuse of discretion), 64 (two alleged errors in law, and two alleged instances of abuse of discretion), 65 (alleged error in fact, and alleged abuse of discretion), 66 (alleged error in law, and alleged abuse of discretion).

⁵ *Id.*, paras. 24-65.

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collateral, in considering that one document lacked sufficient indicia or reliability, and in stating that the Defence should have tendered another document during its case-in-chief.⁶

6. Finally, the Defence claims that the Chamber abused its discretion in failing to deliberate in the Impugned Decision on the Defence's request for sanctions.⁷

Certification to Appeal

7. The Defence submits that the Impugned Decision has a significant effect on the fair and expeditious conduct of the proceedings and on the outcome of the trial if the new and unforeseen allegations brought by rebuttal witnesses remain unchallenged as it could influence the determination of the guilt or innocence of the Accused. Rejecting rejoinder evidence places an unjustified and prejudicial limitation on its case, especially given the limitation on Defence witnesses and that the Prosecution could bring evidence in rebuttal as well as reopen its rebuttal case.⁸

8. According to the Defence, an immediate resolution by the Appeals Chamber will materially advance the proceedings as the Accused would benefit from a fair opportunity to defend himself against the new and unforeseeable allegations brought against him in rebuttal. It would resolve any doubts about the legal correctness of the Impugned Decision. A later resolution of this issue at the appeals stage is not possible. The serious doubt as to the legal correctness of the Impugned Decision and the abuse of discretion by the Chamber is likely to trigger a successful prospective appeal.⁹

Prosecution Response

Reconsideration

9. The Prosecution submits that the Impugned Decision should not be reconsidered, as the Defence has not met its burden of demonstrating any clear errors in law or in fact.¹⁰

10. The Prosecution further submits that the Impugned Decision correctly interpreted and applied the law on rejoinder evidence. According to the Prosecution, the Defence does not establish that the anticipated rejoinder evidence deals with new issues brought during the rebuttal case, and that any such issues are not collateral. Furthermore, the Defence does not show either that it was unaware of what issues the rebuttal witnesses would address, or that the Chamber did not consider the fair trial rights of the Accused. As for the Defence position on the limitation of its number of witnesses, the Prosecution states that this has been raised with, and confirmed by, the Appeals Chamber.¹¹

⁶ *Id.*, paras. 12-23.

⁷ *Id.*, para. 66.

⁸ *Id.*, paras. 68, 70-71, 72-80, 85.

⁹ *Id.*, paras. 68, 70-71, 81-87.

¹⁰ Prosecution Response, paras. 4, 8-9, p. 50.

¹¹ *Id.*, paras. 10-13, 19-28.

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11. As for the non-admission of documentary evidence, the Prosecution submits that the Chamber did not err in exercising its discretion by considering that collateral matters and the late tendering of an exhibit go to relevance and probative value, and that a proposed exhibit lacked sufficient indicia of reliability.¹²

Certification to Appeal

12. The Prosecution submits the Chamber should not grant the certification to appeal the Impugned Decision.¹³

13. The Prosecution states that the Impugned Decision should be weighed on its own merits, and that the denial of rejoinder evidence does not indicate that the Accused has not been given a fair opportunity to defend himself. Moreover, this denial does not affect the expeditiousness of the proceedings.¹⁴

14. As for whether an immediate resolution by the Appeals Chamber would materially advance the proceedings, the Prosecution asserts that certifying the Impugned Decision for appeal would delay the proceedings rather than advance them.¹⁵

Defence Reply

Reconsideration

15. The Defence replies that, for rejoinder evidence, there is no requirement that the totality of the rebuttal evidence constitutes a new and unanticipated matter for the granting of rejoinder. In the Defence's view, the Impugned Decision relied on this assumption, and erred in doing so. The Defence further considers that the Prosecution's submissions confirm that new matters arose in rebuttal.¹⁶

16. The Defence contends that the Chamber imposed contradictory requirements on the Defence by both refusing evidence on the basis of it relating to a collateral issue and also alleging that it dealt with the Accused's presence outside Rwanda. The Prosecution's submissions on disclosure and prejudice were not convincing and failed to address whether new issues arose during rebuttal evidence. In the Defence's view, new and unanticipated evidence arose in the rebuttal case that is non-collateral and that must be rejoined.¹⁷

17. As for the non-admission of documents, the Defence replies that the Prosecution contentions are ill-founded.¹⁸

¹² *Id.*, paras. 14-18.

