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Amend

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

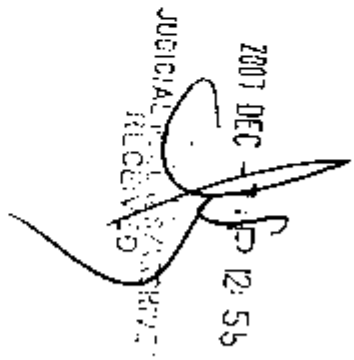
OR: ENG

**TRIAL CHAMBER II**

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 7 December 2007




**The PROSECUTOR**

**v.**

**Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI**

Case No. ICTR-97-21-T

**The PROSECUTOR v. Joseph KANYABASHI**

Case No. ICTR-96-15-T

*Joint Case No. ICTR-98-42-T*

# DECISION ON NYIRAMASUHUKO'S MOTION FOR CERTIFICATION TO APPEAL THE DECISION OF 5 NOVEMBER 2007 AND NTAHOBALI'S MOTION FOR CERTIFICATION TO APPEAL THE DECISIONS OF 5 AND 12 NOVEMBER 2007

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

**BEING SEIZED** of the:

i. "*Requête de Pauline Nyiramasuhuko en certification pour appel de la* 'Decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H' de la Chambre II du 5 novembre 2007", filed on 12 November 2007 ("Nyiramasuhuko's Motion");

ii. "*Requête aux fins de certification d'appel de la* 'Decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H'", filed by the Defence for Ntahobali on 12 November 2007 ("Ntahobali's Motion");

**CONSIDERING** the:

i. "*Réponse de Joseph Kanyabashi à la Requête de Pauline Nyiramasuhuko en certification pour appel de la* Decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H de *la Chambre II du 5 novembre 2007*" and

ii. "*Réponse de Joseph Kanyabashi à la Requête de Shalom Ntahobali intitulée Requête aux fins de certification d'appel de la* 'Decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H'", filed on 19 November 2007 ("Kanyabashi's Response");

iii. "Prosecution's Response to the '*Requête aux fins de certification d'appel de Pauline Nyiramasuhuko et de Shalom Ntahobali de la décision de la Chambre II du 5 novembre 2007*'", filed on 19 November 2007 ("Prosecution's Response");

iv. "*Réplique à la réponse du Procureur et de l'accusé Kanyabashi à la 'Requête en certification d'appel Pauline Nyiramasuhuko et de Shalom Ntahobali de la Décision de la Chambre II du 5 novembre 2007*'", filed by the Defence for Nyiramasuhuko on 23 November 2007 ("Nyiramasuhuko's Reply") ;

v. "*Réplique de Arsène Shalom Ntahobali à la 'Réponse de Joseph Kanyabashi a la requête de Shalom Ntahobali intitulée requête aux fins de certification d'appel de la* decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's witnesses D-13-0, D-2-15-S and D-20-H'" and

vi. "*Réplique de Arsène Shalom Ntahobali à la* 'Prosecutor's Response to the *Requête aux fins de certification d'appel de Pauline Nyiramasuhuko et de Shalom Ntahobali*

*de la décision de la Chambre II du 5 novembre 2007*'", filed on 23 November 2007 ("Ntahobali's Reply");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C) of the Rules;

**NOW DECIDES** the Motions pursuant to Rule 73 (B) and (C) of the Rules, on the basis of the written briefs filed by the Parties.

## INTRODUCTION

1. On 31 December 2004, the Defence for Kanyabashi filed its Pre-Defence Brief, pursuant to Rule 73*ter* of the Rules. The Brief contained the list of witnesses which the Defence intended to call and a summary of the facts about which each witness would testify, including a summary of the expected evidence of Witnesses D-2-13-O, D-2-15-S, and D-20-H.

2. On 11 May 2007 and 19 October 2007, the Defence for Kanyabashi disclosed several will says and additional will says for Witnesses D-2-13-O, D-2-15-S, and D-20-H (the "contested will say statements").

3. On 30 October 2007, the Defence for Ntahobali requested the exclusion of certain evidence from the Witness D-2-13-O's will says of 11 May 2007 and 19 October 2007, Witness D-2-15- S's additional will say of 19 October 2007 and Witness D-20-H's additional will say of 19 October 2007. The Defence for Nyiramasuhuko joined Ntahobali's Motion.

