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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 17 September 2009

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

2009 SEP 17 A 11: 08
JUDICIAL RECORDS ARCHIVES
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**DECISION ON THE DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE TRIAL CHAMBER'S ORAL DECISIONS OF 31 AUGUST 2009**

Rules 73(B) and 73(F) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Holo Makwaia
Althea Alexis-Windsor
Cheikh Tidiane Mara
Lasana Dumbuya

Defence Counsel:

David Jacobs
Claver Sindayigaya
Marc Nerenberg

INTRODUCTION

1. The trial in this case commenced on 31 August 2009.¹
2. On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("the Rules"), requesting that the Prosecution disclose and return exculpatory documents seized from the Accused during his arrest in South Africa in June 2004.² The Defence contended that, at the time of his arrest, the Accused possessed three Rwandan laissez-passers, which were seized by officers of the Tribunal and are currently in the custody of the Prosecution.³
3. On 11 August 2009, the Prosecution filed a response to the Defence motion, arguing that it does not have custody of the laissez-passers requested by the Defence.⁴ The Prosecution further submitted that it is not required under Rule 68(A) to disclose material of which it does not have knowledge or possession.⁵
4. On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecutor to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused's possessions.⁶
5. The Prosecutor filed a response to the Chamber's Interim Order on 21 August 2009.⁷ The Prosecutor concedes that the Accused made notations on the 10 September 2004 inventory, indicating that certain seized items were missing.⁸ The Prosecutor also acknowledges that certain items included in the 19 July 2004 inventory are not accounted for in the 10 September 2004 inventory.⁹ The Prosecution provided several possible explanations regarding the inconsistencies in the two inventories.¹⁰ Finally, the Prosecution indicates that it has contacted authorities in South Africa regarding the items seized from the Accused at the time of his arrest.¹¹
6. On 25 August 2009, the Defence for Gaspard Kanyarukiga filed an extremely urgent motion for a stay of the proceedings, arguing that a fair trial would not be possible

¹ *Prosecutor v Kanyarukiga*, Case No ICTR-2002-78-I, Scheduling Order (TC), 7 July 2009; T. 31 August 2009.

² Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009.

³ Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009, paras. 2, 4-6.

⁴ Prosecutor's Response to the Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 11 August 2009.

⁵ *Ibid*, para. 2.

⁶ Interim Order Concerning the Defence Request for Rule 68 Disclosure (TC), 18 August 2009.

⁷ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009.

⁸ *Ibid*, para. 12.

⁹ *Ibid*, para. 14.

¹⁰ *Ibid*, para 11.

¹¹ *Ibid*, para. 5.

in this case due to the disappearance of three laissez-passers allegedly seized from the Accused at the time of his arrest.¹²

7. In light of the impending commencement of the trial, the Chamber issued an Interim Order on 25 August 2009, instructing the Prosecution to file its response to the Defence motion for a stay of the proceedings, if any, by the close of business on Wednesday, 26 August 2009, and the Defence to file its reply, if any, by close of business on Thursday, 27 August 2009.¹³

8. On 28 August 2009, the Chamber issued a decision denying the Defence motion for a stay of proceedings but indicating that it remained seized of the matter.¹⁴

9. On 31 August 2009, the Defence filed a motion for certification to appeal the Trial Chamber's decision denying the motion for a stay of the proceedings.¹⁵ The same day, the Defence made oral submissions requesting an adjournment of the proceedings while the Prosecution continues its search for the items mentioned in the Chamber's decision of 28 August 2009 ("first Defence motion for adjournment").¹⁶ The Defence also sought an adjournment in order to have time to review exhibits from the *Seromba*¹⁷ trial that were disclosed to the Defence a few days before trial ("second Defence motion for adjournment").¹⁸

10. In an oral ruling on the same day, the Chamber denied the first Defence motion for adjournment for the reasons set forth in its 28 August 2009 decision on the Defence request for a stay of proceedings.¹⁹ Concerning the second Defence motion for adjournment, the Chamber ruled that the Defence request would be decided on a case-by-case basis, as the documents are presented.

11. On 7 September 2009, the Defence filed a motion for certification to appeal the Trial Chamber's 31 August 2009 oral decisions on the Defence requests to adjourn the proceedings ("the Impugned Decisions").²⁰ The Defence submits that certification is warranted because the Impugned Decisions affect Kanyarukiga's right to a fair trial by putting him at a disadvantage compared to the Prosecution and because an immediate resolution by the Appeals Chamber would materially advance the proceedings.²¹

¹² Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009, para. 1.

