

ICTR-98-44-T
7-6-2006
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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: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 7 June 2006

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR



Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON DEFENCE MOTIONS FOR CERTIFICATION TO APPEAL
DECISION GRANTING SPECIAL PROTECTIVE MEASURES FOR WITNESS ADE

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

Office of the Prosecutor:
Don Webster
Gilles Lahaie
Alayne Frankson-Wallace
Iain Morley
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

INTRODUCTION

1. The third trial session in this case started on 15 May 2006. Prosecution Witness ADE will most likely be heard during the next trial session. On 3 May 2006, at the Prosecution's request, the Chamber granted this witness special protective measures, including hearing the witness' testimony by video-link.¹ Each co-Accused seeks now certification to appeal that Decision.² The Prosecution opposes these applications.³

DISCUSSION

2. Rule 73(B) of the Rules provides that Decisions rendered under Rule 73 motions are without interlocutory appeal. However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: 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".

3. Each co-Accused claims that the requirements for a certification to appeal, as set out by Rule 73(B) of the Rules of Procedure and Evidence, are met. Mathieu Ngirumpatse and Edouard Karemera submit that a systematic authorization to hear the most important Prosecution witness via video-link affects the right of the co-Accused to cross-examine the witness. According to Mathieu Ngirumpatse, it would be as if the Chamber was ratifying the Prosecution's deal with its witness. Edouard Karemera claims that taking testimony via video-link diminishes the ability of the opposing party, to assess the witness' credibility. He also claims that the Trial Chamber did not take into account his arguments in the Decision of 3 May 2006. In Joseph Nzirorera's view, because of the importance of Witness ADE's testimony, taking the witness' testimony by video-link deprives him of the right to personally confront the witness, violates his right to adequate cross-examination and therefore his right to a fair trial. Each co-Accused further contends that a resolution by the Appeals Chamber will also materially advance the proceedings because if the Appeals Chamber ruled in their favor, they would be able to hear the witness live, while respecting the rights the Accused. In Joseph Nzirorera's view, a finding at a later stage that the Chamber erred will require taking the testimony anew, either before the Appeals Chamber or at a new trial. Joseph Nzirorera finally argues that a resolution by the Appeals Chamber may resolve an issue in which there are two directly contradictory decisions. The Accused makes reference to the Trial Chamber's Decision in the Zigiranyirazo case, where the Chamber denied the video-link motion to hear Witness ADE and found that it will benefit from the physical presence of the Accused.⁴

5. The two conditions set out in Rule 73(B) are cumulative and are not determined on the merits of the appeal against the impugned Decision. The Appeals Chamber further stated that the certification to appeal must remain exceptional,⁵ and even the absolute exception when deciding on the admissibility of the evidence.⁶

¹ Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case No. ICTR-98-44-PT ("Karemera et al."), Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE (TC), 3 May 2006.

² The Defence for Nzirorera and the Defence for Ngirumpatse filed respectively their Motions on 5 and 8 May 2006; the Defence for Karemera filed a Motion on 9 May 2006.

³ See: Prosecution's Responses filed on 9 and 11 May 2006.

⁴ Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE (TC), 31 January 2006.

⁵ See: Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent

6. In the present case, the Chamber did not grant a blanket authorization that important Prosecution witnesses shall always be heard by video-link. On the contrary, it has considered each application to hear testimony by video-link on a case-by-case basis. The Accused will not be deprived of their right to confront the witness, nor to assess his demeanor and credibility, since they will cross-examine him from the seat of the Tribunal. Moreover, the Chamber was satisfied that it will be able to assess the witness' demeanor and credibility. The Chamber is not satisfied that the co-Accused have shown that the Impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial.

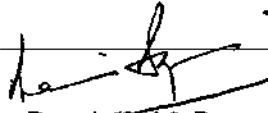

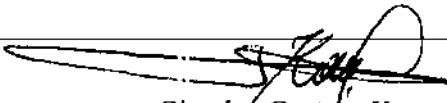

7. Moreover, like the Trial Chamber in the *Zigiranyirazo* case, this Chamber made its own findings on its own assessment of the facts. There is no difference in the interpretation of the law made by the two Chambers but it is the application to each specific case which resulted in a different conclusion.⁷ An Appeals Chamber ruling is therefore not warranted.

8. Finally, contrary to Karemera's assertion, the Chamber has not failed to take into consideration his arguments when dealing it decided the Prosecution's Motion for special protective measures for Witness ADE. As indicated by the reference at footnote 3 of the Impugned Decision, the Chamber considered each Defence argument, but since they were similar, there was no reason to repeat each of them in the text of the Decision. In any event, such argument would not satisfy the requirements to grant a certification to appeal.

FOR THOSE REASONS, THE CHAMBER

DENIES the Defence Motions.

Arusha, 7 June 2006, done in English

		
Dennis C. M. Byron	Emile Francis Short	Gberdao Gustave Kam
Presiding Judge		Judge
[Seal of the Tribunal]		

Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

⁶*Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10: "[...] it is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial."

⁷ It can be noted that the same Trial Chamber in the *Zigiranyirazo* case granted an application for video-link in respect to another witness (see: *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Motion for Witness BPP to Testify by Video-link (TC), 27 March 2006).