4. On 5 November 2007, the Chamber partially granted the Motions to exclude certain portions of the anticipated evidence of Witness D-2-13-O.[1] On 12 November 2007, the Chamber rendered an oral decision concerning an objection raised by the Defence for Ntahobali against a question from the Prosecution during Witness D-2-13-O's cross-examination (the "Impugned Decisions"). The question related to one of the issues excluded in the Decision of 5 November 2007, namely the presence of Ntahobali at the University Hospital in Butare.

5. On 12 November 2007, the Defence for Nyiramasuhuko filed a motion under Rule 73 (B) for certification to appeal the Impugned Decision of 5 November 2007; on the same day, the Defence for Ntahobali filed a motion under Rule 73 (B) for certification to appeal the Impugned Decisions of 5 November and 12 November 2007.

6. The Chamber will consider Nyiramasuhuko's and Ntahobali's Motions jointly as they address related issues.

[1] *Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-T, Decision on Ntahobali's and Nyiramasuhuko's oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H", 5 November 2007.

## SUBMISSIONS OF THE PARTIES

***The Defence for Nyiramasuhuko***

7. The Defence for Nyiramasuhuko submits that paragraphs 24 to 27 of the Impugned Decision of 5 November 2007, dealing with the will say statement of Witness D-20-H disclosed on 19 October 2007, involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings as provided for in Rule 73 (B).

8. Concerning the interpretation of Rule 73 (B), the Defence endorses the view that the Chamber needs to consider whether there is serious doubt as to the correctness of the legal principles at issues. The Defence submits that the threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was unfair or unreasonable so as to constitute an abuse of the Trial Chamber's discretion.

9. The Defence submits that the first requirement of Rule 73 (B) is met when the impugned decision affects fundamental rights of one Accused, as set out in the Statute and the Rules;[2] it furthermore states that among others, the following criteria have been found relevant regarding the second requirement of Rule 73 (B): where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.[3]

10. The Defence submits that the Impugned Decision of 5 November 2007 concerns particularly crucial matters of procedure and evidence and includes new elements that incriminate the Accused and may affect her responsibility despite the fact that her case has been closed for more than two years.

11. The Defence argues that the Chamber based the Impugned Decision on an inaccurate or incomplete premise. It did not sufficiently and precisely take into account the new and incriminating elements against the Accused contained in paragraph 30 of the relevant will say of D-20-H, which are of a totally different nature from those encompassed in paragraph 4 of the Impugned Decision dealing with D-20-H's will say.

12. The Defence further submits that the Impugned Decision runs counter to the Accused's fundamental rights set out in the Statute and the Rules. The Defence argues that its application would result in an irreparable breach of the principle of fair trial; it would violate the right to a full defence according to Article 20, and the right encompassed in Rule 82 (A) to be accorded the same rights as if she were being tried alone.

13. The Defence states that the said allegations in D-20-H's will say were never introduced during the Prosecution case. In consequence, the Accused would have to defend herself

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[2] Nyiramasuhuko's Motion, para. 18, citing among others *Prosecutor v. Bizimungu et al.*, Case No ICTR-00-56-T, Decision on Ndindiliyimana's request for certification to appeal the Chamber's decision, dated 21 September 2005, 26 October 2005, para. 8.

[3] Nyiramasuhuko's Motion, para. 22, citing *Bagosora* et al, Certification of Appeal concerning Prosecution investigation of protected Defence witnesses, 21 July 2005, para. 6.

against new allegations, which the Accused could not have foreseen and of which the Accused did not know.

14. Concerning the finding in the Impugned Decision that the anticipated evidence of Witness D-20-H "appears to relate to evidence submitted by Ntahobali in his evidence in chief", the Defence submits that facts presented during the Defence case of an accused [Ntahobali] are not sufficient basis for allowing a co-accused [Kanyabashi] to present new accusations against another co-accused [Nyiramasuhuko]. The Defence states that no such case law exists to support it. The Defence adds that in his case in chief, Ntahobali only confirmed that the Accused was present in Mpare; he did not confirm any of the allegations encompassed in D-20-H's will say.

