ICTR-01-72-A
9-7-2009
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IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, *President*
Juge Mehmet Güney
Juge Fausto Pocar
Juge Liu Daqun
Juge Theodor Meron

Registrar: Adama Dieng

Filed on: 9 July 2009

Simon BIKINDI

v.

The Prosecutor

Case No. ICTR-I-72-A

PROSECUTOR'S RESPONSE

to "Defence Motion to Admit Additional Evidence on Sentencing"

Office of the Prosecutor

Hassan Bubacar Jallow
Alex Obote-Odora
Dior Fall

Counsel for the Appellant

Andreas O'Shea

A – Nature of the Filing and Prosecutor's Position

1. The Prosecutor hereby responds to the Appellant Bikindi's *Defence Motion to Admit Additional Evidence on Sentencing* ["The Motion"].[1]

2. The Prosecutor opposes the Motion, which should be summarily dismissed as ill-founded and devoid of any probative value. A party cannot request the admission, under Rule 115 of the Rules of Procedure and Evidence ["The Rules"], of material that it considers "cannot be properly referred to as 'additional evidence'"[2] and which, admittedly, "does not go to any specific finding of fact."[3] The threshold requirements of Rule 115 could not possibly be satisfied with such material. In any event, the Appellant fails to show how the tenets of the tests under Rule 115 are applicable to each or any of the proffered materials. Even if the proffered material were to be considered, it was available at trial and its content is irrelevant and *could* not or, more appropriately, *would* not have had any impact on the sentence under appeal.

B. — Responses to Issues in the Appellant's Motion

(i) The proffered material cannot qualify for consideration and admission under Rule 115

3. The Motion is unwarranted and should be dismissed on the basis that Rule 115 does not provide for material which are not evidence and for parties' *alternative* submissions on issues they already fully briefed. The Appellant asserts, in this Motion, that "national legislation and judicial decisions are not matters designed to fall within the terms of Rule 115 of the Rules [...] Rule 115 was never intended to apply to such matters being raised on appeal since these cannot be properly referred to as 'additional evidence'"[4] The Prosecutor concurs that national legislations and judicial decisions are not evidence *stricto sensu*, which

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[1] *Defence Motion to Admit Additional Evidence on Sentencing*, dated 9 June 2009. The Motion was received at the ICTR Judicial Record Archives on 11 June 2009 and served on the Prosecutor the same day.
[2] Motion, para. 3.
[3] Motion, para. 17.
[4] Motion, para. 3.

can fall within the ambit of Rule 115, inasmuch as they are referred to as mere authorities to support a party's submission.[5]

4. The Appellant already placed the documents containing the proffered legal provisions from different countries, including Bulgaria, Canada, and Ethiopia, to support his appeal against sentence.[6] He also addressed, in his Defence Reply Brief, the Prosecutor's position at paragraphs 158 and 159 of the Prosecutor's Respondent's Brief.[7]

5. In these circumstances, the Appellant did not have to file a Rule 115 application for the admission of such material that "cannot be properly referred to as 'additional evidence'".

6. The present Motion should therefore be summarily dismissed as it is unmeritorious under Rule 115 and amounts to an abuse of the appeal process and the time and resources of the Tribunal.

(ii) The proffered national legislations and judicial decisions were available at trial and do not contain relevant evidence for the purpose of Rule 115

7. A preliminary consideration for the admission of additional evidence on appeal requires the Appeals Chamber to determine whether the proposed evidence sought to be admitted was available during the trial and whether it relates to a material issue and is reasonably capable of belief or reliance.[8] The Appellant contends, without any basis, that "much of the criteria for admitting evidence under Rule 115 does not apply to evidence (*sic*) in this category."[9] This assertion is baseless. It is, at best, a further indication that the proffered documents cannot fall under the ambit of Rule 115.

