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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: 6 February 2008

ICTR-00-56-T
06-02-08
(64665-64662)

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON NDINDILYIMANA'S REQUEST FOR CERTIFICATION OF THE
CHAMBER'S *PROPRIO MOTU* DECISION OF 30 NOVEMBER 2007

Office of the Prosecutor:

Mr. Alphonse Van
Mr. Moussa Sefou
Mr. Segun Jegede
Mr. Lloyd Strickland
Mr. Abubacarr Tambadou
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Counsel for the Defence:

Mr. Gilles St-Laurent and Mr. Ronnie MacDonald for Augustin Bizimungu
Mr. Christopher Black and Mr. Vincent Lurquin for Augustin Ndingilyimana
Mr. Charles Taku and Ms. Beth Lyons for François-Xavier Nzuwonemeye
Mr. Fabien Segatwa and Mr. Seydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. The Prosecution closed its case on 7 December 2006. The first Accused Bizimungu completed his case on 14 December 2007.¹ On 12 November 2007, the Chamber issued an Oral Decision regarding the contact of Bizimungu's protected witnesses by other Defence teams prior to their testimonies.² Subsequently, the Defences for Ndindiliyimana, Bizimungu and Nzuwonemeye filed motions for certification to appeal the Oral Ruling. On 30 November 2007, the Chamber rendered a *proprio motu* decision clarifying its oral ruling of 12 November 2007, which disposed of the motions for certification (hereafter "Impugned Decision").³ The Impugned Decision ordered that Counsel wishing to meet protected witnesses who were not called as witnesses by their Defence teams must first seek authorisation from the Chamber.⁴ On 13 December 2007, the Defence for Ndindiliyimana filed a Motion requesting certification from the Chamber to appeal the Impugned Decision (hereafter "Motion").⁵

DELIBERATIONS

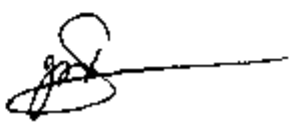
(i) Time of Filing

2. The Chamber notes that pursuant to Rule 73(C) of the Rules of Procedure and Evidence (the "Rules"), requests for certification must be filed within seven days of the filing of the Impugned Decision, and that this Motion was filed outside of this time limit.⁶ Lead Counsel for Ndindiliyimana's explanation for the late filing was that he was travelling on the day when the Motion should have been filed, but the Chamber notes that Co-Counsel for Ndindiliyimana was present in Court on that day and therefore could have filed the Motion in accordance with the Rules. The Chamber therefore rejects the Motion as it was filed out of time.

3. Even if the Chamber had considered the Motion, it would still have rejected it on the grounds that the Defence had failed to satisfy the criteria for certification set out in Rule 73(B).⁷ The Chamber notes that the Motion was primarily concerned with the merits of the case, as opposed to the criteria stipulated in Rule 73(B). The Chamber further notes that the Defence misread the Impugned Decision as exemplified by paragraph 14 of the Motion:

"...the 'clarification' does not resolve the prejudice to the defence created by the original ruling. It maintains that prejudice and further prejudices the defence by stating that if the Chamber gives permission to the defence to meet a witness and then the defence cross-

¹ Subject to 3 expert witnesses to be called by other Defence teams at a later time.
² T. 12 November 2007, p. 1.
³ *Proprio Motu* Decision Clarifying The Chamber's Oral Ruling of 12 November (TC), 30 November 2007, paras. 3, 6.
⁴ *Proprio Motu* Decision Clarifying The Chamber's Oral Ruling of 12 November (TC), 30 November 2007, para. 3.
⁵ Ndindiliyimana's Reply To *Proprio Motu* Decision By Trial Chamber For Clarification Of 30 November 2007 filed on 13 December 2007.
⁶ The Impugned Decision was filed on 30 November 2007 and the Motion was not filed until 13 December 2007. Pursuant to Rule 73(C) and Rule 7 *ter* (B) of the Rules, the Motion should have been filed on 7 December 2007.
⁷ 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 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.



examines that witness that the Chamber will give less weight to the answers received in cross-examination...If the fact of cross-examination alone is to reduce the weight of testimony given under cross-examination then the Chamber is really stating that there is no right to cross-examine as it will have no weight".

The Chamber observes that the Impugned Decision does not in any way limit or infringe the Defence's right to cross-examine and meet with witnesses. Protective measures are granted to witnesses by the Chamber and only the Chamber has the responsibility to uphold and enforce those protective measures. It is for this reason that Defence Counsel are required to seek authorisation from the Chamber to meet with protected witnesses not called by their own Defence teams. The Chamber recalls that the same procedure exists for the Prosecution intending to meet with protected Defence witnesses.⁸

(ii) Inappropriate Use of Language

4. The Chamber admonishes Counsel for Ndindiliyimana for using inappropriate and unacceptable language in the Motion, asserting bias of the Chamber as follows: "The Chamber, by reconfirming its claimed right to determine if counsel can meet with witnesses, is again attempting to paralyze the Defence in favour of the Prosecution."⁹ The Chamber recalls that it has already issued several warnings to Counsel for Ndindiliyimana for using inappropriate and abusive language.¹⁰

5. The Chamber further recalls that, according to Rule 73(F), it may deny costs and/or fees in whole or in part if a motion brought is considered frivolous or an abuse of process. The Chamber finds this Motion to be frivolous and an abuse of process by its offensive language, failure to address the necessary legal criteria, and unjustifiable late filing. The Chamber therefore denies costs and fees for the Motion.

⁸ Impugned Decision, para. 3.

⁹ See Motion, para. 15.

¹⁰ One written warning dated 1 July 2005 and four oral warnings dated 27 September 2005, 2 February 2006, 16 March 2006 and 20 November 2006, respectively, pursuant to Rule 46(A) of the Rules.

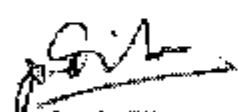
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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion; and accordingly

DIRECTS the Registrar to withhold payment of fees associated with the Motion and costs thereof pursuant to Rule 73(F).

Arusha, 6 February 2008


 Asoka de Silva
 Presiding Judge



 Tughrul Hikmet
 Judge


 Sean Ki Park
 Judge

[Seal of the Tribunal]