



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3709
MWA

ENG/ENR 2007
NO 00000000

OR: ENG

TRIAL CHAMBER II

ICTR-01-70-T
14-12-2007
(3709-3706)

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

Registrar: Mr Adama Dieng

Date: 14 December 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

Emmanuel Rukundo
PROSECUTOR
7.11.07

**DECISION ON DEFENCE REQUEST FOR CERTIFICATION TO APPEAL
OR IN THE ALTERNATIVE RECONSIDERATION OF
THE CHAMBER'S DECISION OF 30 NOVEMBER 2007**

Office of the Prosecutor:

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

Counsel for the Defence:

Ms Aïcha Condé
Ms Allison Turner

(12)

INTRODUCTION

1. The evidentiary phase of the trial was completed on 22 October 2007. On 30 November 2007, the Chamber rendered its written decision on the Defence motion to present additional witnesses and to file documentary evidence prior to the close of its case.¹ In this decision, the Chamber provided reasons for the denial of further time to hear Defence Witness GSC. The Chamber also denied the Defence request for additional time to file documentary evidence (certified witness statement and the Swiss judicial dossier) and to file the certified statement pursuant to Rule 92*bis* of the Rules of Procedure and Evidence.
2. On 7 December 2007, the Defence filed a motion requesting certification to appeal or reconsideration of the Chamber's Decision of 30 November 2007 (the Impugned Decision).² On 11 December 2007, the Defence filed a Corrigendum to its motion.³
3. The Prosecution, in its Response, requests the Chamber to dismiss the Defence motion in its entirety.⁴

DELIBERATIONS

4. As a preliminary matter, the Chamber notes that the Corrigendum filed on 11 December 2007 does not make any substantive alterations to the pleadings in the original motion. The Chamber, therefore, accepts the Corrigendum.
5. In view of the limited time available before the Chamber's recess and since the Motion is sufficiently documented, the Chamber will proceed with its decision without waiting for a Defence Reply to the Prosecution's Response. The Chamber will first consider the Defence request for certification of the Impugned Decision. In its motion, the Defence repeats several of its arguments on previously adjudicated issues. The Chamber will now restrict its enquiry to the criteria for certification, and will provide clarifications on the Impugned Decision only to the extent necessary to the issue at hand.
6. Rule 73(B) is the relevant provision governing applications for certification to appeal. In principle, decisions rendered under Rule 73 are "without interlocutory appeal". Certification to appeal is an exception which *may* be granted when the two criteria set out in Rule 73(B) are both satisfied.⁵ First, in order to exercise the discretion conferred 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.⁶
7. The Defence requests certification on the ground that the Chamber's refusal to hear Witness GSC adversely impacts the Accused's right to an adequate defence, and thereby

¹ Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case (TC), 30 November 2007.

² Defense (*sic*) Request for Certification to Appeal, or Alternatively, for Reconsideration of the Trial Chamber's Decision of 30 November 2007, filed on 7 December 2007.

³ Defence Request for Certification to Appeal, or Alternatively, for Reconsideration of the Trial Chamber's Decision of 30 November 2007 – Corrigendum, filed on 11 December 2007 (Defence Motion).

⁴ Prosecutor's Response to Defence Request filed on 07 December 2007 and Corrigendum filed on 11 December 2007 for Certification to Appeal, or Alternatively, for Reconsideration of the Trial Chamber's Decision of 30 November 2007 (Rule 73(B) and (C)(ii) ICTR R.P.E.), filed on 12 December 2007.

⁵ Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 4 July 2007 (TC), 25 July 2007, para. 11.

