



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 3 May 2007

The PROSECUTOR v. Joseph KANYABASHI
Case No. ICTR-96-15-T
Joint Case No. ICTR-98-42-T

**DECISION ON JOSEPH KANYABASHI'S MOTION FOR CERTIFICATION TO
APPEAL THE DECISION OF 21 MARCH 2007**

Office of the Prosecutor

Ms Silvana Arbia
Ms Adelaide Whest
Ms Holo Makwaia
Ms Madeleine Schwartz
Ms Althea Alexis Windsor
Ms Tolulope Olowoye, Case Manager
Ms Astou Mbow, Case Manager

Defence Counsel for Kanyabashi

Mr Michel Marchand
Ms Simone Santerre
Defence Counsel for Ndayambaje
Mr Pierre Boulé
Mr Claver Sindayigaya

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the “*Requête aux fins de certification d’appel de la décision de la Chambre de première instance du 21 mars 2007 en vertu de l’article 73 (B)*”, filed on 27 March 2007 (the “Motion”);

CONSIDERING the:

- i. “Prosecutor’s Response to the Motion of Joseph Kanyabashi for Certification to Appeal the Trial Chamber’s Decision of 21 March 2007 Pursuant to Rule 73 (B),” filed on 30 March 2007 (“Prosecution’s Response”);
- ii. “*Réponse d’Élie Ndayambaje à la ‘requête aux fins de certification d’appel de la décision de la Chambre de première instance du 21 mars 2007 en vertu de l’article 73 (B),’*” filed on 3 April 2007 (“Ndayambaje’s Response”);
- iii. “*Réplique à la réponse du Procureur relative à la requête aux fins de certification d’appel de la décision de la Chambre de première instance du 21 mars 2007 en vertu de l’article 73 (B),*” filed on 3 April 2007 (“Kanyabashi’s Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73 (B) of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 of the Rules, on the basis of the written briefs only, as filed by the Parties.

INTRODUCTION

1. This is a joint trial of six Accused. The Prosecution closed its case on 5 November 2004 after calling 59 witnesses. The Defence case is on-going. During the Pre-Defence Conference of 18 October 2004, the Chamber ruled that each Accused’s Pre-Defence Brief should be filed by 31 December 2004, including the lists of witnesses that they intended to call to testify. This order was complied with.¹
2. Of the six Accused, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali and Sylvain Nsabimana have completed their respective Defences after having called respectively 26, 22, and 11 witnesses. The Accused Alphonse Nteziryayo is now presenting his Defence case and has hitherto called 21 of a total of 23 Witnesses. He will be followed by Joseph Kanyabashi and Élie Ndayambaje.
3. Having reviewed the Pre-Defence Briefs, the Chamber concluded that an excessive number of witnesses had been listed by the Defence teams for Nteziryayo, Ndayambaje and Kanyabashi. It therefore issued three successive Scheduling Orders²

¹ The Defence for Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje filed their Pre-Defence Briefs on 31/12/2004, 30/12/2004, 30/12/2004, 31/12/2004 and 23/12/2004 respectively.

² Scheduling Orders of 5 October 2006, 9 November 2006 and 13 December 2006.

requesting the Defence of Kanyabashi and Ndayambaje to reduce their list of witnesses.

4. On 21 March 2007, the Chamber issued the Impugned Decision, which denied Kanyabashi's Motions for addition of witnesses, and stated that the number of witnesses remaining on Kanyabashi's witness list was still excessive. In the same Decision, the Chamber further considered that the Defence for Ndayambaje had had ample time to investigate its case, and denied its motion seeking extension of time to comply with the 13 December 2006 Scheduling Order. The Chamber therefore ordered the Defence for Kanyabashi and Ndayambaje to file, by 5 April 2007, their revised lists of witnesses containing not more than 30 witnesses each.
5. On 27 March 2007, the Defence for Kanyabashi filed a motion for certification to appeal the Decision of 21 March 2007.
6. On 5 April 2007, the Defence for Kanyabashi and Ndayambaje filed their respective lists of 30 witnesses.

SUBMISSIONS OF THE PARTIES

The Defence for Kanyabashi

7. The Defence for Kanyabashi submits that the Impugned Decision violates the rights of the Accused provided for in Articles 19 and 20 of the Statute, notably, the right to be heard fairly, and the right to a complete defence and to an equality of treatment.
8. The Defence alleges that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial as it did not comply with the *audi alteram partem* principle by failing to ask the Defence its view on the number of witnesses it deems necessary to support its case. Besides, the Chamber violated Article 20 (2) of the Statute by not ruling upon the two Defence motions for addition of witnesses and by imposing the number of 30 witnesses which is insufficient to defend against the full scope of the indictment.
9. The Defence further submits that an immediate resolution by the Appeals Chamber of the matter may materially advance the proceedings. It considers that it is imperative for the Accused to be reassured of his rights, which are guaranteed by the Statute, before presenting his case. It asserts that this issue ought to be settled immediately to avoid any further breach of Kanyabashi's rights.
10. According to the Defence, the Chamber erred in the exercise of its discretion, by arbitrarily fixing the number of defence witnesses. In this regard, the Defence submits that the Appeals Chamber quashed the decision rendered by the ICTY Trial Chamber in the *Orić* case when the latter fixed unreasonably the length of the defence case;³ it was also the case in the *Prlić* case when the Trial Chamber exercised its discretion in the conduct of the proceedings but not in respect of the fundamental right of the accused.⁴

³ *The Prosecutor v. Orić*, "Interlocutory Decision on Length of Defence Case" (AC), 20 July 2005, paras 7-10.

