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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 14 September 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

DECISION ON NIZEYIMANA DEFENCE MOTION FOR CERTIFICATION OF THE 19 AUGUST 2011 SCHEDULING ORDER

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
Astou Mbow

Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastien Chartrand

INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, having called 38 witnesses. The Defence closed its case on 16 June 2011, having called 38 witnesses.

2. On 14 July 2011, the Chamber informally communicated the Chamber's guidelines regarding the anticipated scheduling of the proceedings to the parties via e-mail.[1]

3. On 14 July 2011, the Defence for the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) filed a letter outlining its misgivings regarding the Chamber's informal scheduling guidelines.[2] More specifically, the Defence raised issues with the Chamber's directions in respect to the timing of the closing brief.[3]

4. On 5 August 2011, the Office of the Prosecutor ("Prosecution") filed a motion, requesting the Chamber to issue a formal scheduling order to enable the parties to facilitate the planning of their cases and to avoid further delays of the Trial.[4] The Prosecution also noted therein that it would attempt to file its closing brief simultaneously in English and in French, so as to avoid further delays.[5]

5. On 9 August 2011, the Defence filed a response to the Prosecution Motion.[6] The Defence submitted that the Prosecution's proposed schedule is not viable and would violate the Accused's right to be afforded adequate time and facilities in preparation of his defence.[7]

6. On 19 August 2011, the Chamber issued a scheduling order in which it ordered the parties to file their closing briefs simultaneously by 8 November 2011, following the site visit, and that the closing arguments should be heard on 8 December 2011.[8]

7. On 25 August 2011, the Defence filed a motion for certification to appeal the Chamber's Scheduling Order.[9] In support of its motion, the Defence submits, *inter alia*, that

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[1] E-mail entitled "Chamber's Informal Guidelines on Potential Scheduling Time-Line," by Daniella Ku, 14 July 2011.
[2] Letter entitled "Closing brief and scheduling, Prosecutor vs Ildephonse Nizeyimana," ("Defence Letter") by John Philpot, 14 July 2011.
[3] *Ibid.*
[4] Prosecutor's Motion to Request a Scheduling Order and to Order the Defence to Request a Rejoinder Prior to Hearing the Rebuttal Witnesses ("Prosecution Motion"), 4 August 2011, para. 8.
[5] Prosecution Motion, para. 18.
[6] Defence Response to Prosecutor's Motion to Request a Scheduling Order and an Order to the Defence ("Defence Response"), 9 August 2011.
[7] Defence Response, paras. 5-17.
[8] Scheduling Order ("Impugned Decision"), 19 August 2011, para. 12.

the Chamber erred in having failed to order the Prosecution to file its closing brief simultaneously in English and in French.[10] The Defence further argues that the Chamber should have granted the Defence an additional 21 days to allow the Accused to "take cognizance of the Closing Brief in his language".[11] The Defence lastly submits that the Chamber abused its discretion by ordering the parties to file their closing briefs "48 days after the end of the potential rejoinder evidence on 22 September 2011."[12]

8. On 1 September 2011, the Prosecution filed its response.[13] The Prosecution submits that the arguments advanced by the Defence in favour of its motion do not satisfy the requirements for certification. The Prosecution notes that (1) the Defence has failed to demonstrate how the issue of translation will affect the fairness of the trial;[14] and (2) the Defence did not demonstrate how the Trial Chamber abused its discretion in ordering that the closing briefs be filed within 48 days of the rejoinder evidence.[15]

9. The Defence did not file a reply.

DELIBERATIONS

Law on Certification

10. The Chamber recalls that decisions rendered by the Trial Chamber are without interlocutory appeal save with certification by the Trial Chamber.[16] Certification to appeal is at the Trial Chamber's discretion and is only warranted under exceptional circumstances.[17] According to Rule 73(B) the Chamber may grant certification to appeal a decision if the decision involves an issue that would significantly affect the fair and expeditious conduct of

