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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-01-70-T
25-07-2007

(3264-3258)

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 25 July 2007

SECRETARY GENERAL
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THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

**DECISION ON THE DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE CHAMBER'S DECISION OF 4 JULY 2007**

Office of the Prosecutor:

Mr William T. Egbic
Mr Sulaiman Khan
Ms Veronic Wright
Mr Patrick Gabaake
Ms Thembile Segocete
Ms Amina Ibrahim

Counsel for the Defence:

Ms Aicha Condé
Ms Allison Turner

INTRODUCTION

1. The trial against Emmanuel Rukundo commenced on 15 November 2006. The Prosecution closed its case on 12 March 2007. On 7 May 2007, the Chamber ordered the Defence to begin its case on 2 July 2007.¹ The Chamber also ordered to hear Prosecution Witness BLP and the Defence investigator Mr. Léonidas Nshogoza on the circumstances surrounding their alleged meetings.² After having learnt of the detention of Mr. Nshogoza by Rwandan authorities, the Chamber issued a *proprio motu* Order under Rule 90bis for the temporary transfer of Mr. Nshogoza to the Tribunal's detention facility.³ On 29 June 2007, the Defence filed several Motions requesting, *inter alia*, a stay of the proceedings citing the detention of Mr. Nshogoza by the Rwandan authorities⁴, and on other issues connected to the scheduled appearances before the Chamber of Prosecution Witness BLP and Mr. Nshogoza. The Prosecution also filed a Motion on 2 July 2007, requesting that the Defence not be allowed to contact Mr. Nshogoza during his stay in Arusha.⁵ On 2 July 2007, following Witness BLP's testimony in which he stood by his earlier testimony of November 2006, the Chamber indicated that the Registry would be instructed to conduct an independent investigation into issues related to Witness BLP's alleged recantation of his testimony.⁶

2. On 4 July 2007, the Chamber rendered a Decision on the issues raised by the Parties in their Motions of 29 June 2007 and 2 July 2007,⁷ and granted the Defence an adjournment until 9 July 2007 to commence its case. The Chamber also ordered the appointment of an interim investigator for the Defence team, in light of the temporary unavailability of Mr. Nshogoza. Furthermore, the Chamber permitted the Defence to make contact with Mr. Nshogoza during his stay in Arusha for the limited purpose of handing over documents and information pertaining to the substantive Defence case.⁸ At the Defence's request, the Chamber subsequently extended the period of Mr. Nshogoza's stay in Arusha on two occasions until 19 July 2007 to permit the Defence to consult with him.⁹ In its 4 July 2007 Decision, the Chamber instructed the Registry to conduct an investigation into the alleged false testimony of Witness BLP and related issues.¹⁰ The Chamber denied the Defence requests for a concomitant hearing of Witness BLP and Mr. Nshogoza and to obtain their Rwandan judicial dossiers.¹¹

3. On 11 July 2007, the Defence filed the current Motion requesting the Chamber to grant certification to appeal all aspects of the Decision of 4 July 2007 (the "Impugned Decision").¹² The Defence alleges that the Chamber dealt with some requests in a prejudicial and unsatisfactory manner. It also claims that the Chamber failed to substantively deal with several significant Defence requests made in the Motions filed on 29 June 2007.¹³ The

¹ Scheduling Order following the Pre-Defence Conference (TC), 7 May 2007.

² Decision on Defence Motion to Recall Prosecution Witness BLP (TC), 30 April 2007.

³ *Proprio Motu* Order for the Transfer of a Detained Witness (TC), 27 June 2007.

⁴ Urgent and Strictly Confidential Defence Request for a Stay of Proceedings, filed on 29 June 2007.

⁵ The Prosecutor's Request for Directives as to the Evidentiary Hearing of Detained Witness Léonidas Nshogoza, filed on 2 July 2007.

⁶ Oral Decision (TC), T. 2 July 2007, p. 35 (ICS).

⁷ Decision on the Motions relating to the Scheduled Appearances of Witness BLP and the Defence Investigator (TC), 4 July 2007 ("Decision of 4 July 2007").

⁸ Decision of 4 July 2007, p.5.

⁹ T.09.07.07, pp.29-30; T.12.07.07, p.89(French transcript).

¹⁰ Decision of 4 July 2007, p.5.

¹¹ Decision of 4 July 2007, p.5.

¹² Request for Certification to Appeal the Trial Chamber's Decision of 4 July 2007, filed on 11 July 2007 ("Defence Motion").

¹³ Defence Motion, p.1.

