



INTERNATIONAL  
TRIBUNAL

ICTR-98-44-T  
4-4-2007  
(28659-28655)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

28659  
Jury

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Dyon, Presiding  
Gberdao Gustave Kam  
*sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence*

**Registrar:** Adama Dieng

**Date:** 4 April 2007

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA  
Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVES  
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*[Signature]*

**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL  
DENIAL OF MOTION TO OBTAIN STATEMENTS OF WITNESSES ALG AND GK**

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

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**Defence Counsel for Joseph Nzirorera**  
Peter Robinson and Patrick Niny Mayidika Ngimbi

*[Signature]*

## INTRODUCTION

1. The trial in this case started on 19 September 2005. On 19 January 2007, Judge Short decided to withdraw from the case. In accordance with Rule 15 *bis* (D) of the Rules, the remaining Judges decided on the continuation of the proceedings with a substitute judge.<sup>1</sup> The President also authorized the Trial Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.<sup>2</sup>

2. On 22 March 2007, the Chamber, sitting as a bench of two judges, issued its Decision on the Defence Motion for Cooperation of the Government of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK and UB.<sup>3</sup> The Chamber granted the Defence's request with respect to the prior statements of Witness UB, but denied the motion with respect to the remaining two Witnesses, GK and ALG.

3. The Defence for Nzirorera now applies to the Chamber for certification to appeal that decision.<sup>4</sup> The Prosecution partially opposes certification.<sup>5</sup>

## DISCUSSION

4. Rule 73(B) of the Rules of Procedure and Evidence provides that decisions rendered on motions filed by the parties under Rule 73 are without interlocutory appeal. However, the same provision confers a discretion on the Trial Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must show how the impugned Decision involves an issue (i) that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.

5. 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>

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, ICTR-98-44-T ("Karemera et al."), Decision on Continuation of the Proceedings (TC), 6 March 2007.

<sup>2</sup> See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

<sup>3</sup> *Karemera et al.*, Decision on the defence motion for cooperation of the government of Rwanda to obtain statements of Prosecution witnesses ALG, GK and UB (TC), 22 March 2007 ("Impugned Decision").

<sup>4</sup> Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, filed on 23 March 2007 ("Nzirorera's Application").

<sup>5</sup> Prosecutor's Response to Nzirorera's Motion for Certification to Appeal Trial Chamber III Denial of Motion to Obtain Statements of Witnesses ALG and GK, filed on 28 March 2007 ("Prosecutor's Response").



6. The Defence for Nzirorera identifies two issues raised by the Impugned Decision for which certification would be appropriate: first, that the two remaining Judges were without authority to deliberate and render a decision pursuant to Rule 15 *bis* (F); second, that the Judges erred in requiring a heightened showing of relevance to obtain undisclosed prior statements of a prosecution witness after that witness has testified. The Prosecution supports the Defence for Nzirorera's request for certification with respect to the first issue, while opposing certification with respect to the second issue, clarification by the Appeals Chamber of the scope of Rule 15 *bis* (F).

7. With respect to the first issue, the Chamber is of the view that the scope of an authorization to conduct routine matters pursuant to Rule 15 *bis* (F) is an issue which would significantly affect the fair and expeditious conduct of the proceedings. Rule 15 *bis* (F) departs from the general rule according to which decisions are to be rendered by a bench of three Judges. Its overall context and phrasing suggest that this provision is indeed exceptional.<sup>7</sup> The scope of this exception is intimately connected to the fairness and expeditiousness of the proceedings. The Chamber is also of the view that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings. Whereas matters of admissibility of evidence are primarily for the trier of fact to determine,<sup>8</sup> the novel, legal questions raised by the present issue form an appropriate matter for review by the Appeals Chamber.<sup>9</sup> In addition, the Chamber has previously rendered decisions pursuant

<sup>7</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T ("Nyiramasuhuko et al."), 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 QH2 Inadmissible' (TC), 18 March 2004, para. 15; *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

<sup>8</sup> Rule 15 *bis* (F) reads as follows: "In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members."

<sup>9</sup> *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("Bagosora et al."), Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006, para. 7; *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals (TC), 16 February 2006, para. 5.

<sup>10</sup> *Bagosora et al.*, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006, para. 6 ("In light of the complexity and importance of the issues involved, clarification of the principles applicable to this type of motion would materially advance the proceedings"); *Prosecutor v. Stohodan Milosevic*, Case No. IT-02-54-T, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003 (where the Appeals Chamber limited its consideration of the appeal to the legal test for the admission of adjudicated facts under Rule 94(B) and thus did not consider alleged errors relating to the application of this test by the Trial Chamber"). See also, *a contrario*, *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10 ("The Chamber does not believe that there is serious doubt on a question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B)"); *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial

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to Rule 15 *bis* (F) and may have to do so in the future as well. Should the case proceed with these decisions having been rendered on the basis of an incorrect legal footing, then this would have significant implications for a number of issues which would potentially need to be revisited by the Appeals Chamber or reconsidered by the Trial Chamber on remand.<sup>10</sup>

