



UNITED NATIONS
NATIONS UNIES

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

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 30 November 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

**DECISION ON DEFENCE MOTION TO PRESENT ADDITIONAL WITNESSES
AND TO FILE DOCUMENTARY EVIDENCE
PRIOR TO THE CLOSE OF ITS CASE**

Office of the Prosecutor:

Mr William T. Egbe
Mr Sulaiman Khan
Ms Veronica Wright
Mr Patrick Gabaake
Mr Disengi Mugeyo
Ms Amina Ibrahim

Counsel for the Defence:

Ms Aïcha 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, after calling 18 witnesses. The Defence commenced its case on 9 July 2007 and began its second and last session on 3 September 2007.

2. During the presentation of the Defence case, the Chamber reminded the Defence on several occasions that it was expected to close its case by 5 October 2007.¹ In its second session, the Defence requested the Chamber for an extension of the session to allow the Accused Emmanuel Rukundo to testify from 5 October 2007.² On 3 October 2007, the Chamber directed the Defence to present the Accused as its last witness starting from 5 October 2007 and to close its case thereafter.³ On the same day, the Chamber reconsidered its decision and allowed the Defence to present additional witnesses who were ready to testify until 11 October 2007.⁴ The Accused testified from 5 October 2007 until 11 October 2007.

3. On 8 October 2007, the Defence filed the present motion⁵ requesting the Chamber to permit Witnesses SLD, SJA and GSC to testify prior to the close of its case. The Defence further requested permission to file a certified witness statement on the nomination procedure for military chaplains in Rwanda pursuant to Rule 92*bis* of the Rules of Procedure and Evidence and the Swiss judicial dossier on the Accused as soon as they are available. The Prosecution opposed the motion.⁶

4. Witness SLD testified on 11 and 16 October 2007.⁷ On 16 October 2007, the Chamber rendered an Oral Decision⁸ on the Defence motion. With regard to Witness SLD, the Chamber held that the request to hear the witness was moot since he had already started testifying.⁹ With respect to Witness SJA, the Defence had filed a second motion for the transfer of the witness pursuant to Rule 90*bis*.¹⁰ The Chamber was, however, informed by the WVSS that it was highly unlikely that Witness SJA could travel to Arusha before the expiry of the time limits given by the Rwandan authorities.¹¹ In the Oral Decision, the Chamber therefore directed to hear the witness via video-link from Kigali on 19 October 2007.¹² In the

¹ See T. 24 July 2007, pp. 7-8, 12; T. 3 September 2007, p. 2; T. 5 September 2007, pp. 1-3; T. 12 September 2007, pp. 26-27; T. 21 September 2007, pp. 2, 30.

² T. 13 September 2007, pp. 45-48; T. 24 September 2007, pp. 42-43.

³ T. 3 October 2007, pp. 2-4.

⁴ T. 3 October 2007, pp. 27-28.

⁵ Extremely Urgent Defence Motion to Present Witnesses Available to Testify and to File Documentary Evidence Prior to the Close of its Case, filed on 8 October 2007 (Defence Motion).

⁶ Prosecutor's Response to Extremely Urgent Defence Motion to Present Witnesses Available to Testify and to File Documentary Evidence Prior to the Close of its Case, filed on 11 October 2007.

⁷ Witness SLD was initially scheduled to testify in the second half of September. Following the Chamber's enquiry into his status after his non-appearance, the WVSS indicated that the Defence had provided them with incomplete witness information, making it impossible to contact him. Further, the witness may not have the requisite travel documents. Hence, the delay in the witness's testimony. (T. 24 September 2007, pp. 44-47)

⁸ T. 16 October 2007, p. 19.

⁹ *Ibid.*

¹⁰ In its Decision of 21 September 2007, the Chamber had denied the first Defence motion on the subpoena and transfer of Witness SJA and had noted the inadequate documentation provided by the Defence for such transfer. On 8 October 2007, the Defence filed a second motion for the transfer of Witness SJA pursuant to Rule 90*bis*, attaching documentation which confirmed the availability of the witness to testify before the Chamber from 1 October 2007 until 20 October 2007. The Prosecution requested the Chamber to summon the witness as a witness of the court, if the Defence was unwilling to persist with the witness in light of the findings of the investigative report presented to the Chamber on 11 October 2007.

¹¹ T. 16 October 2007, p. 14.

