



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
14-3-2006
(238 - 26335)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 14 March 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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14-03-06

DECISION ON REQUESTS FOR CERTIFICATION TO APPEAL DECISION ON DEFENCE MOTION TO REPORT GOVERNMENT OF A CERTAIN STATE TO UNITED NATIONS SECURITY COUNCIL AND PROSECUTION MOTIONS UNDER RULE 66(C)

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

Office of the Prosecutor:

Don Webster
Gregory Lombardi
Iain Morley
Gilles Lahaie
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera

Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse

Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera

Peter Robinson and Patrick Nimy Mayidika Ngimbi

[Signature]

INTRODUCTION

1. On 15 February 2006, the Chamber denied the Defence's request to report the Government of a certain State to United Nations Security Council¹ and granted in part the related Prosecution Motions Under Rule 66(C).
2. On 20 February 2006, Joseph Nzirorera and Mathieu Ngirumpatse filed motions for certification to appeal the Decision.² The Prosecution opposes both motions.³

DISCUSSION

3. Relying on a *Bagosora* Decision, Joseph Nzirorera contends that Trial Chamber I granted the certification to appeal its Decision on whether the Prosecution could have access to immigration records of Defence witnesses for impeachment purposes.⁴ He submits that the same situation applies in the present case and the resolution of this issue by the Appeals Chamber will allow him to obtain the material in time for his use in cross-examining Witness T.
4. Joseph Nzirorera is of the view that the Chamber should also verify whether the requesting party has shown that the appeal could succeed, in addition to the clear standard required for certification.⁵ According to him, the Chamber made some errors of law in the impugned Decision. The Chamber held that security concerns are a valid ground for a State not to comply with Article 28 of the Statute. Referring to the *Blaskic* case, he submits that the State must comply and could request protective measures to protect its national security interests.⁶
5. Joseph Nzirorera stresses that the Government of the State never filed any objection to the disclosure of the material requested. The Chamber erred in relying on an unofficial letter from a Prosecutor as the position of the Government of the State.
6. Moreover, Joseph Nzirorera submits that in the Chamber's ruling of 23 February 2005 following a Defence motion pursuant to Article 28 of the Statute, it was affirmed that the Prosecutor's request to use Rule 66(C) was of no interest to him and inadmissible.⁷ The Prosecutor got the same material from the State Prosecutor and applied the same

¹ *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66(C) (TC), 15 February 2006.

² "Application for Certification to appeal decision on Defence Motion to report Government of a certain State to united nations Security Council and Prosecution Motions Under Rule 66(C)", filed by the Joseph Nzirorera on 20 February 2006. "Requête de M. Ngirumpatse en certification d'appel contre les décisions suivantes: (...) Decision on Defence Motion to report Government of a Certain state to UNSC and on prosecution Motins Under Rule 66 C of the Rules), filed on 20 February 2006 (...).

³ "Prosecutor's Response to Joseph Nzirorera and Mathieu Ngirumpatse application for Certification to Appeal Decision on Defence Motion to Report Government of a Certain State to United Nations Security council and Prosecution Motions Under Rule 66(C)", filed on 27 February 2006.

⁴ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (*Bagosora et al.*), Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

⁵ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

⁶ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of the republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 64.

⁷ *Karemera et al.*, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement d'un certain Etat (TC), 23 février 2005, para. 6.

Rule 66(C) to withhold some documents. The Chamber erred in allowing an unlawful interference by the Prosecutor with the Article 28 procedure.

7. In addition, he claims that the Chamber valued the fair trial rights of Witness T over the rights of Joseph Nzirorera and those of his co-accused.

8. According to Joseph Nzirorera, the Chamber could have ordered the disclosure of the documents with some protective measures, including an order forbidding the Defence to contact the witnesses revealed by the disclosure. Alternatively, the Chamber could have postponed the testimony of Witness T until the completion of his trial.

9. Mathieu Ngirumpatse argues that while the Chamber found that the Prosecution did not comply with its obligation, it refused to apply the consequence of its analysis but rather dismissed the Defence motions. The Prosecution's non-compliance with its obligations under Rule 66(A)(ii) is systematic and tends to be strategic. Mathieu Ngirumpatse contends that the Chamber is creating a culture of impunity in favour of the Prosecution while penalizing the Defence. The Defence rights cannot be freely and fully exercised if the material is not disclosed in its entirety 60 days before the testimony of a witness, thereby affecting the fair and expeditious conduct of the proceedings. Moreover, the immediate resolution of this issue will allow the Chamber and the parties to hear the Prosecution witnesses in accordance with the rights of the Defence to cross-examine them with full knowledge of the case.

10. The Prosecution is of the view that that both applications do not meet all the requirements of Rule 73(B) and therefore have to be dismissed.

11. Rule 73(B) provides that Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for very limited circumstances provided for in that Rule. Certification to appeal may be granted if both conditions stipulated by Rule 73(B) are satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings".

12. Having reviewed the applicants' Motions, the Chamber considers that the Defence has failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber recalls that the respect of the rights of the Defence to cross-examine the Prosecution witnesses and the rights of the Accused to a fair and expeditious conduct of the proceedings were considered in the impugned Decision of 15 February 2006. In this regard, it was specified that Prosecution witnesses could be recalled to testify at a later stage of the proceedings, if necessary.⁸

13. The Chamber also takes the view that the Defence did not prove that an immediate resolution by the Appeals Chamber of the issue will materially advance the proceedings.

14. Moreover, Joseph Nzirorera referred to some errors of law as a ground for certification to appeal a Chamber's Decision without showing how such an argument meets the conditions set out by Rule 73 (B) of the Rules. The Chamber notes that allegations of errors of law are not relevant in considering a motion on certification to appeal.⁹

⁸ *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66(C) (TC), 15 February 2006, para. 26.

⁹ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on

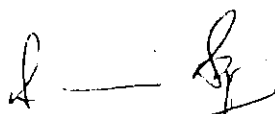
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15. The Chamber concludes that the conditions under Rule 73(B) have not been satisfied and is therefore unable to grant certification to appeal the Impugned Decision.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Defence Motions on certification to appeal.

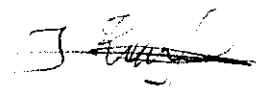
Arusha, 14 March 2006, done in English.



Dennis C. M. Byron
Presiding



Emile-Francis Short
Judge



Gberdao Gustave Kam
Judge



Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material (TC)", 4 February 2005, para. 28.