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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judge Dennis C. M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 29 November 2007

THE PROSECUTOR

v.

**ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA**

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**DECISION ON MATHIEU NGIRUMPATSE'S REQUEST FOR CERTIFICATION
OF APPEAL OF THE CHAMBER'S DECISION TO
ADMIT EXHIBITS IP005 AND IP006**

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

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CI1107-0192 (E)

The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case No. ICTR-98-44-T

INTRODUCTION

1. On 5 November 2007, the Chamber granted the Prosecutor's application for admission into evidence of the documents identified as IP005 and IP006 during the examination-in-chief of Prosecution Witness Jean Bosco Twahirwa.¹

2. On 12 November 2007, the Defence for Mathieu Ndirumpatse ("the Defence") filed an application for certification of appeal of the said decision ("the decision of 5 November 2007") pursuant to Rule 72(B) of the Rules ("Rules").² The Prosecutor opposed it on the ground that the Defence had not shown that the criteria required by the Rules had been met.³

DELIBERATIONS

3. The Chamber first notes that the Defence relies on Rule 72(B) of the Rules on preliminary motions, whereas its application should have been brought under Rule 73(B) regarding interlocutory appeals of decisions rendered by the Trial Chamber. The Chamber will therefore adjudicate pursuant to Rule 73(B) of the Rules.⁴

4. Under Rule 73(B) of the Rules, two requirements must be met for a certification of appeal to be granted: the applicant must demonstrate (i) that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that its immediate resolution by the Appeals Chamber may materially advance the proceedings.

(i) *Fair and expeditious conduct of the trial and its outcome*

5. The Defence for Mathieu Ndirumpatse submits that the fairness and outcome of the trial were vitiated by the Chamber's admission *a posteriori* of Documents IP005 and IP006, whereas it had refused to grant the request for admission of the Prosecutor's documents during the examination-in-chief of Jean-Bosco Twahirwa, and had simply marked them for identification.⁵ The Defence submits that, in view of that refusal, it had decided not to question the witness on matters drawn from the impugned documents, which it would not have done had it foreseen that the said documents would be subsequently admitted "[on the strength of mere attestations from the RPF archivist]".⁶

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*. ("The Prosecutor v. Karemera et al."), Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Reconsideration of Oral Decisions of 25 June 2007 and 3 July 2007 Concerning Admission Into Evidence of Documents Marked IP 005 and IP 006 (Trial Chamber), 5 November 2007.

² *Requête de Mathieu Ndirumpatse's aux fins de certification d'appel de la "Decision on the Prosecution Motion for Reconsideration of Oral Decisions of 25 June and 3 July 2007 Concerning Admission Into Evidence of Documents Marked IP005 and IP006"*, filed on 12 November 2007 ("Mathieu Ndirumpatse's Request"), para. 1.

³ Prosecutor's Response to Ndirumpatse's Application for Certification for Interlocutory Appeal of Trial Chamber III's Decision of 5 November 2007 to Admit IP005 and IP006 in Evidence, filed on 19 November 2007, paras. 2, 4.

⁴ See *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 13; See also *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 7.

⁵ Mathieu Ndirumpatse's Request, paras. 5-6, 9.

⁶ *Ibid.*, paras. 7-8.

6. The Defence further submits that the duration of the trial is also affected as the admission of the documents would mean that the Defence is founded in requesting that Witness Jean-Bosco Twahirwa be recalled for cross-examination, and in requiring that those who attested to the circumstances under which the said documents were obtained be called to testify.⁷

7. In *Nyiramasuhuko*, the Appeals Chamber held that: "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; it is not for the Appeals Chamber to assume [that] responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence".⁸

8. In the instant case, the Decision of 5 November 2007, which was the subject of the request for certification, concerns only two documents admitted into evidence which do not involve a substantial or broad category of the evidence.⁹ Moreover, as the Appeals Chamber has stressed on many occasions, admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence as this is a matter to be decided by the Trial Chamber after hearing the totality of the evidence.¹⁰

9. Lastly, it is the Chamber's view that the Defence's claim that it has good cause to recall Witness Jean-Bosco Twahirwa is not an acquired or absolute right whose application is likely to significantly affect the duration of the trial; such right is assessed by the Chamber which determines whether the said conditions have been met.¹¹ In any event, the Defence's submission that recalling the witness would affect the duration of the trial should have been made by the Defence in support of its claims during the reconsideration of oral decisions by the Chamber.¹² By virtue of its inherent power to reconsider its own decisions, the Chamber

⁷ *Ibid.*, para. 10.

⁸ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, Appeals Chamber, 4 October 2004, para. 5.

⁹ See *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417, Trial Chamber, 15 November 2006, para. 2; citing *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of an Appeal Concerning Access to Protected Defence Witness Information, Trial Chamber, 29 July 2005, para. 2; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Certification of Appeals on Admission of Testimony of Witness DBY, Trial Chamber, 2 October 2003, para. 4.

¹⁰ *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (Appeals Chamber), 2 July 2004, para. 15; *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko Request for Reconsideration (Appeals Chamber), 27 September 2004, para. 12; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (Appeals Chamber), 18 September 2006, fn. 40.

¹¹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (Trial Chamber), 29 September 2004, para. 6; See also *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (Trial Chamber), 19 September 2005, para. 2; *The Prosecutor v. Simba*, Case No. ICTR-2001-76-I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (Trial Chamber), 28 October 2004, para. 5.

¹² *Mémoire pour M. Ndirumpitse sur la requête du Procureur aux fins d'obtenir le réexamen des décisions orales du 25 June 2007 et du 3 juillet 2007 relatives à l'admission en preuve des documents IP005 et IP006*.

in its Decision of 5 November 2007 took into account the right to a fair trial and recalled the rules applicable in guaranteeing the rights of the Accused.¹³

10. In light of the above-mentioned circumstances, the Chamber is of the opinion that the Decision of 5 November 2007 does not concern essential matters that may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

(ii) *Materially advance the proceedings*

11. Since the conditions set forth in Rule 73(B) are cumulative, the Chamber does not find it necessary to consider the Defence submissions in support of the second condition and therefore dismisses the motion in its entirety.

FOR THESE REASONS, THE CHAMBER DENIES the Defence's request for certification of appeal.

Arusha, 29 November 2007, done in French.

[Signed]

Dennis C. M. Byron
Presiding Judge

[Signed]

Gberdao Gustave Kam
Judge

[Signed]

Vagn Joensen
Judge



filed on 8 October 2007, para. 40; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Reconsideration of Oral Decisions of 25 June 2007 and 3 July 2007, 5 November 2007.

¹³ See *Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the references cited in the footnotes in this paragraph).