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NATIONS UNIES

ICTR-98-44-T  
30-10-2006  
(27973 - 27969)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 30 October 2006

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

Case No. ICTR-98-44-T

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*Joseph Nziroera*

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE  
CHAMBER'S DECISION ON NZIRORERA'S EX PARTE MOTION FOR ORDER  
FOR INTERVIEW OF DEFENCE WITNESSES NZ1, NZ2 and NZ3**

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

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## INTRODUCTION

1. The trial in this case started on 19 September 2005. On 12 July 2006, the Chamber denied the Defence request for subpoenas to meet with potential Defence Witnesses DN1, DN2, and DNZ3 ("Impugned Decision").<sup>1</sup> The Defence for Nzirorera now applies to the Chamber for certification to appeal that decision. The Prosecution opposes the Motion.

## DISCUSSION

2. The Defence submits that, according to the Appeals Chamber Judgement in the *Tadic* case, "[a Trial] Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."<sup>2</sup> It claims that by denying the Defence's motions to issue subpoenas for DNZ1, DNZ2 and DNZ3, the Chamber failed in its duty to provide those facilities, thereby jeopardizing his right to obtain the attendance and examination of witnesses who may be able to rebut the testimony of prosecution witnesses pursuant to Article 20(4)(e) of the Tribunal's Statute.

3. The Chamber notes that the Appeals Chamber has held that "[t]he Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."<sup>3</sup> This, however, does not mean that a Chamber must grant all requested facilities by a party because it alleges that it needs assistance. The Chamber must exercise its discretionary power in accordance with the Rules and the Statute. As stated in the Impugned Decision, the Appeals Chamber has determined specific criteria following the outline in the Statute and the Rules, for a Chamber to issue a subpoena and to require a prospective witness to attend at a nominated place and time in order to be interviewed.<sup>4</sup> When an Accused is seeking this particular facility, the Chamber must determine whether it can be granted in accordance with the Statute and the Rules.

4. The Defence argues that the requirements set out for granting certification are met in the instant situation. It also submits that when deciding to grant certification, the Chamber should consider the merits of the appeal against the Impugned Decision as recognized by the Trial Chamber in the *Bagosora* case.<sup>5</sup>

5. Rule 73(B) of the Rules of Procedure and Evidence provides that a decision rendered on Rule 73 motions are without interlocutory appeal except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Trial Chamber has discretion to grant certification when:

- 1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et. al"), Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3 (TC), 12 July 2006.

<sup>2</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 52.

<sup>3</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 52 (emphasis added).

<sup>4</sup> *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of a Subpoena (AC), 21 June 2004.

<sup>5</sup> The Defence relies upon *Bagosora et. al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005.

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2) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The moving party must demonstrate that both requirements of Rule 73(B) are satisfied, and even then, certification to appeal must remain exceptional.<sup>6</sup>

7. This Chamber has already decided that the merits should not be considered when addressing an application to certification.<sup>7</sup> Other Trial Chambers have taken the same position.<sup>8</sup> The Chamber is also of the view that the Defence has improperly relied on the *Bagosora* Chamber's view on this issue. In a recent decision not cited by the Defence, the Trial Chamber in the *Bagosora* case has also clarified its position on the question whether a Trial Chamber is barred from considering the merits of an appeal in deciding whether leave for that appeal should be granted. It considered that:

The correctness of a decision is a matter for the Appeals Chamber, should certification be granted. In this sense, it is certainly true that a Trial Chamber is not concerned with the correctness of its own decision when determining whether to grant leave to appeal. On the other hand, Trial Chambers do have a responsibility to screen out requests for certification with no prospect of success and which, accordingly, would not "materially advance the proceedings."<sup>9</sup>

8. In the light of these principles, the Chamber will now determine whether the Defence has shown that both requirements under Rule 73(B) are met.

9. The Defence submits that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings because the right of the Accused to a fair trial, and in particular his right to obtain the attendance and examination of witnesses pursuant to Article 20(4)(e) of the Statute, is greatly jeopardized by the Chamber's denial of access to potential witnesses who may be able to rebut the testimony of prosecution witnesses. To support its application, the Defence relies upon prior Decisions rendered by this Tribunal in the *Bagosora et al.* and *Nyiramasuhuko* cases, as well as a Decision from the Special Court in Sierra Leone.<sup>10</sup> It asserts that the issue at hand is similar

<sup>6</sup> *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 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.

<sup>7</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, para. 5.