8. There is no dispute that the proffered national legislations and judicial decisions existed before the Appellant's judgement was rendered. The Appellant's bald assertion that the availability requirement is not applicable because "the legislation now being referred to

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[5] The position stated at paragraphs 158 and 159 of the Prosecutor's Respondent's Brief should therefore be revised and read within these parameters.
[6] Corrigendum to Defence Appellant's Brief, 19 March 2009, Annexures A, B, and E.
[7] Motion, para. 3, footnote 3, referring to Defence Reply Brief, paras. 3-4.
[8] *Prosecutor v. Nahamina et al.*, Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ["*Decision on Ngeze 6 Motions*"], para. 7.
[9] Motion, para. 15.

forms part of an assertion on appeal that the Trial Chamber erred in law [and that] there can be no time limit placed on the appellant's right to require the correct legal considerations are made by the Trial Chamber in sentencing him"[10] is baseless. There is no exception to the availability threshold, and the Appellant's contention is not supported by any argument, law or jurisprudence of this Tribunal. The said contention rather supports the position that the Motion is frivolous as the proffered documents cannot be possibly construed as additional evidence falling under the ambit of Rule 115.

9. With regard to relevance, the Appeal Chamber repeatedly held that "evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence."[11] The Appellant's unsubstantiated contention that the proffered "provisions and decisions are relevant to the determination of the gravity of the offence and appropriate sentence for the offence of direct and public incitement"[12] to commit genocide in this Tribunal is not sufficient to meet such test. The Appellant merely lists the documents at paragraph 14 of the Motion, indicating penalties he claims are applicable for public incitement to genocide in various countries. This cannot meet the threshold test of showing that the proffered documents could be construed as containing any evidence relevant to a material issue. The Appellant cannot also meet his burden, under Rule 115, of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed.[13] Since the material, admittedly, "does not go to any specific finding of fact", it is irrelevant for the purpose of Rule 115. The Appellant's admission in this regard should be fatal to his application.

10. The Motion should be dismissed on these grounds too.

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[10] Motion, para. 20.
[11] *Prosecutor v. Mrksic and Sljivancanin*, Case No. IT-95-13/1-A, Decision on Mile Mrksic's Second Rule 115 Motion, 13 February 2009, para. 7; *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Decision on Appellant Momcilo Krajisnik's Motion to Call Radovan Karadic Pursuant to Rule 115, 16 October 2008, para. 5; *Prosecutor v. Stanisic and Simatovic*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para, 7.
[12] Motion, para. 19.
[13] Rule 115(A).

(ii) The proffered documents cannot be construed as additional evidence that* could *or* would *possibly have had any impact on the sentence under appeal

11. Even assuming, *arguendo,* that the proffered documents could be considered under Rule 115, the Appellant does not demonstrate that he proffered any evidence that *would* have, or even *could* have, affected the sentence reached by the Trial Chamber.[14]

12. It is trite law that the Tribunal is not bound by national law and practice. Its sentencing provisions are clear. Both Article 24 of the Statute and Rule 101 of the Rules contain general sentencing guidelines for a Trial Chamber that amount to an obligation to take into account factors, including sentencing practices of the Tribunal and in Rwanda.[15] As such:

> A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in *substantially similar circumstances*; otherwise, a Trial Chamber is *limited* only by the provisions of the Statute and the Rules.[16]

13. Trial Chambers have broad discretion to tailor the penalties to fit the individual circumstances of the accused and the gravity of the crime, such that even "the precedential effect of previous sentences rendered by the [ICTY] and the ICTR is not only 'very limited' but 'also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence.'"[17]

14. With regard to cases from national jurisdiction, the ICTY Appeals Chamber held that:

> [W]hile some guidance may be found in sentencing practices of systems other than the former Yugoslavia [or Rwanda], those must not be given undue weight as *Trial Chambers are not bound by any maximum term of imprisonment applied in a national system.*[18]