¹² T. 16 October 2007, pp. 19-20, 36.

same Oral Decision, the Chamber further denied the request to hear Witness GSC and indicated that the reasons for its decision would be provided in writing.¹³

5. Witness SJA was finally heard on 22 October 2007.¹⁴ Following his testimony, the Chamber denied the Defence request for his transfer pursuant to Rule 90*bis*.¹⁵

6. On 26 October 2007, the Defence filed a further motion¹⁶ to tender the statement on the nomination procedure for military chaplains pursuant to Rule 92*bis*. The Prosecution opposed the motion and requested to cross-examine the proposed witness on the issue, should the Chamber grant the Defence application.¹⁷ The Defence later filed an addendum to its 92*bis* motion containing a witness declaration pursuant to Rule 92*bis*(B), to which the Prosecution objected.¹⁸

DELIBERATIONS

7. The Chamber will now address the outstanding issues in turn.

(i) Witness GSC:

8. The Chamber recalls that Witness GSC was subject to a subpoena order issued on 24 September 2007.¹⁹ Since the date of that decision granting the subpoena, efforts by the Registry to trace the witness and to serve the subpoena were unsuccessful. On 16 October 2007 and well into the additional time granted by the Chamber to the Defence, WVSS informed the Chamber that although the subpoena had been transmitted to the Rwandan authorities on 27 September 2007, the witness remained untraceable, making it impossible to serve the subpoena. Further, WVSS was not in a position to indicate when the subpoena may be served and when, if at all, the witness may appear to testify.²⁰ In light of this information, the Chamber could not permit the Defence to keep its case open indefinitely.

9. The Chamber had granted the request for subpoena based on the Defence submission that Witness GSC was the only witness present throughout the events at the Kabgayi Major Seminary.²¹ However, since the decision granting the subpoena, the Chamber heard Witness GSA who was presented as an eyewitness of the events of 24 May 1994 at the Seminary.²² Further, Defence Witnesses GSB and SJC also previously testified on the events at that location.²³ The Chamber was, therefore, satisfied that it had heard sufficient evidence on this issue. It was for these reasons that the Chamber denied the Defence request for further additional time to hear Witness GSC.

¹³ T. 16 October 2007, pp. 19-20.

¹⁴ T. 19 October 2007, p. 4 (French).

¹⁵ T. 22 October 2007, p. 41.

¹⁶ Defence Motion to File Witness Statement Pursuant to Rule 92*bis* ICTR R.P.E, filed on 26 October 2007.

¹⁷ Prosecutor's Response to Defence Motion to File Witness Statement Pursuant to Rule 92*bis* ICTR R.P.E, filed on 30 October 2007.

¹⁸ Defence Strictly Confidential Addendum to Filing of Witness Statement Pursuant to Rule 92*bis* ICTR RPE, filed on 15 November 2007; Prosecutor's Response to Defence Strictly Confidential Addendum to Filing of Witness Statement Pursuant to Rule 92*bis* ICTR RPE, filed on 20 November 2007.

¹⁹ Decision on Defence Motion for Subpoena for Witness GSC (TC), 24 September 2007 (Decision of 24 September 2007).

²⁰ T. 16 October 2007, pp.14-15.

²¹ Decision of 24 September 2007 (TC), para.6.

²² See T. 1 October 2007; T. 2 October 2007.

²³ See T.10 September 2007; T.3 September 2007.

10. The Chamber additionally notes that Witness SJA, who gave evidence after the Chamber had orally denied the request to hear Witness GSC, also testified that he was present at the Seminary on 24 May 1994.

(ii) Witness statement pursuant to Rule 92bis:

11. The Defence seeks leave to tender a witness statement on the nomination procedure for military chaplains pursuant to Rule 92bis. The Defence submits that Witness MCA who was originally scheduled to testify on the issue is no longer available and requests that he be replaced by the author of the statement.²⁴ The Defence provides, in its motion of 26 October 2007, a copy of the certified statement along with certain Annexes.

12. In order to tender a statement pursuant to Rule 92bis, the person who gave the statement must have been listed as a witness in the first place.²⁵ This is not the case with the author of the statement. The Defence, instead, makes a belated request to substitute Witness MCA who was on its original witness list by the author of this statement. The Chamber recalls that the evidentiary phase of the case was completed on 22 October 2007. There are no good reasons advanced as to why the Defence did not follow the proper procedure to vary its witness list in a timely manner. Furthermore, the Chamber has heard Witness MCC extensively on the procedure for nomination of military chaplains,²⁶ and has admitted significant documentary evidence on the recruitment of military chaplains and the rules and regulations governing them. The Chamber notes that all the Annexes to the witness statement have already been admitted into evidence in this case.²⁷ In light of Witness MCC's testimony, the evidence contained in the tendered witness statement would be unnecessarily cumulative in nature.