15. The Defence refers to the *Bagosora* Decision of 11 September 2006, and states that the Chamber excluded evidence presented by a co-accused because it "incriminates the Accused and broadens the facts imputed to the accused or the nature of his culpability, if they deviate from the order of proof prescribed by Rule 85."[4] The Defence argues that these principles also apply when new and incriminating evidence against an accused is introduced by a party who presents a witness or who cross-examines that witness. In both cases, the prejudice against the Accused would be the same because new allegations are introduced in the proceedings after the Prosecution and the Accused respective cases are closed. It would deviate from the presentation of evidence prescribed by Rule 85. The Defence adds that it does not matter if this testimony is presented by the Prosecution or by a co-accused; the prejudicial effect on the Accused's right to a fair trial remains the same.

16. The Defence further submits that the remedies mentioned in the Impugned Decision are inadequate. The right to cross-examine, to rebut, or to recall a witness are designed for a situation in which the Accused's right according to Rule 85 has been observed; they are not designed to be remedies in a case of grave prejudice against an accused. Indeed, the only adequate remedy would have been to exclude the said anticipated evidence. The Defence adds that the Chamber's ruling that it "may not hold the accused responsible for a charge which was not specifically pleaded" is no sufficient remedy.

17. The Defence contests that D-20-H's will say was disclosed in a timely manner. It argues that as the anticipated evidence of D-20-H includes new allegations against the Accused, the Defence did not have sufficient time to prepare.

18. The Defence states that the Impugned Decision furthermore breaches the right to an expeditious procedure because the presentation of the anticipated evidence will prolong the proceedings extensively, particularly in view of the fact that the only remedy is rebuttal of evidence.

19. The Defence finally submits that a certification of Appeal would also be of general interest for all multiple accused cases tried before the ICTR. The Defence lists a number of legal questions which supposedly have not been dealt with by the Appeals Chamber:

- the question of proper procedure for contradictory, antagonistic and irreconcilable defences;

[4] *Prosecution v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on severance or exclusion of evidence based on prejudice arising from testimony of Jean Kambanda, 11 September 2006, para. 3.

- the exclusion of anticipated evidence presented by one of the co-accused, which introduced new and incriminating facts;
- the question of when the criterion for admitting evidence where "the facts are not new" is met, when those facts have been presented during the case of another co-accused and after the case of the first accused, who is incriminated by this evidence, has been closed;
- the question of whether anticipated evidence is admissible if it was not part of the Prosecution case and if the defence case of the accused has been closed for more than two years and if in the meantime three other co-accused have finished the presentation of their case.[5]

20. The Defence adds that no definite interpretation of Rule 68 (B) exists and that in view of the significance of the Prosecutor's disclosure obligation, a definitive interpretation of Rule 68 (B) by the Appeals Chamber would significantly affect the fair and expeditious conduct of the current proceedings

***The Defence for Ntahobali***

21. The Defence for Ntahobali submits that in its Impugned Decision of 12 November 2007, the Chamber rejected the Defence's objection to a question from the Prosecution during the cross-examination of Witness D-2-13-O. The question related to one of the issues excluded in the Impugned Decision of 5 November 2007, namely the presence of Ntahobali at the University Hospital in Butare. The Defence alleges that the Chamber reasoned that its finding in the said Decision referred only to the examination-in-chief but not to the cross-examination.

22. The Defence submits that in its original Motion, it requested the Chamber not to allow the Defence for Kanyabashi or any other party to examine Witnesses D-2-13-O, D-2-15-S and D-20-H regarding new and additional facts. It argued that these facts were not included in Kanyabashi's Pre-Defence-Brief, disclosed on 31 December 2004; indeed they were disclosed to the Defence for the first time in D-2-13-O's will-say, disclosed on 11 May 2007 and the will-says of D-2-13-O, D-2-15-S and D-20-H disclosed on 19 October 2007 by which time the Prosecution and the Accused's respective case had been closed.

23. The Defence submits that such late disclosure breaches the rights of the Accused; the Accused has been taken by surprise and is prejudiced by this evidence. The introduction of the evidence through the examination in chief of Kanyabashi or the examination by any other Party would place the Accused in a situation similar to that in which he would be forced to defend himself against the Prosecution case, without knowing the complete evidence which will be presented against him.