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[14] *Decision on Ngeze 6 Motions*, para. 9.
[15] See Judgement ["J."]. 443, 447, Prosecutor's Respondent's Brief, para. 157.
[16] *Furundzija* (AC), para. 250, cited in *Nahimana et al.* (AC), footnote 2380 [emphasis added]. See also *Galic* (AC), para. 442, *Simic* (AC), para. 238; *Celebici* (AC), para. 717.
[17] *Naletelic and Martinovic* (AC), para. 615, referring to *Babic* (AC), para. 32; *Blagojevic and Jokic* (AC), para. 333. See also *Nahimana et al.* (AC), para. 1046, referring i.e. to *Semanza* (AC), paras. 312, 394; *Kayishema and Ruzindana* (AC), para. 352; *Musema* (AC), para. 387.
[18] *Galic* (AC), para. 443 [emphasis added]. See also *Brdjanin* (AC), paras. 500 and 501.

15. Thus, as the Prosecutor already pointed out, "very little or no weight would have been accorded to such provisions, considering, as the Appellant conceded, that there is no requirement on the Trial Chamber to have recourse to provisions on sentencing from national jurisdictions and that the Trial Chamber is not bound as a matter of law to do so."[19] In other words, the proposed national legislations and Rwandan judicial decisions cannot serve as the basis for establishing that the Trial Chamber ventured outside its discretionary framework in imposing the impugned sentence.[20]

16. The Appellant does not show how legislations from Bulgaria, Canada, United States of America, Jamaica, or Ethiopia could have been determinative authorities the Trial Chamber should have considered and given the weight he claims they should be given in his case. He also does not explain how the circumstances in any of the two judgements, from the Kigali Tribunal de Première Instance and the High Court, which are not final decisions, were so similar to that in his case, that a similar sentence should have been imposed on him, by this Tribunal.

17. The proposed national legislations and Rwandan judicial decisions therefore *could* not, and more appropriately, *would* not have been, in any way, a decisive factor in reaching the sentence under appeal. There is therefore no reason for the Appeals Chamber to intervene on the basis of the proffered documents and substitute its own sentence for that imposed by the Trial Chamber.[21]

18. The Prosecutor hereby reiterates his position that an appellate intervention is rather necessary to increase the sentence imposed on the Appellant.[22] The Trial Chamber failed to exercise its discretion properly and erred by considering that 15 years imprisonment is adequate for a crime of the most serious gravity, namely direct and public incitement to commit genocide, and the Appellant Bikindi's degree of participation in its commission.

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[19] Prosecutor's Respondent's Brief, para. 160.
[20] *Strugar* (AC), para. 336; *Hadzihasanovic and Kubura* (AC), para. 302; *Limaj et al.* (AC), para. 127; *Zelenovic* Judgement on Sentencing Appeal, para. 11; *Blagojevic and Jokic* (AC), para. 137; *Celebici* (AC), para. 725. *See* also *Ndindabahizi* (AC), para. 132.
[21] *Karera* (AC), para. 385, referring i.e. to *Nahamina et al.* (AC), para. 1037; *Ntagerura et al.* (AC), para. 429; *Naletilic and Martinovic* (AC), para. 593; *Jokic* (AC), para. 8; *Gacumbitsi* (AC), para. 111; *Kajelijeli* (AC), para. 291.
[22] Prosecutor's Appellant's Brief, 28 January 2009, i.e. paras. 4, 18, 19, 22, 28, 41.

The sentence rendered was taken from the wrong shelf and falls outside the range of sentences available to it in the circumstances of this case. [23]

C. — Relief Sought

19. On the basis of the foregoing reasons, the Prosecutor requests the Appeals Chamber to dismiss the Motion in its entirety.

Respectfully submitted this 9 July 2009, in Arusha, Tanzania.

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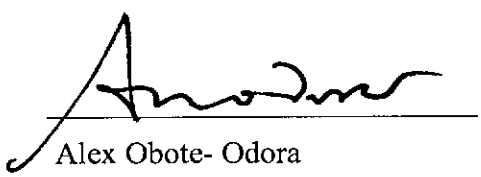

Alex Obote- Odora
Chief, Appeals and Legal Advisory Division

[23] *Galic* (AC), para. 455.

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