



ICTR-98-42-T
15-01-2009
(13202-13208)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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PM

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 15 January 2009

JUDICIAL RECORDS ARCHIVE
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The PROSECUTOR

v.

Pauline NYIRAMASUHUKO et al.

Joint Case No. ICTR-98-42-T

**DECISION ON NTAHOBALI'S, NYIRAMASUHUKO'S AND NSABIMANA'S
MOTIONS FOR CERTIFICATION TO APPEAL THE FORMAL STATEMENT OF
2 DECEMBER 2008**

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Mr. Titinga Frédéric Pacéré
Mr. Gershom Otachi Bw'Omanwa

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:

- i. “*Requête de Nsabimana aux fins de certification de la décision contenue dans le ‘Formal Statement’ de la Chambre rendue le 2 décembre 2008*”, filed on 10 December 2008 (“Nsabimana’s Motion”);
- ii. “*Requête de Pauline Nyiramasuhuko et Arsène Shalom Ntahobali en certification d’appel de la décision contenue dans le ‘Formal Statement’ de cette Chambre, rendue le 2 décembre 2008*”, filed confidentially on 10 December 2008 (“Nyiramasuhuko’s and Ntahobali’s Joint Motion”);

CONSIDERING the:

- i. “Prosecutor’s Response to the *requête de Sylvain Nsabimana, Pauline Nyiramasuhuko et Arsène Shalom Ntahobali en certification d’appel de la décision contenue dans le ‘Formal Statement’ de cette Chambre, rendue le 2 décembre 2008*”, filed confidentially on 15 December 2008 (“Prosecution’s Response”);
- ii. “Alphonse Nteziryayo’s Response to *requête de Pauline Nyiramasuhuko, Sylvain Nsabimana, et Arsène Shalom Ntahobali en certification d’appel de la décision contenue dans le ‘Formal Statement’ de cette Chambre, rendue le 2 décembre 2008*”, filed on 16 December 2008 (“Nteziryayo’s Response”);
- iii. “*Extrême urgence réponse et réplique de Pauline Nyiramasuhuko et Arsène Shalom Ntahobali à la requête de Nsabimana et aux réponses du Procureur et de Nteziryayo en certification de la décision contenue dans le ‘Formal Statement’ de cette Chambre rendue le 2 décembre 2008*”, filed on 19 December 2008 (“Nyiramasuhuko’s and Ntahobali’s Joint Reply”);

RECALLING the:


- i. “Decision on the Parties Oral Motions to Review the Timeframes and Length of Closing Briefs of the 2 July 2008 Scheduling Order” issued on 29 August 2008, (the “Decision of 29 August 2008”);
- ii. “Formal Statement” issued on 2 December 2008; (the “Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 (B) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. The Chamber will consider the two Motions jointly as they address the same formal statement of 2 December 2008.

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2. On 29 August 2008, the Chamber ordered the Parties to this trial to file their respective closing briefs no later than 60 days after the presentation of all the evidence.

3. On 2 December 2008, through a formal statement, the Chamber declared the case closed and instructed the Parties that the 60-day deadline for the Parties to file their respective closing briefs began to run as of that day and would therefore expire on 2 February 2009.¹ Upon some Parties' request made orally that same day, the Chamber extended the aforesaid deadline until 17 February 2009.² This Formal Statement of 2 December 2008 is the subject matter of the Motions for certification to appeal.

SUBMISSIONS OF THE PARTIES

Nsabimana's Motion

4. The Defence applies for certification to appeal the Formal Statement of 2 December 2008. The Defence argues that the Formal Statement involves an issue that would affect the fair and expeditious conduct of the trial in that it ordered the Parties to file their final briefs before the presentation of all the evidence. Therefore, the said Formal Statement is in breach of Rule 86 (A) and (B) and contradicts the Decision of 29 August 2008.

5. The Defence submits that as of 2 December 2008, all the evidence within the meaning of Rule 86 had not yet been presented as some Prosecution Witnesses will be recalled after the 17 February 2009.³ In addition, other motions for recall of other Prosecution witnesses are still pending before the Chamber.

6. The Defence further submits that an immediate resolution by the Appeals Chamber may advance the proceedings to avoid the filing of an addendum which might amount to a second final brief totally different from the first one.

Nyiramasuhuko's and Ntahobali's Joint Motion

7. The Defence submits that on 2 December 2008, the Chamber *proprio motu* modified its Scheduling Order of 2 July 2008 and its Decision of 29 August 2008, with the consequence that the closing briefs must be filed before all the evidence has been heard. According to the Defence, this variation violates Rule 86 according to which the Parties may present their closing briefs and arguments after the presentation of all the evidence.