8. With respect to the second issue, the Prosecution submits that the Defence for Nzirorera has failed to demonstrate how obtaining the previous statements of witnesses ALG and GK is of particular significance to the outcome of the proceedings or the trial. The Prosecution argues that as Witnesses ALG and GK have already testified before the Trial Chamber, unless the Defence for Nzirorera can show with some specificity that the required documents are not of a cumulative nature, it has not been prejudiced in any way. The Prosecution contends that the Defence's insistence on receiving additional disclosures is wholly speculative. In addition, the Prosecutor submits that an appeal for documents for witnesses that have already testified without the slightest indicia of potential to assist in assessing the witness's credibility will not advance the proceedings in any way.<sup>11</sup>

9. The Chamber is not persuaded by the arguments presented by the Prosecution as these revisit the merits of the Impugned Decision. Indeed, the Prosecution's arguments rely on and assume the correctness of the interpretation of the law expounded in the Impugned Decision.

10. In the opinion of the Chamber, the criteria for certification have in fact been met with respect to this issue as well. First of all, the Chamber finds that this issue could affect the outcome of the trial. This is a question which may affect a considerable number of Prosecution witnesses. If the Chamber's interpretation of the applicable legal standard is incorrect, then the effect on the Defence would be profound as previous witness statements constitute an important tool for assessing the credibility of witnesses. Second of all, the Chamber finds that an immediate resolution of this issue would materially advance the proceedings. The issue as to the legal standard applicable for the production of documents is one which is likely to recur throughout the case.<sup>12</sup> In particular, the application of the

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Notice (TC), 22 March 2007, paras. 12 ("No useful purpose would be served by requesting the Appeals Chamber to revisit legal principles which it has recently affirmed.")

<sup>10</sup> *Bagasora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 11 ("resolution of the present controversy by interlocutory appeal will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing.").


<sup>11</sup> *Ibid.*, paras. 11-13.

<sup>12</sup> *Nyiramaruhuka et al.*, Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews (TC), 1 June 2006, para. 28 ("The Chamber also notes that in the specific circumstances of this case, similar issues may arise in the future, and that an immediate resolution of this matter by the Appeals Chamber may therefore materially advance the proceedings").

criterion of relevance in circumstances where witnesses have already been testified is related not only to requests for state cooperation, but also to other types of requests for the production of documents. This issue therefore constitutes a crucial matter of procedure and evidence, certification of which is appropriate.<sup>13</sup>

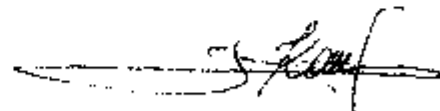
**FOR THOSE REASONS, THE CHAMBER GRANTS the Defence Motion.**

Atisha, 4 April 2007, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]



<sup>13</sup> *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004; *Nyiramasuhuko et al.*, 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; *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4; *Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 11 March 2003, para. 4.



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Dates:	Transmitted: 4 April 2007		Document's date: 4 April 2007	
No. of Pages:	5	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK			
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TRIM Document Type:	<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities			

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The Prosecutor vs.

- Joseph NZIRORERA  
- Mathieu NGIRUMPATSE  
- Edward KAREMERA

Case No / Affaire No.:

ICTR-98-44-T

To:  
A:

- ☐ TC1  
☐ Judge E. Mose, President  
☐ Judge J. R. Reddy  
☐ Judge S. A. Egorov  
☐ Judge F. Lattanzi (Mwambare)  
☐ Judge F. R. Arrey (Korera)  
☐ SLO  
☐ C. Gosnell, Co-ordinator

received by / reçu par:

ALO: received by / reçu par

- ☐ TC2  
☐ Judge W. H. Sekule  
☐ Judge A. Ramarsson  
☐ Judge K. R. Khan  
☐ Judge A. J. N. de Silva  
☐ Judge S. B. Bossa (Nyiramasuhuko et al.)  
☐ Judge F. Lattanzi (Muvunyi)  
☐ Judge L. G. Muthoga (Bizimungu et al.)  
☐ Judge F. R. Arrey (Muvunyi)  
☐ Judge E. F. Short (Bizimungu et al.)  
☐ Judge T. Hixmet (Ndingiyeimana et al.)  
☐ Judge S. K. Park (Ndingiyeimana et al.)  
☐ M. Nang, SLO  
☐ A. Leroy, Co-ordinator  
☐ A. Marong, Judgement Co-ordinator  
☐ S. Mawalla, Judgement Co-ordinator  
☐ W. Romans, Judgement Co-ordinator

- ☒ TC3  
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☒ Judge K. R. Khan  
☐ Judge D. C. M. Byron  
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☒ Judge L. G. Muthoga (Ziganyiweza)  
☐ Judge F. R. Arrey (Rukundo)  
☒ Judge E. F. Short (Karamera et al.)  
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☐ C. Denis, Co-ordinator (Karamera et al. & Ryamukuba)  
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☒ OTP / BUREAU DU PROCUREUR

☐ Senior Trial Attorney in charge of case:

D. Webster

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☒ DEFENSE

☐ Accused / Accusé: J. Nzirorera, M. Ngirumpatse & E. Karemera

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☐ F. A. Talon  
(Appeals/Team IV)

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4/4/2007 5