[9] Nizeyimana Defence Motion for Certification of the 19 August 2011 Scheduling Order ("Defence Motion"), 25 August 2011.
[10] Defence Motion, paras. 10(A), 11-19.
[11] Defence Motion, para. A(a).
[12] Defence Motion, paras. 10(B), 20-26.
[13] Prosecutor's Response to Defence Motion for Certification of the 19 August 2011 Scheduling Order ("Prosecution Response"), 1 September 2011.
[14] Prosecution Response, paras. 15-30.
[15] Prosecution Response, paras. 31-34.
[16] Rule 73 of the Rules of Procedure and Evidence ("Rules").
[17] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case (TC), 14 May 2008, para. 4 ("The Appeals Chamber recognizes the discretionary powers of the Trial Chamber over Rule 73(B) procedures and regularly emphasizes that requests for certification to appeal are only warranted under exceptional circumstances."). *See also Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal (TC) ("Niyitegeka Decision of 13 May 2008"), 13 May 2008, para. 15; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 22 May 2007, para. 6.

the proceedings, or the outcome of the trial, for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[18] Certification to appeal may be granted only if both criteria are satisfied.[19]

11. In considering whether to grant certification for appeal, the Chamber need not determine whether the Impugned Decision is correct.[20] Rather, the Chamber must determine whether the issue is one that merits certification under Rule 73(B).[21]

Translation of Closing Briefs and Additional Time

12. The Defence submits that the Chamber erred when it failed to require the Prosecution to file its closing brief in French and did not grant an additional 21 days to allow the Accused time to understand the closing brief.[22] The Defence argues that the Chamber "ignored" both the principles set forth in the Akayesu Appeals Chamber Decision and the "mandatory" language contained in the Practice Direction on the Length and Timing of the Closing Briefs and Closing Arguments ("Practice Directions").[23]

13. Having reviewed the Appeals Chamber's order in the Akayesu case,[24] the Chamber is not satisfied that the said order supports the contention by the Defence that the Accused has a general right to have the Prosecution briefs translated into a language understood by him or her. The Chamber recalls that the Appellant in the Akayesu case requested that its French Appellant's briefs be translated into a language understood by the majority of the Judges responsible for adjudicating his case. The Appeals Chamber granted the Defence motion for translation of the appellant's briefs, as it considered it "imperative, for the proper

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[18] *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98*bis* (TC), 24 April 2007, para. 5.
[19] *Ibid.*
[20] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007, para. 4; Niyitegeka Decision of 13 May 2008, para. 17; *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC) ("Bagosora Decision of 16 February 2006"), 16 February 2006, para 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92*bis* Admission of Faustin Nyagahima's Written Statement (TC), 22 August 2007, para. 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence (TC), 23 July 2008, para. 6 (citations omitted).
[21] *Prosecutor v. Nizeyimana*, Case No. ICTR-2001-55C-PT, Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi (TC), 2 December 2010, para. 5.
[22] Defence Motion, para. A.
[23] Defence Motion, paras. A(a) and (b).
[24] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Order (for Translation of Appellant's Briefs ("Akayesu Appeals Decision"), 29 March 2001

administration of justice and for equality of arms for the parties" that their briefs be translated into the working languages of the Tribunal.[25]

14. Contrary to the Defence's suggestions, the Appeals Chamber did not confer upon the Appellant the right to translation of the Prosecution's briefs or additional time in order to allow for the preparation of his case. The Chamber's decision to refrain from ordering the Prosecution to translate its brief in French therefore does not constitute an issue which infringes upon the Accused's right to a fair trial. The Chamber accordingly does not consider the Impugned Decision at variance with the Akayesu Appeals Decision.

15. Indeed, as discussed in the Impugned Decision, there is nothing in the Statute, the Rules or the jurisprudence that confers upon the accused a fundamental right to translation of the *closing briefs* into a language understood by the accused, particularly where, as in this case, the counsel for the accused are both entirely bilingual and have worked with the accused throughout trial receiving and filing applications in English.[26] Similarly, there is nothing in the Statute, the Rules or the jurisprudence that requires the Chamber to order the Prosecution to file its closing brief in the French language. Moreover, the Prosecution's indication that it will attempt to file its closing brief in both English and French[27] renders moot any question surrounding the translation of the brief and additional time required in the absence thereof.