¹³ *Id.*, para. 29, p. 50.

¹⁴ *Id.*, paras. 35-37, 40-44.

¹⁵ *Id.*, paras. 45, 48-50.

¹⁶ Defence Reply, paras. 10-12. The Defence also "reiterates all of its submissions made in support of Reconsideration". See, for example, *id.*, para. 9.

¹⁷ *Id.*, paras. 13-15, 20-21, 24-27. See also *id.*, paras. 22, 26.

¹⁸ *Id.*, paras. 16-19.

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Certification to Appeal

18. The Defence claims that the Impugned Decision, considered both jointly with and separately from the reopening of the rebuttal case, qualifies for certification to appeal.¹⁹

19. Specific to whether an immediate resolution may “materially advance the proceedings”, the Defence submits that this phrase should not be limited to time but should also apply to whether the proceedings continue on the correct legal footing. The issue of length for any rejoinder evidence should be immaterial to whether certification is granted.²⁰

DELIBERATIONS

Reconsideration

20. The Chamber recalls the Tribunal’s jurisprudence on reconsideration:²¹

... 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.²²

21. 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 the 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.²³

¹⁹ *Id.*, paras. 36-38, 40-41. See also *id.*, paras. 5-9, 28-35.

²⁰ *Id.*, paras. 42, 45-48, 51-53.

²¹ *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 73bis(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 73bis(E)” (TC), 15 June 2004 (“*Bagosora et al.* Decision of 15 June 2004”), para. 7.

²² *Bagosora et al.* Decision of 15 June 2004, para. 7.

²³ *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.

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22. The Chamber recalls that the Impugned Decision denied leave for the Defence to call five witnesses in rejoinder, as well as the admission into evidence of two sets of documents. It also denied leave to recall Witness PRWVII for further cross-examination.²⁴ The Chamber notes that although the Defence seeks reconsideration of the Impugned Decision “in its entirety”,²⁵ the Defence does not challenge the Impugned Decision insofar as it denied leave to recall Witness PRWVII.

23. The Defence submits that the Chamber erred and abused its discretion in stating that the Defence could have foreseen the Prosecution rebuttal evidence, that the evidence was not new, and that the Defence could have called witnesses concerning this evidence in its case-in-chief if it so chose.²⁶ In the Chamber’s view, these arguments were considered by the Chamber and adequately addressed in the Impugned Decision, and the Defence has failed to substantiate how the Chamber’s Decision amounts to an abuse of its discretion. The Chamber did not specifically address the issue of the limitation on Defence witnesses, which has already been adjudicated by both the Trial Chamber and the Appeals Chamber,²⁷ and because it does not form part of the test for rejoinder evidence. Nor was the Chamber required to address the issue of “fresh evidence”, and the Defence has not substantiated what it meant by fresh evidence in the context of its rejoinder motion.²⁸

24. The Defence further contends that the Chamber only considered Massamba Ndiaye’s evidence as a whole, and that this was an error and an abuse of discretion.²⁹ The Chamber recalls that the Impugned Decision stated that “[s]ome aspects of his testimony cannot be taken in isolation to support the argument that the content of his testimony was unforeseeable”.³⁰ This statement was made in the context of notice and foreseeability, and did not imply that the Impugned Decision only considered Witness Ndiaye’s evidence as a whole in addressing the merits of specific claims by the Defence. The Defence argument to the contrary is unfounded and thus does not suffice for reconsideration.

²⁴ Impugned Decision, paras. 4, 12, p. 10. The Chamber recalls that the Defence also sought an order that protective measures apply to the potential rejoinder witnesses. See Impugned Decision, para. 4. In this regard, the Chamber further recalls that protective measures apply to potential Defence witnesses. See Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, p. 8.

²⁵ Defence Motion, para. 7.

²⁶ *Id.*, paras. 24, 30, 34, 47, 50, 53, 56, 62, 64-65. See also *id.*, para. 10.

²⁷ See T. 13 July 2011, pp. 89-90 (Oral Order); 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; Order Denying the Defence Request for a Stay of the Order to File Its Final List of Witnesses by 5 September 2011 (TC), 2 September 2011; Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011; Decision on Ngirabatware’s Appeal of the Decision Reducing the Number of Defence Witnesses (AC), 20 February 2012.