24. The Defence submits that for these reasons, the Impugned Decisions violate the Accused's rights under Article 20 (2), Article 20 (1) and 20 (4)(a) to (c) of the Statute. It further submits that the Impugned Decisions run counter to the principle, which flows from the right to a fair trial, that the Accused must be afforded the same rights as if he was tried alone.

[5] See Nyiramasuhuko's Motion, para. 99.

***Kanyabashi's Response***

25. The Defence for Kanyabashi does not oppose the certification to appeal the Impugned Decision of 5 November 2007, as far as it allows Witnesses D-2-13-O, D-20-H and D-2-15-S to testify on matters that have not been part of the Prosecution Case.[6]

26. The Defence submits that Ntahobali and Nyiramasuhuko are accused in Paragraph 6.27 of their joint Indictment of having manned a roadblock. It states that Ntahobali's Defence strategy is to shift the responsibility for this roadblock to the communal authorities despite the fact that the Indictment against Kanyabashi, who was *bourgmestre* during the relevant time, did not contain any of these allegations.

27. The Defence refers to an oral motion argued by the Defence for Ntahobali on 13 September 2007 in which the Defence for Ntahobali stated that the aim of cross-examining Kanyabashi's Defence Witness D-2-5-W on the control of certain roadblocks was to show that the responsibility for these roadblocks did not lie with Ntahobali but with the local authorities.[7]

28. The Defence states that the allegations raised by Ntahobali may have a negative effect on his defence. The Defence needs to counter them, unless the Chamber clarifies that they do not have any negative effect on Kanyabashi.

29. The Defence submits that the principles outlined in the *Bagosora* Decision of 11 September 2006,[8] apply not only to the Prosecution but also to the other co-accused; the Defence states that Ntahobali testified in its own case-in-chief on matters referred to in Paragraph 30 of the will say of D-20-H and Paragraph 26 of the Impugned Decision of 5 November 2007; they were neither part of the Prosecution case nor of the Indictment against Kanyabashi or the joint Indictment against Nyiramasuhuko and Ntahobali.

30. The Defence submits that in the *Bagosora* Decision of 11 September 2006, the Chamber excluded several statements by Kambanda, in which he attempted to shift responsibility to his co-accused Kabiligi. The Defence argues that Kanyabashi's situation is comparable to that of Kabiligi as Ntahobali attempted to shift responsibility to Kanyabashi.

31. The Defence submits that the Defence for Nyiramasuhuko and Ntahobali have subjected Kanyabashi's witnesses to a constant cross-examination, which is a strategy to prolong the proceedings considerably.

32. With regard to Ntahobali's Motion, the Defence adds that Ntahobali did not demonstrate that the requirements for certification to appeal the Impugned Decisions of 5 and 12 November 2007 are met.

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[6] The Defence refers to paragraphs 18 to 27 of the Impugned Decision.
[7] T. 13 September 2007 p.25-32 (French).
[8] *Prosecutor v. Bagosora* et al., Decision on severance or exclusion of evidence based on prejudice arising from testimony of Jean Kambanda, 11 September 2006, paras. 2, 3.

***Prosecution's Response***

33. The Prosecution submits that the certification requested does not meet the requirements of Rule 73 (B) and that the Defence failed to demonstrate the alleged error of law or fact committed by the Trial Chamber in its Impugned Decision.

34. The Prosecution submits that the Impugned Decision of 5 November 2007 was rendered within the Chamber's discretion pursuant to Rule 89 (C); it will also be within the Chamber's discretion to determine at the end of the case what weight should be accorded to the evidence and that it may not hold the accused responsible for a charge which was not specifically pleaded.[9]

35. The Prosecution further states that the remedies available to the Defence, listed in the Impugned Decision of 5 November 2007, are adequate and do ensure the Defendant's right to a fair trial and to a full defence.

36. The Prosecution submits that the Impugned Decision is not concerned with broad categories of evidence or particularly crucial matters of procedure or evidence; it is only concerned with passages of anticipated evidence of three witnesses. It further argues that the appellate review will be supererogatory and will not materially advance the proceedings.

***Nyiramasuhuko's Reply***

37. The Defence for Nyiramasuhuko replies that – as acknowledged in Kanyabashi's Response – Witness D-20-H's will-say solely relates to testimony of a co-accused, namely Ntahobali, who testified after the case of the Accused had been closed. It points out that Kanyabashi did not oppose a certification to appeal the Impugned Decision of 5 November 2007.