¹³ Interim Order (TC), 25 August 2009.

¹⁴ Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings (TC), 28 August 2009.

¹⁵ Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 31 August 2009.

¹⁶ T. 31 August 2009 pp. 4-5.

¹⁷ *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T.

¹⁸ T. 31 August 2009 p. 18.

¹⁹ T. 31 August 2009 p. 22.

²⁰ Motion for Certification to Appeal the Trial Chamber's Decision on the Defence Motion to Adjourn Proceedings, filed on 7 September 2009.

²¹ Motion for Certification to Appeal the Trial Chamber's Decision on the Defence Motion to Adjourn Proceedings, filed on 7 September 2009, paras. 18-26.

12. On 11 September 2009, the Prosecutor filed a response, in which he submits that the Defence request is frivolous and, alternatively, that the criteria for certification have not been met.²²

13. On 14 September 2009, the Defence filed a reply.²³

DELIBERATIONS

14. The Chamber recalls that the Defence filed the instant motion prior to receiving a decision on its motion for certification to appeal the Chamber's decision denying its request for a stay of the proceedings.

15. The Chamber notes that the Defence seeks certification against both oral rulings rendered on 31 August 2009, i.e. the Chamber's decisions on both the first and second Defence motions for adjournment.

16. The Chamber further notes that it did not deny the Defence request for adjournment due to the late disclosure of *Seromba* exhibits. Rather, the Chamber ruled that it would consider this request for adjournment on a case-by-case basis during the course of the proceedings.²⁴ Thus, the Chamber finds that the Defence request for certification to appeal the Chamber's decision on the second Defence motion for adjournment is premature.

17. Certification to appeal *may* be granted on an exceptional basis when the two criteria set out in Rule 73(B) are both satisfied.²⁵ Under Rule 73(B), the Trial Chamber may grant certification to appeal a decision of the Chamber "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."

18. In the instant motion, the Defence repeats several of the arguments made in its previous submissions, including *inter alia* its motion for disclosure of exculpatory materials, its motion for a stay of the proceedings and its motion for certification to appeal the Trial Chamber's decision of 28 August 2009.²⁶ The Chamber notes, for example, that there is substantial overlap between the instant motion and the motion for certification to appeal filed on 31 August 2009. Likewise, the Chamber observes that the motion for adjournment, which was filed on the same day as the Defence motion for certification to appeal the Chamber's decision on the stay of proceeding, rested on similar

²² Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's Decision on the Defence Motion to Adjourn Proceedings, filed on 11 September 2009.

²³ Reply to the "Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's Decision on the Defence Motion to Adjourn Proceedings," filed on 14 September 2009.

²⁴ T. 31 August 2009 p. 22.

²⁵ *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 4 July 2007 (TC), 25 July 2007, para. 11.

²⁶ See Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009; Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009; Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 31 August 2009.

grounds to those advanced by the Defence in its motion for a stay. Finally, the arguments raised by the Defence in its two motions for certification to appeal are virtually identical to those advanced in the underlying motions.

19. The Trial Chamber recalls that, under Rule 73(F), it may “impose sanctions against Counsel if Counsel brings a motion ... that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associate with the motion and/or costs thereof.”

20. The Chamber finds that the successive filings by the Defence are unnecessary and disruptive and amount to re-litigating issues raised in previous Defence submissions.²⁷ Therefore, the Chamber finds that the instant motion constitutes an abuse of process under Rule 73(F) of the Rules.

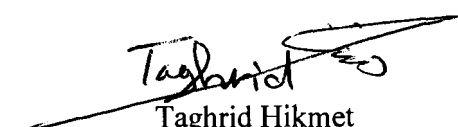
FOR THESE REASONS, the Chamber hereby:

FINDS that the request for certification to appeal the Chamber's decision on the second Defence motion for adjournment is premature;


DISMISSES the remainder of the motion; and

DENIES payment of fees associated with the Defence motion for certification as well as any costs thereof.

Arusha, 17 September 2009


Taghrid Hikmet
Presiding Judge


Seon Ki Park
Judge


Joseph Masanche
Judge

[Seal of the Tribunal]

²⁷ See *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Request for Certification to Appeal or in the Alternative Reconsideration of the Chamber's Decision of 30 November 2007 (TC), 14 December 2007, para. 10.