8. The Defence argues that a Chamber cannot reconsider its own decision *proprio motu*, save for exceptional circumstances warranted to uphold a fair trial, and only after the Parties have been informed about the reasons for this amendment and after they have been heard. In the instant case, none of these requirements have been met. Therefore, the Decision of 2 December 2008 significantly affects the fair and expeditious conduct of the proceedings.

9. The Defence alleges that an immediate resolution by the Appeals Chamber may materially advance the proceedings. It would be in the interests of justice for the Appeals Chamber to determine if a Trial Chamber has the discretionary power to amend its decisions and orders, without having heard the Parties or providing the reasons for this amendment; if a Trial Chamber can order the filing of the closing briefs before the presentation of all the

¹ T. 2 December 2008, p. 37.

² T. 2 December 2008, p. 41.

³ The Defence mentions Prosecution Witnesses SJ, QY and QCB.

evidence; if Rule 86 can be altered by procedures other than those provided for under Rule 6. According to the Defence, the Appeals Chamber Decision would be the only way of legitimising the trial proceedings that will follow. Furthermore, it is of general importance for the Appeals Chamber to rule on these issues because the Trial Chamber's 2 December 2008 Decision establishes a precedent.

The Prosecution's Response

10. The Prosecution supports the Motions and submits that the Formal Statement raises issues that could significantly affect the fair and expeditious conduct of the proceedings. The Prosecution argues that the Formal Statement is inconsistent with the Decision of 29 August 2009 because all the evidence has not been presented; it must be determined whether it was within the Chamber's discretion to make the Formal Statement that declared the case closed before hearing all the evidence and whether the Chamber had the discretion to set out a deadline for the filing of closing briefs that will result in the final briefs being filed before the presentation of all the evidence, in spite of the Decision of 29 August 2008.

11. The Prosecution argues that an immediate resolution by the Appeals Chamber may materially advance the proceedings as a decision by the Appeals Chamber will provide a final determination on this issue at a crucial stage of the proceedings when the Parties have completed their cases but a number of witnesses remain to be recalled

Nteziryayo's Response

12. The Defence supports the Motion and argues that the Motions raise serious questions of law on *inter alia*, the apparent conflict between the Formal Statement of 2 December 2008, the Scheduling Order of 2 July 2008 and the Decision of 29 August 2008. The expected evidence of the recalled Prosecution Witnesses will have a fundamental bearing on the arguments in the closing briefs.

Nyiramasuhuko's and Ntahobali's Joint Reply

13. The Defence underscores that the Motions should be considered as extremely urgent.

DELIBERATIONS

14. Recalling its jurisprudence,⁴ the Chamber notes that decisions rendered on Rule 73 motions are without interlocutory appeal, except at the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).⁵ These conditions require a specific demonstration that 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.

⁴ *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.

⁵ 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."

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15. The Chamber notes in particular the Defence submissions that the Formal Statement violates the provisions of Rule 86 as all evidence in this trial had not yet been presented as of 2 December 2008 and therefore the deadline for the filing of the closing briefs should not have started to run.

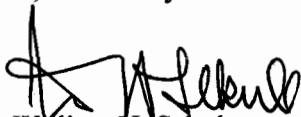
16. The Chamber observes that Rule 86 governs the scheduling of closing arguments whereas the Formal Statement deals specifically with the filing of closing briefs. In the Chamber's view, the Defence Motions lack legal basis and do not meet the requirements of Rule 73 (B). The Chamber denies them accordingly.

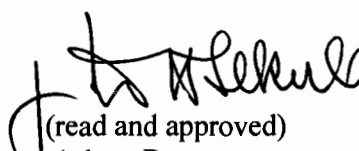
17. Nevertheless, the Chamber underscores that its 2 December 2008 statement considered the Prosecution witnesses yet to be recalled and the pending motions before it when declaring the case closed and ordering that the 60-day deadline for the Parties to file their closing briefs would run from then. With regard to any matter that may occur after the closure of the case such as the recall of certain Prosecution witnesses and the hearing of other witnesses, if any, the Chamber particularly stated that "the Parties will be given an opportunity to address any issue that may arise in their oral closing argument or for specific addendum to their closing briefs, if warranted".⁶

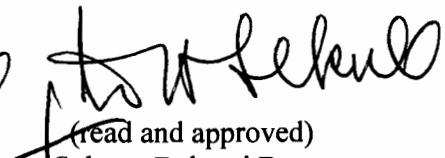
FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 15 January 2009


William H. Sekule
Presiding Judge


(read and approved)
Arlette Ramaroso
Judge
(absent at the time of
signature)


(read and approved)
Solomy Balungi Bossa
Judge
(absent at the time of
signature)



[Seal of the Tribunal]

⁶ T. 2 December 2008, p. 37.