16. Lastly, the Chamber notes that the Practice Directions, while helpful guidelines on the management of the trial schedule, do not prescribe mandatory time lines for taking various steps that one is required to take during the trial. The Practice Directions are not binding on the Trial Chamber. Trial Chambers remain free to fix their schedule as the interest of justice, fairness and convenience of the parties and the court may dictate.

17. For reasons stated above, the Chamber does not consider that its refusal to require the Prosecution to file its closing brief in French and the Chamber's scheduling of the closing arguments is an issue that would significantly affect the fairness and expeditiousness of the trial.

Timing of the Filing of the Closing Briefs

18. The second ground advanced by the Defence centres around the timing of the closing briefs. The Defence submits that the Chamber abused its discretion by ordering that the

[25] *Ibid.*
[26] Impugned Decision, paras. 8-11.
[27] *See* Prosecution Motion, para. 18.

closing briefs be filed 48 days following the close of the potential rejoinder evidence.[28] The Defence argues that the Practice Directions entitles it to 74 days following the close of the evidence, which would bring the filing date to 4 December 2011.[29] The Defence further notes that two issues related to the cooperation of member states remain unresolved at this date, rendering it impossible for the Defence to submit its closing brief.[30]

19. Rule 86(B), which governs closing arguments, provides that "[a] party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument." The Chamber recalls that the Practice Directions provide that closing briefs in a single-accused trial must be filed *no later than* 74 days after the closure of the evidence phase, if there is a site visit.[31] The maximum days set out by the Practice Directions therefore suggests that the Chamber has considerable discretion to schedule the filing of the closing briefs, according to the circumstances of the case.

20. In the present instance, the Chamber is satisfied that the time allowed between the end of the evidentiary phase and the filing of the closing briefs is more than adequate. The Chamber also notes that in the event the Prosecution is able to file its closing brief in the two languages, any discomfort occasioned to Counsel or the Accused will be ameliorated. The Chamber particularly notes that the evidentiary phase of this trial ended for all practical purposes at the close of the Defence case on 16 June 2011 and the additional evidence introduced by way of rebuttal and rejoinder could not significantly disorganize the parties' preparation of their closing briefs.

21. Moreover, the Chamber informally apprised the parties of the scheduling regarding the closing briefs and the closing arguments on 14 July 2011, allowing the parties to effectively plan their time in the two months before the hearing of the rebuttal evidence.[32] The Chamber considers, taking into account the circumstances surrounding this single accused case,[33] that the parties have been afforded sufficient time for the submission of their closing briefs by 8 November 2011. In light of the above, the Chamber does not consider that it abused its discretion by requiring the parties to file their closing briefs on 8 November 2011.

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[28] Defence Motion, para. B.
[29] Defence Motion, para. B(a).
[30] Defence Motion, para. B(e). The Chamber notes that the issue related to D14 has since been resolved.
[31] Practice Directions, paras. 4(i) and (ii).
[32] *See* E-mail Correspondence to the parties entitled "Chamber's Informal Guidelines on Potential Scheduling Time-Line", by Daniella Ku, 14 July 2011.
[33] The current case involves a single accused, 84 witnesses, spanning approximately 55 trial days. Moreover the parties were put on notice as early as 14 July 2011 of the schedule the Chamber intended to maintain.

22. In the present case, the Chamber is not satisfied that the Impugned Decision raises an issue the immediate resolution of which by the Appeals Chamber would materially advance the proceedings or will affect the fair and expeditious outcome of the proceedings. Consequently, the Chamber does not find that the Defence has discharged its burden of demonstrating the existence of exceptional circumstances warranting certification of the Impugned Decision pursuant to Rule 73 (B).

FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion for Certification.

Arusha, 14 September 2011, done in English.

Lee Gacuiga Muthoga Presiding Judge	Seon Ki Park Judge	Robert Fremr Judge

[Seal of the Tribunal]