²⁸ See Impugned Decision, paras. 23-25 (providing the law on leave to present rejoinder evidence). The Chamber also notes that the Defence claims to have addressed the issue of fresh evidence “at length”, but that the three cited paragraphs make no explicit mention of fresh evidence. See Defence Motion, para. 53, citing Defence Motion for Leave to Call Rejoinder Witnesses and, in the Alternative, for Admission of Documentary Rejoinder Evidence and to Recall Prosecution Witness PRWVIII, 2 April 2012, paras. 15-17.

²⁹ Defence Motion, paras. 31, 33.

³⁰ Impugned Decision, para. 28.

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25. Also in relation to Witness Ndiaye, the Defence alleges that it was an error to consider that no rejoinder evidence was warranted because he did not testify as an expert.³¹ The Impugned Decision “notes that [he] did not testify as an expert witness, nor will his evidence be treated as that of an expert”, and then provided reasoning for the denial of proposed Defence Witness DRW I.³² The Chamber considers that the Defence has not demonstrated any error in this regard, let alone one warranting reconsideration.

26. The Defence also argues that the Chamber erred in failing to consider that the denial of rejoinder evidence, when combined with the rebuttal evidence and the reopening of the rebuttal case, “result[s] in an inadmissible and unprecedented injustice for the Accused”.³³ In this regard, the Chamber recalls that it granted leave to the Prosecution to call rebuttal witnesses, in part, because the Defence violated Rule 67(A)(ii) by not providing notice of the alibi for 23 April to 23 May 1994.³⁴ The Chamber further recalls that the reopening of the rebuttal case and the Impugned Decision were decided on an individual basis and on their own merits.³⁵ The Defence efforts to link these two issues, and the contention that the Chamber did not consider any resultant prejudice, are without merit.

27. The Defence also submits that this issue “is similar” to one arising in the *Nizeyimana* case, where rejoinder evidence was granted, and that the Chamber’s different outcome constitutes an abuse of discretion.³⁶ The Chamber considers that this contention is devoid of merit and fails to demonstrate an abuse of discretion. In this regard, the Chamber recalls that “decisions of Trial Chambers ... have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive”.³⁷

28. The Defence further alleges that the *Semanza* Trial Chamber referred to the common law standards for challenging witness credibility in rejoinder, but that the Chamber misinterpreted this to mean that it was limited to these standards.³⁸ The Chamber notes that the Impugned Decision states that “the *Semanza* Trial Chamber has

³¹ Defence Motion, para. 59.

³² Impugned Decision, para. 28.

³³ Defence Motion, para. 44.

³⁴ See Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 (“Decision of 14 November 2011”), paras. 44, 48, p. 14. See also Decision on Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber’s Decision of 14 November 2011 on Rebuttal Evidence (TC), 13 December 2011 (“Decision of 13 December 2011”), paras. 52, 67.

³⁵ See Decision on Defence Motion for Certification to Appeal the Decision Granting Leave to Reopen the Prosecution Rebuttal Case (TC), 4 June 2012, para. 14.

³⁶ Defence Motion, paras. 41-42, referring to *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Urgent Defence Motion for Leave to Call Evidence in Rejoinder (TC), 13 September 2011.

³⁷ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000, para. 114. See also *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 188.

³⁸ Defence Motion, para. 27, discussing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witnesses (TC), 30 April 2002 (“*Semanza* Decision”).



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indicated that while it may be allowable to bring rejoinder evidence to challenge the credibility of rebuttal witnesses, this should only be permitted under specific circumstances".³⁹ This statement was not in error, and the Defence contention to the contrary is without merit.