Defence filed a Corrigendum to its original Motion on 12 July 2007.¹⁴ The Prosecution filed a Response on 16 July 2007.¹⁵ The Defence filed a Reply on 18 July 2007.¹⁶ The Prosecution filed a further Response on 20 July 2007.¹⁷

SUBMISSIONS

4. The Defence submits that the adjournment granted by the Chamber in the Impugned Decision was not sufficient to provide for the requirements of the Defence, which was proceeding in the absence of its investigator. The Defence also claims that assistance from the Registrar by way of appointment of an interim investigator was a "band-aid solution to a very serious crisis."¹⁸ With respect to the issue of immunity, the Defence alleges that the Chamber refused to recognise Mr. Nshogoza's mission status while he was arrested in Rwanda and avoided addressing the issue in the Impugned Decision.¹⁹ In its request for certification, the Defence attaches a copy of the work programme of Mr. Nshogoza to demonstrate his mission status.²⁰ The Defence also seeks clarification of the Chamber's order for an independent investigation. The Defence further states that the Chamber had effectively denied its request for the Rwandan judicial dossiers of Witness BLP and Mr. Nshogoza. The Defence additionally argues that the Impugned Decision does not address their request for access to the report prepared by Ms. Loretta Lynch in the *Kamuhanda* affair.²¹ With respect to the concomitant hearing of Witness BLP and Mr. Nshogoza, the Defence claims that the Chamber misunderstood its request in this regard, and clarifies that it requested for Mr. Nshogoza to be heard immediately following Witness BLP.²² As a last issue, the Defence states that the Chamber failed to recognise the violation of protective measures by the Prosecution in its Decision of 4 July 2007, and that this failure could destroy the Defence case.²³ The Defence claims that all of the above issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial and a resolution of such issues by the Appeals Chamber would materially advance the proceedings.

5. The Prosecution, citing Decisions in *Nyiramasuhuko et al.*, argues that the Defence Motion for certification is time barred since it was not filed within the seven day time period stipulated by Rule 73(C) and should therefore not be considered by the Chamber.²⁴ In its

¹⁴ Corrigendum to the Request for Certification to Appeal the Trial Chamber's Decision of 4 July 2007, filed on 12 July 2007 ("Corrigendum").

¹⁵ Prosecutor's Response to the Defence Request for Certification to Appeal the Trial Chamber's Decision of 4 July 2007, filed on 16 July 2007 ("Prosecution Response").

¹⁶ Reply to Prosecution Response dated 16 July 2007 to Defence Request for Certification to Appeal Chamber II decision dated 4 July 2007, filed on 18 July 2007 ("Defence Reply").

¹⁷ Prosecutor's Response to the Defence Reply dated 18 July 2007 in response to the Prosecutor's Response on the Defence Request for Certification to Appeal Chamber II Decision dated 4 July 2007, filed on 20 July 2007 ("Prosecution Further Response").

¹⁸ Defence Motion, paras. 9-10.

¹⁹ Defence Motion, para. 24.

²⁰ Annexe A, Defence Motion.

²¹ Defence Motion, paras. 39, 40, 56.

²² Defence Motion, paras. 47, 48.

²³ Defence Motion, paras. 60-63.

²⁴ Prosecution Response; Prosecution Further Response; *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Joint Case No. ICTR-98-42-T, Decision on Arsene Shalom Ntahobali's Motion for Certification to Appeal the "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsene Shalom Ntahobali" (TC), 26 September 2005; *Prosecutor v. Arsene Shalom Ntahobali and Pauline Nyiramasuhuko*, Joint Case No. ICTR-98-42-T, Decision on Arsene Shalom Ntahobali's Motion for Reconsideration of the "Decision on Arsene Shalom Ntahobali's Motion for Certification to Appeal the

Reply, the Defence states that it is the longstanding practice of the Tribunal to commence the seven day time period for filing a request for certification on the day following the filing of the Impugned Decision, and refers to case law in that regard.²⁵

DELIBERATIONS

(i) Preliminary Issues:

6. The Chamber finds that the Defence Motion was filed within the time limits set forth in Rule 73(C) and will therefore consider the Motion.

7. The Chamber, however, notes that the Corrigendum, filed by the Defence on 12 July 2007, substantially expands the arguments of the Defence, particularly in respect of the Prosecution's Request for directives on the evidentiary hearing of Mr. Nshogoza and on the issue of protective measures.²⁶ The Chamber recalls that a Corrigendum is usually filed to correct typographical and grammatical errors or inaccurate references, and not to make substantial alterations to the pleadings in the original motion.²⁷ If the Defence intended to make different substantive arguments separate from those presented in the original Motion, it should have sought leave to do so within the time-period provided for under the Rules. No such application having been made, the Chamber finds that the Corrigendum was filed out of time. The Chamber will therefore only consider the Defence's original Motion filed on 11 July 2007.