<sup>8</sup> See for example, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on 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. "The Bizimungu Chamber agreed that whether there was an error of law or abuse of discretion is not an issue to be considered by the Trial Chamber in its determination of a certification to appeal. It emphasized, however, that the word "significant" in the first prong of the Rule, intends the exclusion of minor or trivial issues that arise in the course of the trial; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence (TC), 4 February 2005, para. 11; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4.

<sup>9</sup> *Bagosora et al.*, Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

<sup>10</sup> *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005; *Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2006; *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali Using 1997 Custodial

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to the issues faced in those cases. The Defence also cites other cases that have certified issues concerning the admission and exclusion of evidence, also asserted to be much like the issue at hand, and which have the effect of excluding important potential Defence evidence at the trial.

10. The Defence believes that the resolution of the issue of the Defence obtaining access to potential witnesses by the Appeals Chamber will materially advance the proceedings because this issue is likely to recur as the Defence will request access to more potential Defence witnesses and it will obtain certainty on this issue early in the Prosecution's presentation of evidence and before the Defence begins presenting its case. Should certification be denied and the Trial Chamber be found incorrect in an appeal from a final judgement, the Defence asserts that a new trial would be required to hear the Defence witnesses who had not been originally compelled to testify, thereby significantly delaying the proceedings. The Defence also argues that the potential testimonies are so clearly relevant that since the Chamber did not exercise its power to order a subpoena in this case it is unlikely that it will ever exercise it. Therefore review of the decision will materially advance proceedings.

11. In the Impugned Decision, there has been no general denial of the right of the Accused to examine a witness. Neither has there been a blanket refusal to order subpoenas for all potential witnesses who may rebut the testimony of Prosecution witnesses. The Chamber recalls that the Impugned Decision was not concerned with the attendance of witnesses at the trial. It related only to a request to compel attendance at out-of-court interviews. The Chamber was seized of specific requests concerning three potential witnesses and made its ruling on the basis of the information provided by the Defence with respect to these witnesses. No general conclusion can be drawn from the Impugned Decision as to how the Chamber will decide a future motion for subpoena. The Accused is free to submit further requests for subpoenas for out-of-court interviews or to compel their attendance in court when the need arises in this case, which the Chamber will evaluate on a case-by-case basis.

12. The Chamber also finds that the Defence misplaces reliance on several decisions, which it analogizes to the present case and uses to support the claim that the issue in question affects the Accused's right to a fair trial. What distinguishes those cases to the present case is that they all concern issues with a broad scope and a general statement of law which affect a large category of documents or witnesses. The Impugned Decision cannot affect a large category of witnesses, nor does it involve a general statement of law because the evaluation of each request for subpoena was done on a case-by-case basis, and included an exercise of the Chamber's discretion.

13. The Chamber rejects Nzirorera's reliance on the decision from the Special Court for Sierra Leone, which certified a decision from the Trial Chamber after it denied the request to issue a subpoena to call the President of Sierra Leone to testify. In that case, the Trial Chamber was divided in its opinion, the very first considering the issue of pre-testimony interview subpoenas at the Special Court which it claimed would likely arise again, with the majority decision, a concurring opinion, and a dissenting opinion. It was for these reasons that the Trial Chamber certified its decision.<sup>11</sup> This Tribunal has issued other decisions on subpoenas for pre-testimony interviews and the jurisprudence has enunciated that ultimately, the decision to order a subpoena remains discretionary, but also promulgated criteria when

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Interviews (TC), 1 June 2006; *Prosecution v Norman et. al.*, Special Court for Sierra Leone, Case No. SCSL-04-14-T, 28 June 2006.


<sup>11</sup> *Prosecution v Norman et. al.* at para. 12.

the issuance of a subpoena would be appropriate which the unanimous Chamber in this case took into consideration in the Impugned Decision.

14. Consequently, the Defence failed to show that the Impugned Decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Without satisfying the first requirement needed to grant certification to appeal, the Chamber need not continue its analysis and denies the Defence Motion on that basis.

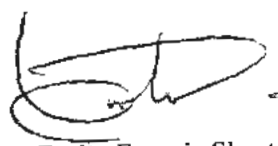
**FOR THE ABOVE REASONS, THE CHAMBER  
DENIES** the Defence Motion in its entirety.

Arusha, 30 October 2006, done in English.



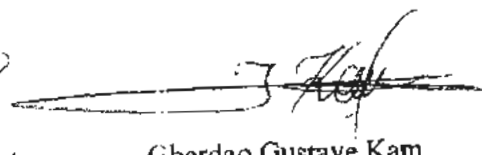
Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