⁶ *Ibid.*

affects the fair and expeditious conduct of the proceedings and the outcome of the trial.⁷ The Defence request is based on an erroneous understanding of the facts relating to Witness GSC as presented in the report of the WVSS representative on 16 October 2007.⁸ The WVSS had indicated that it was, at that time, unable to contact either the witness or the Rwandan authorities to establish exactly when the subpoena order may be served on the witness in question.⁹ As previously noted, Witness GSC was unable to testify before the Chamber despite two extensions of time beyond the scheduled dates granted to the Defence for its case, and until the Defence had exhausted all the time allotted to it for the presentation of its case.¹⁰ Therefore, the Impugned Decision was based on the premise that, in the absence of exact information on the likelihood of Witness GSC's appearance before the Chamber, the Chamber could not permit the Defence to keep its case open indefinitely. The Chamber, therefore, does not consider 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.¹¹ Since the Defence fails to satisfy the first limb of the cumulative test stipulated in Rule 73(B), its request for certification regarding Witness GSC is denied.

8. With respect to the Chamber's denial of the admission of the witness statement pursuant to Rule 92bis, the Defence quotes a section of the transcript of the proceedings of 9 October 2007 and alleges that the Chamber had granted it permission to file the statement after the close of the case.¹² The Defence further submits that it was led to believe that the Chamber had implicitly granted the modification of its witness list, and permitted the addition of the author of the statement as a witness of the case.¹³ A thorough perusal of the relevant transcript indicates that the Chamber had permitted the Prosecution to take its allotted time to respond to the Defence motion, and had stated that the Defence may file the statement after the close of the case, *if the Prosecution permitted*. The Prosecution subsequently objected to the filing of that witness statement.¹⁴ Therefore, contrary to the Defence assertion, the Chamber did not grant the Defence permission to file the statement. More importantly, however, the Chamber was not aware at that time that the author of the statement was not yet a witness in the case and required substitution. Thus, the Chamber subsequently denied the filing of the statement on the ground that the Defence had not made a timely request to substitute the original Witness MCA with the author of the statement.¹⁵ The Defence's failure to follow the stipulated procedure for varying its witness list cannot be remedied by its request for certification. The Chamber does not, therefore, find that this issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial and denies the request for certification.

9. The Defence requests, in the alternative, the reconsideration of the Impugned Decision and submits that it has satisfied the requirements for reconsideration as a result of

⁷ Defence Motion, para. 28.

⁸ See T.16 October 2007, pp.14-15.

⁹ *Ibid*

¹⁰ Impugned Decision, para. 8.

¹¹ See also *Prosecutor v. Ramush Haradinaj et al.*, Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision concerning Shetfjet Kabashi (TC), 5 December 2007, para. 3.

¹² Defence Motion, paras. 34-35. The relevant quote referred to by the Defence is a statement by the Presiding Judge, in response to the Prosecution Counsel's question if it could take the normal period of five days to respond to the Defence motion, and reads as follows: "I think this has nothing to do with this (inaudible). You take your time, and if you permit, they can file it even after the closing of the case." (See T.9 October 2007, p. 35.)

¹³ Defence Motion, para. 43.

¹⁴ See 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.

¹⁵ Impugned Decision, para. 12.

3706

having met the criteria for certification.¹⁶ The Chamber finds that the Defence has not sufficiently articulated the basis for its request for reconsideration, and that it merely relies on its arguments advanced for certification which have already been rejected. The Chamber, therefore, denies the request for reconsideration.

10. The Chamber has already noted the extensive re-litigation of issues in the Defence motion and considers this particular filing to constitute an abuse of process pursuant to Rule 73(F).

11. The Chamber further emphasizes that the time allocated to the Parties after the close of the evidentiary phase is meant to be utilised towards the preparation of the closing brief and the closing arguments, and not for the re-litigation of adjudicated issues. The Chamber reminds the Defence that it will not grant any additional time for the filing of the closing brief on this account.

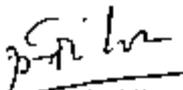
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence request for certification;

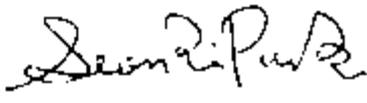
DENIES the Defence request for reconsideration; and

ORDERS the Registry not to pay any fees or costs associated with the preparation and the filing of this Motion.

Arusha, 14 December 2007


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]



¹⁶ Defence Motion, para. 61.