8. As a further preliminary issue, the Chamber notes that the Defence Motion filed on 11 July 2007 bears only the signature of the Co-Counsel for Rukundo, and not that of the Lead Counsel. Article 15(E) of the Directive on the Assignment of Defence Counsel states that Lead Counsel must sign all the documents submitted to the Tribunal unless he or she authorises Co-Counsel, in writing, to sign on his or her behalf. The provision also stipulates that Lead Counsel bears primary responsibility for the Defence.²⁸ The Chamber considers the sole signature of the Co-Counsel on the Motion, in the absence of specific authorisation to do so, to be very unusual practice and instructs the Defence to comply with the above provisions in its future submissions before the Chamber.

9. Finally, the Chamber notes that the Defence Motion contains several requests for clarification of the Impugned Decision, in addition to the requests for certification. Since the primary issue before the Chamber is that of certification, the Chamber will address the issues of clarification only to the extent necessary.

(ii) Standard for Certification:

10. The Chamber recalls Rule 73(B) as the relevant provision for certification, which reads as follows:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the

²⁵ Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalum Ntahobali" (TC), 12 October 2005.

²⁶ Defence Reply.

²⁷ See Corrigendum, paras. 48, 49, 50, 55, 58, 61, 67, 69, 70, 71, 72, 73, 74, 78, 79, 80, 81, 82 and the prayers.

²⁸ *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motions of 5 July 2006 (AC), 30 October 2006, p.2.

²⁹ Article 15(E), Directive on the Assignment of Defence Counsel, as amended on 15 May 2004.



proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The Chamber notes the principle that decisions rendered under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception to that general principle. Certification *may* be granted when the two criteria set out in Rule 73(B) are both satisfied.²⁹ First, in order to exercise the discretion conferred to by Rule 73(B), the Chamber must be satisfied 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. Second, the moving party must satisfy the Chamber that an immediate resolution by the Appeals Chamber on the issue may materially advance the proceedings.³⁰

(iii) *Stay of Proceedings:*

12. The Chamber reminds the Defence that the purpose of the adjournment granted prior to the commencement of the Defence case was to facilitate the handover of relevant information from Mr. Nshogoza to members of the Defence team and the new investigator. The Chamber recalls that unlike the right to Counsel, an accused person has no right to an investigator under Article 20(4)(d). The appointment of the investigator is based on discretionary powers of the Registrar as manager of the Tribunal's legal aid programme.³¹ The Chamber also notes that once the Pre-Defence Brief has been submitted and the Defence case has started, the role of the investigator, after having guided the team to this stage, is significantly limited. Further, the Pre-Defence Brief in this case which includes summaries of the anticipated testimony of Defence witnesses shows that the investigator has conveyed the fruits of his investigation on the witnesses to the Defence team. To this extent, the Chamber finds unconvincing the continuing insistence of the Defence that it is not in a position to proceed without its investigator, and that only Mr. Nshogoza can serve the interests of the Defence. The Chamber reminds the Defence that the primary responsibility for the case lies with the Lead Counsel.

13. The Chamber recalls that the issue of stay of proceedings as it relates to the general conduct of proceedings falls within the discretion of the Trial Chamber.³² The Defence requests certification to appeal this issue on the grounds that the Chamber ought to have taken into account the crisis situation in which the Defence found itself as a result of the

²⁹ *Prosecutor v. Augustin Bizimungu, Augustin Ndiridiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Sagahutu's Request for Certification to Appeal the Decision dated 13 May 2005 Dismissing Applicant's Request for Exclusion of Witnesses LMC, DX, BB, GS, CJ and GFO(TC), 9 June 2005 (*Ndiridiliyimana et al.* Decision of 9 June 2005), para. 16; *Prosecutor v. Augustin Bizimungu, Augustin Ndiridiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Ndiridiliyimana's Request for Certification to Appeal the Chamber's Decision dated 21 September 2005 (TC), 26 October 2005, para.7; *Prosecutor v. Augustin Bizimungu, Augustin Ndiridiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence(TC), 27 February 2006, para.11.

³⁰ *Ndiridiliyimana et al.* Decision of 9 June 2005, para. 16; *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Bagosora Request for Certification concerning Admission of Prosecution Exhibit P-417(TC), 15 November 2006, para. 2; *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on False Testimony(TC), 23 March 2007, paras. 3, 4.

