



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-98-44-T 26356  
17-3-2006  
(26356-26353) *Sumf*

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 17 March 2006

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

2006 MAR 17 P 1:03  
*Sumf*  
17-03-2006

**DECISION ON DEFENCE REQUESTS FOR CERTIFICATION TO APPEAL  
DECISION ON MOTIONS FOR ORDER FOR PRODUCTION OF DOCUMENTS BY  
THE GOVERNMENT OF RWANDA AND FOR CONSEQUENTIAL ORDERS**

*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

*Sumf*

## INTRODUCTION

1. The Defence has complained that, despite repeated efforts, certain documents have not yet been obtained from the Rwandan government pertaining to Prosecution witnesses. On 13 February 2006, the Chamber rendered its "Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders" in which it granted in part the Defence Motions for the material requested which was sufficiently defined.
2. On 20 February 2006, Joseph Nzirorera and Mathieu Ngirumpatse filed motions for certification to appeal the said Decision on the issue of the material that the Chamber decided was not sufficiently defined.<sup>1</sup> The Prosecution opposes both motions.<sup>2</sup>

## DISCUSSION

3. Joseph Nzirorera seeks a certification to appeal the issue discussed in paragraph 8 of the impugned Decision which held that:

"with regard to the documents containing charges filed against the listed persons and information from witnesses or victims which accuse the listed Prosecution witnesses of crimes relating to events in 1994, the Chamber finds that the material requested is not adequately precise for a request of cooperation of the Rwandan authorities".
4. Joseph Nzirorera argues that this denial of disclosure of charges will deprive the Defence of important information which can be used in its cross-examination of Prosecution witnesses to challenge their credibility.
5. Moreover, Joseph Nzirorera submits that the Chamber should also verify whether or not the requesting party has shown that the appeal could succeed.<sup>3</sup> He also argues that the Chamber made an error of law in determining that the documents sought did not meet the specificity required by the Appeals Chamber for Article 28, being whether the requested State can sufficiently identify the documents to disclose them to the requesting party.<sup>4</sup> He claims that the charging documents and statements of witnesses and victims are part of the dossier of the Prosecution witness whose prior statements were ordered to be disclosed by the Chamber and can be easily identified by the Rwandan authorities.
6. 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

<sup>1</sup> "Motion for Certification to Appeal Decision on Motions for Order for Production of Documents by the Government of Rwanda"; and "Requête de M. Ngirumpatse en certification d'appel contre les décisions suivantes: (...) Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders", filed both on 20 February 2006.

<sup>2</sup> "Prosecutor's Response to Joseph Nzirorera and Mathieu Ngirumpatse Motions for Certification to Appeal Decisions on Motion for Order for Production of Documents by the Government of Rwanda", filed on 27 February 2006.

<sup>3</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (Bagosora et al.), Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

<sup>4</sup> *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/1-A, Decision on Request of the Republic of Croatia for Review of a Binding Order (AC), 9 September 1999, para. 38.

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. It claims that 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.

7. The Prosecution contends that both applications do not meet all the requirements of Rule 73(B).

8. 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". The Chamber considers that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.

9. The Chamber recalls that the right of the accused to a fair and expeditious conduct of the proceedings have been taken into account in the Impugned Decision of 13 February 2006. It was specified that, if need arises, Prosecution witnesses could be recalled to testify at a later stage of the proceedings.<sup>5</sup> The Chamber notes that the Defence counsels have failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings. In addition, it considers that the first requirement of the disjunctive first condition for certification to appeal having not been satisfied, there is no need to consider the alternative requirement i.e. whether the issue will affect the outcome of the trial.

10. Mathieu Ndirumpatse contends that the immediate resolution of this issue will prevent all disclosure problems and the renewal of Defence motions due to the violations of its rights without obtaining any sanction. It will also allow sanctioning efficiently these violations to prevent their repetition. In addition, the Chamber and the parties will hear the Prosecution witnesses in accordance with the rights of the Defence and the Accused to cross-examine them with a full knowledge of the case. Mathieu Ndirumpatse also argues that the remedy the Chamber always proposes consists in giving the opportunity to recall a witness for further cross-examination, if it becomes necessary. The immediate resolution of this issue may clarify such interpretation of the Rules.

11. The Chamber endorses the Tribunal's finding that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chambers in their assessments of witnesses' credibility pursuant to Rule 90(G) of the Rules.<sup>6</sup> The Chamber has found in the Impugned Decision that "the overall interest of the

<sup>5</sup> *Karemera et al.*, Decision on Motions for Order for Production of Documents and Consequential Orders (TC), 13 February 2006, para. 13.

<sup>6</sup> *Karemera et al.*, Decision on Motion for Order for Production of Documents by the Governments of Rwanda and for Consequential Orders, 13 February 2006, para. 7; *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records (TC), 14 September 2005, para. 8; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.



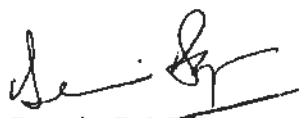
proceedings in this case would not be served by an order delaying the testimonies of some Prosecution witnesses scheduled to testify during the next trial session before the Chamber, even if their judicial records are not disclosed before they testify. They can be recalled at a later stage of the proceedings, if necessary".<sup>7</sup> Consequently, Mathieu Ndirumpatse did show how an immediate resolution by the Appeals Chamber of the issue will materially advance the proceedings.

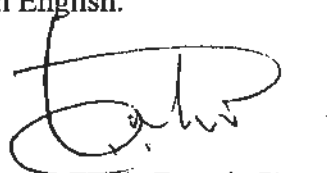
12. Moreover, Joseph Nzirorera refers to an error of law as a ground for certification to appeal the impugned Decision without showing how such an argumentation meets the requirements set out by Rule 73(B) of the Rules. The Chamber finds that the allegation relating to an error of law is irrelevant in considering this motion on certification to appeal.<sup>8</sup>


**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER**

**DENIES** the Defence Motions on certification to appeal.

Arusha, 17 March 2006, done in English.

  
Dennis C. M. Byron  
Presiding

  
Emile Francis Short  
Judge

  
Gberdao Gustave Kam  
Judge



<sup>7</sup> *Karemera et al.*, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006, para. 13.

<sup>8</sup> *Bagosora et al.*, 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 Bicomupaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomupaka and Mugenzi for Disclosure of Relevant Material (TC)", 4 February 2005, para. 28.