29. According to the Defence, the proposed rejoinder testimony and documents did not seek to address collateral matters and did not need to be presented during the Defence case-in-chief, and the Chamber erred in finding otherwise and using this as a basis for denying the Defence requests.⁴⁰ In the Impugned Decision, the Chamber observed that the proposed witnesses appeared intended to buttress the alibi of the Accused, that as a result these witnesses and one of the documents should have been brought during the Defence case-in-chief if at all, and that the other document was collateral.⁴¹ The Defence has not demonstrated any error in this regard. Similarly without merit is the Defence's misconception of the Chamber's consideration about another document's indicia of reliability.⁴²

30. Finally, the Defence claims that the Chamber failed to provide a reasoned opinion as to why the Defence's request for sanctions was not granted.⁴³ The Chamber notes that the Defence does not claim, let alone demonstrate, how this may have resulted in an injustice. The Chamber further recalls that the prayer for sanctions only arose in the Defence Reply, and that the Chamber has reminded the Parties that "[i]f a party raises a new argument or request for the first time in a reply then the opposing party is deprived of an opportunity to respond [which] could harm the fairness of the [] proceedings".⁴⁴ The Chamber therefore denies the Defence Motion insofar as it seeks reconsideration.

Certification to Appeal

31. 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

³⁹ Impugned Decision, para. 25, citing *Semanza* Decision, para. 12, fn. 1.

⁴⁰ Defence Motion, paras. 13, 18-20, 23, 28, 35.

⁴¹ Impugned Decision, paras. 27, 37, 39. See generally *Karemura et al.*, Decision on Prosecution's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89 (C) (TC), dated 2 September 2009, para. 3 (although there is no absolute ban on the admission of fresh evidence after the close of a Party's case-in-chief, "as a general rule, the [Party] must present all of the evidence in support of its case during its case-in-chief"). The Chamber notes that the Defence cited this paragraph in support of its Motion. See Defence Motion, para. 20.

⁴² Defence Motion, paras. 17-18. The Chamber notes that the Defence misconstrues the Impugned Decision, which states that the document located in Annex 5 to the original Defence Motion lacked "the same indicia of reliability ... as those found in Defence Exhibit 207". Impugned Decision, para. 39. This contrast is significant given the Defence claim that the document found in Annex 5 "is yet the identical replica of the version sent to the FAO (Exhibit D207)". See Defence Motion, para. 17.

⁴³ Defence Motion, para. 66.

⁴⁴ Decision on Defence Motion to Declare the Prosecution in Violation of Its Disclosure Obligations (TC), 26 April 2012, para. 36, quoting *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement (AC), 8 October 2008, para. 229. See also *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement (AC), 8 May 2012, fn. 623 (declining to consider an argument raised for the first time by the Defence in a reply, because it "effectively prevented the Prosecution from making any submission on this issue").

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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.

32. 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.⁴⁵

33. 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.⁴⁶

34. The Defence suggests that the issue for which it seeks certification is “the denial of the Defence Motion in its entirety”.⁴⁷ In the Chamber’s view, the identification of the issue is exceedingly general in nature. The Chamber also notes that, despite seeking certification to appeal the entire Impugned Decision, the Defence makes no submissions on the denial of leave to recall Witness PRWVII.

35. In any event, the Chamber recalls that the Impugned Decision concerns evidence that the Defence seeks to bring in rejoinder in order to counter rebuttal evidence. This rebuttal evidence was allowed, in part, because the Defence failed to provide timely notice of alibi with respect to the time span from 23 April to 23 May 1994.⁴⁸ Contrary to the Defence’s suggestion that the rebuttal evidence has been “[l]eft unchallenged”,⁴⁹ the Chamber observes that it heard relevant evidence regarding the Accused’s alibi during the Defence case-in-chief, and that the Defence has had ample opportunity to challenge the rebuttal evidence through cross-examination. The Chamber therefore considers that the Defence has not demonstrated an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

⁴⁵ 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; *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.

⁴⁶ *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 Bicumupaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicumupaka and Mugenzi for Disclosure of Relevant Material.” (TC), 4 February 2005, para. 28.

⁴⁷ Defence Motion, para. 80. See also, for example, *id.*, para. 7.

⁴⁸ See Decision of 14 November 2011, paras. 44, 48, p. 14. See also Decision of 13 December 2011, paras. 52, 67.

⁴⁹ See Defence Motion, para. 76.

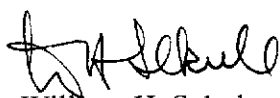
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36. Having failed to establish the first criterion under Rule 73(B), the Chamber denies the Defence Motion insofar as it seeks certification to appeal the Impugned Decision.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

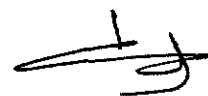
Arusha, 21 June 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