³¹ *Prosecutor v. Augustin Bizimungu*, Case No. ICTR-00-56-T, Decision on an Application for Review of the Registrar's Decision Denying the Requested Assignment of Emmanuel Rwirangira as a Defence Investigator(Office of the President), 10 June 2004, p.4.

³² See *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal(AC), 29 May 2006, para.5.

arrest of its investigator, and stayed the proceedings until such time the crisis is resolved. The Chamber agrees that as a fundamental right under Article 20 of the Statute, the issue of sufficient time for the preparation of the Defence could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. However, having regard to the stage the trial has reached and the uncertainty as to when criminal proceedings pending in Rwanda against the Defence investigator may end, and the 'crisis resolved', the Trial Chamber is not convinced that an immediate resolution of the issue of stay by the Appeals Chamber would materially advance the proceedings. Consequently, the Defence request for certification is denied.

(iv) Immunity of Defence Investigator:

14. With respect to the Defence request for certification on the question of immunity, the Chamber particularly notes that contrary to the Defence claim, it did not fail to address the issue of immunity. Instead, the Chamber found that it was not in a position to address the issue since the request for a ruling on immunity was inadequately documented by the Defence.³³ The Chamber notes that the Defence now provides, by way of Annex A, the work programme of Mr. Nshogoza. However, the Defence's failure to attach the supporting documents with the original Motion is not remedied through the belated provision of one document attached to the request for certification. The Chamber therefore finds that the criteria for certification are not satisfied in respect of this prayer.

(v) Investigation:

15. With respect to the Defence request for certification on the issue of the independent investigation ordered by the Chamber, the Chamber notes that the Defence requests certification to the extent that the investigation ordered by the Chamber is not 'independent' in the sense of an investigation conducted by an individual or institution not connected to the Tribunal. The Chamber reiterates that an investigation by the Registrar under the circumstances of the case falls squarely within the purview of the Rules. The Rules, however, do not require or envisage that the person or institution conducting the investigation must be unconnected to the Tribunal. By 'independent' investigation, the Chamber meant an investigation by a person or institution other than the Trial Chamber itself. The Chamber therefore denies the request for certification on this issue because the Defence has not shown that it could affect the fair and expeditious conduct of the proceedings.

(vi) Request for Judicial Dossiers and Concomitant Hearing:

16. The Chamber recalls that in the Impugned Decision, it ruled that the dossiers were not necessary for the limited purpose of the inquiry that the Chamber was going to embark upon with respect to the alleged recantation by Witness BLP of his prior testimony. The Chamber has, prior to the date of the Impugned Decision, already heard Witness BLP. Further, the Chamber is yet to receive the results of the investigation it ordered on 4 July 2007, which entails a possibility that Witness BLP and Mr. Nshogoza may still appear before the Chamber. The Chamber considers that both the requests for the judicial dossiers of Witness BLP and Mr. Nshogoza and the recall of Witness BLP and Mr. Nshogoza are not precluded at this point in time. Further, requests for reports relating to the investigation may become relevant after the results of the investigation into the related issues are known. The Chamber therefore denies the request for certification on this issue because the Defence has not shown that it could affect the fair and expeditious conduct of the proceedings. The same reasoning applies to the Defence request for certification on the issue of the concomitant hearing.

³³ Impugned Decision, para. 7.

(vii) Protective Measures:

17. The Defence requests certification on the issue of protective measures on the ground that the Chamber did not recognise the seriousness of the violations by the Prosecution and merely reminded both Parties of the need to respect such protective measures. The Chamber reminds the Defence that the mandate of the pending investigation includes an inquiry into the alleged violation of protective measures. Therefore, it would not have been appropriate for the Chamber to arrive at a conclusion regarding such violation, if any, until the conclusion of the investigation. The Chamber finds the request for certification on this issue does not meet the requirements under Rule 73(B).

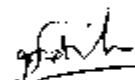
(viii) Defence contact with Mr. Nshogoza:

18. The Defence claims that the Chamber's ruling on the Prosecution's request not to permit contact between the Defence and Mr. Nshogoza is highly prejudicial to the Defence.³⁴ The Chamber finds that the Defence has not adequately addressed why it finds the Impugned Decision prejudicial in this aspect. The Chamber therefore does not need to consider if certification should be granted in this aspect.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 25 July 2007


Asoka de Silva
Presiding Judge


† Taghrid Hikmet
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]

³⁴ Defence Motion, para.66.