13. The Chamber, therefore, denies the Defence request to file the statement pursuant to Rule 92bis. Accordingly, this also disposes of the Defence motion seeking additional time to tender this statement.

(iii) Swiss Judicial Dossier:

14. The Defence requests additional time to tender into evidence the Swiss judicial dossier,²⁸ containing certain witness statements made before the Swiss authorities relating to the Accused.

15. The Chamber recalls that its Decision of 11 September 2007²⁹ indicated that its authorisation was not required to trigger the cooperation of the Swiss authorities for the provision of the Swiss judicial file and directed the Defence to liaise with the Registry in this matter.

²⁴ Defence Motion, paras. 27-36.

²⁵ See Rule 92bis(A); See also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for leave to be authorised to have admitted the affidavits regarding the chain of custody of the diary of Pauline Nyiramasuhuko under Rule 92bis (TC), 14 October 2004, para.12; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92bis(E) (TC), 17 November 2004, paras. 5-6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Variance of the Prosecution Witness List (TC), 13 December 2005, para. 19.

²⁶ See T. 3 September 2007; T. 4 September 2007.

²⁷ Annexes A, B, C and D have been admitted as Exhibits D.70 (B), P.52, D.37 and D.37F respectively.

²⁸ Defence Motion, paras. 37-38.

²⁹ Decision on Defence Motion Requesting Disclosure by Swiss Authorities of the Entire Judicial Dossier Relating to the Accused (TC), 11 September 2007, para.6.

16. The Defence now submits that pursuant to the Chamber's decision, it is taking steps to obtain the judicial file as soon as practicable. The Chamber notes that the Defence gives no indication as to when it will file this dossier. In any event, the evidentiary phase of the case was completed on 22 October 2007. The Chamber cannot permit the Defence to keep its case open indefinitely. Moreover, the materials in the dossier would not be very useful at this stage of the case. The Defence had previously indicated that it intended to challenge the credibility of Prosecution witnesses with their prior statements contained in the file. This would be permissible only if the said witnesses were confronted with the prior statements while testifying. The Chamber, therefore, denies the request.

(iv) Additional Issues:

17. The Defence bases its request for additional time on its communication with the Defence for Augustin Bizimungu (an Accused in *Prosecutor v. Ndindiliyimana et al.*, also before the same Chamber) that the latter will have a shortage of witnesses at some point during the current trial session which started on 16 October 2007. The Defence proposes that it will present its remaining witnesses in the time that the Bizimungu Defence has no witnesses to call.³⁰ The Defence Counsel have also volunteered on previous occasions to request the Lead Counsel for Bizimungu to appear before this Chamber to explain his situation, in an effort to persuade the Chamber to extend the time for the Rukundo trial.³¹

18. The Chamber has on several occasions warned the Defence Counsel not to consult with Counsel in other cases regarding the organisation and length of its own case.³² Scheduling decisions pertaining to the case are solely within the purview of the Chamber. Further, the Chamber is not influenced by external considerations in other cases. The Defence in this case was expected to focus on its responsibility of defending its client in court within the generous time allocated to it by the Chamber. At this stage, after several warnings in open court, the Chamber finds the conduct of the Defence Counsel in this regard to be highly inappropriate and unprofessional.

FOR THE ABOVE REASONS, THE CHAMBER

DENIED the Defence request for additional time to hear Witness GSC;

DENIES the Defence request for additional time to file the certified witness statement pursuant to Rule 92*bis* and the Swiss judicial dossier; and

DENIES the Defence motion to file the witness statement pursuant to Rule 92*bis*.

Arusha, 30 November 2007

Asoka de Silva
Presiding Judge

Taghrid Hikmet
Judge

Seon Ki Park
Judge

[Seal of the Tribunal]

³⁰ Defence Motion, paras. 22, 23, 24, 25.

³¹ T.16 October 2007, p. 17.

³² T. 3 October 2007, pp. 3-4, 27-28; T. 16 October 2007, p. 17.