⁴ *The Prosecutor v. Prlić*, "Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing the Prosecution Case" (AC), 6 February 2007.

The Prosecution's Response

11. The Prosecution opposes the request for certification and submits that it does not meet the conditions set out in Rule 73 (B).
12. The Prosecution advances that the Defence has failed to demonstrate the error of law committed by the Trial Chamber in denying its motions to add witnesses. It submits that the Trial Chamber in arriving at its decision considered the last two motions of the Defence to add witnesses, and denied Kanyabashi's motions for variations of his witness list on the grounds that they are unnecessary and constitute an abuse of process.
13. The Prosecution submits that while the Trial Chamber did not fix a specific number of witnesses to be called by the Prosecution and the other four co-Accused in the Trial, those Parties had reduced witnesses in compliance with the Chamber's orders or at their own initiative. The Prosecution posits that the Trial Chamber, as trier of fact is vested with the duty to control the proceedings, which it has indeed exercised, as per Rule 73 *ter* (D) which provides for reduction of witnesses when the chamber deems that an unnecessary duplicative number is being listed.
14. The Prosecution further submits that in a joint trial, a balance must be struck amongst all the Accused, and that the Trial Chamber is in a position to make that determination, having heard testimonies in the case for 488 days. The Prosecution maintains that the Impugned Decision does not preclude Kanyabashi from varying his witness list, but only invites him to do so in compliance with the Chamber's directive.

Ndayambaje's Response

15. The Defence reiterates Kanyabashi's arguments that the Impugned Decision violates the right to be heard fairly, the right to a complete defence and to an equality of treatment.
 16. The Defence alleges that the Impugned Decision involves an issue that would significantly affect the outcome of the trial. Indeed, it submits that the determination of the required number of witnesses to be called for purpose of trial should depend on the number of facts or events the Accused is charged with and on which the Prosecution has provided evidence. It adds that the 49 witnesses the Defence for Ndayambaje intends to call are reasonable and necessary to cover all the facts charged against him.
 17. The Defence submits that an immediate resolution by the Appeals Chamber of the matter may materially advance the proceedings. It asserts that the Chamber did not clearly indicate in the Impugned Decision the relevant provision of the Statute and the Rules upon which it relied to restrict the overall number of witnesses a party could
-

call to support its case. The Defence also submits that every single witness it currently intends to call will testify particularly and mainly on a unique fact.

18. Finally, the Defence for Ndayambaje requests that the execution of the Decision of 21 March 2007 be stayed until the certification motion and/or the appeal is/are adjudicated on.

Kanyabashi's Reply

19. The Defence contends that the Prosecution discusses and comments the Impugned Decision instead of pleading under Rule 73 (B) governing the certification issue. It therefore requests that the said response be rejected.
20. The Defence further submits that in light of the recent ICTY case law, the motion should be granted.⁵

HAVING DELIBERATED,

21. As a preliminary matter, the Chamber notes Ndayambaje's submissions and considers that had the Accused wished to request a certification to appeal, he should have followed the proper procedure by filing a motion within the prescribed time-limit but not under the guise of a response. The Chamber therefore finds inadmissible the portions of Ndayambaje's Response in support of requests for certification to appeal and for stay of execution of the Impugned Decision.
22. The Chamber, recalling its jurisprudence⁶ notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).⁷ These conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.
23. The Chamber particularly notes the Defence submissions that the Chamber erred in the exercise of its discretion by setting an overall number of 30 witnesses which is insufficient to cover all crimes charged against the Accused. The Chamber considers that its decision to restrict the number of witnesses to be called might be an issue that "would significantly affect the fair and expeditious conduct of the proceedings in the case." Further, as the Defence for Ndayambaje and Kanyabashi are soon to start their

⁵*Prosecution v. Milutinovic et al*, TC, "Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65ter List", 14 March 2007, paragraphs 13 to 16.

⁶ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paragraphs 12 – 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paragraphs 14 – 17.

⁷ Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings."

presentation, “an immediate resolution by the Appeals Chamber may materially advance proceedings”⁸

24. Accordingly, the Chamber finds that the Defence has satisfied the criteria for certification under Rule 73(B), and grants the Motion.

FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Motion for certification.

Arusha, 3 May 2007

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

⁸ *The Prosecutor v. Orić*, “Decision on Request for Certification to Appeal Trial Chamber’s Decision on Defence Filings” (TC), 4 July 2005.