38. The Defence submits that the Prosecution's Response does not deal with any of the matters brought up in Nyiramasuhuko's Motion, neither with the new and incriminating nature of the anticipated evidence of D-20-H, nor with the admissibility of new evidence relating solely to the testimony of a co-accused.

39. The Defence submits that the Prosecution does not explain why the remedies available to the Defence, listed in the Impugned Decision of 5 November 2007, are adequate and ensure the Defendant's right to a fair trial and to a full defence. Furthermore it does not deal with the remedies listed in the *Bagosora* Decision of 11 September 2007.

***Ntahobali's Reply***

40. The Defence for Ntahobali replies that the Impugned Decision of 12 November 2007 concerns fundamental questions of admissibility of evidence which may arise again during the current proceedings, in particular during the testimony of Witnesses D-2-17-A and D-2-YYYY. The Defence points out that on 1 June 2006, the Chamber granted a certification to

[9] Citing *Prosecution v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the appeals by Nyiramasuhuko and Ntahobali on the "Decision on Defence urgent motion to declare parts of the evidence of Witnesses RV and QBZ inadmissible", 27 September 2004, para. 15 and *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on Pauline Nyiramasuhuko's Appeal on the admissibility of evidence, 4 October 2004 para. 5.

appeal because "similar issues may arise in the future and [ ] an immediate resolution of this matter by the Appeals Chamber may therefore materially advance the proceedings."[10]

41. The Defence argues that in the Impugned Decision of 5 November 2007, the Chamber did not define or specify the limits, within which "an accused can bring evidence which may be incriminating for the other Accused". The Defence submits that a clarification of this question is of utmost importance in view of Rule 82 (A) stating that an accused in a multiple accused case has the same rights as if he were tried alone.

42. The Defence submits that the Accused could not undergo the necessary investigations to rebut the allegations made by Kanyabashi's Defence Witnesses, because he did not know about the nature of the allegations. The Defence adds that the Registry refused to grant additional resources to the Defence for pursuing new investigations with regard to testimonies during co-accused cases.[11]

43. The Defence submits that the remedies listed in the Impugned Decision of 5 November 2007 do not compensate for the prejudice against the Accused because he did not know which additional incriminating elements may be presented after his case was closed. The Defence argues that this violates the right of equality under Article 20 (3), because he did not have the same right accorded to him as his co-accused who presented their defences after him.

## DELIBERATIONS

44. As a preliminary matter, the Chamber recalls the Appeals Chamber Decision of 27 August 2007 which emphasized that "the purpose of a response is to give a full answer to the issues raised in a motion by the moving party"[12] and held that:

> To grant an accused, who has not obtained the required certification, the standing to challenge a Trial Chamber decision on appeal in his response to an appeal filed by co-accused would open the interlocutory appeal process to abuse. Where certification in accordance with Rules 73 (B) and (C) is required, parties must obtain such certification if they intend to appeal a decision.[13]

45. The Chamber is of the opinion that Kanyabashi's Response cannot be considered as a basis for certification to appeal. If Kanyabashi had wanted to request a certification to appeal, he should have followed the proper procedure by filing a motion within the prescribed time-limit, but not under the guise of a response. The Chamber therefore will not take into account the portions of Kanyabashi's Response in support of the request for a certification to appeal.

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[10] *Prosecutor v. Nyiramasuhuko* et al., Case No 89-42-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 Interviews, 1 June 2006.

[11] See Annex 1 of Ntahobali's Reply, containing a copy of the letter request additional supplies and the Registry's negative response.

[12] *Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 11.

[13] *Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 14. See also *Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motion for Certification to Appeal the Decision of 21 March 2007, 3 May 2007, para. 21.

46. Decisions rendered under Rule 73 motions are without interlocutory appeal, except at the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).[14] These conditions must be specifically demonstrated and are not met through a general reference to the submissions on which the impugned decisions were rendered. In its Decision of 26 October 2006, the Appeals Chamber emphasizes that certification of appeal has to be the absolute exception when deciding on the admissibility of the evidence and that "the standard of review on interlocutory appeal for such discretionary matters is therefore not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but whether the Trial Chamber reasonably exercised its discretion in reaching its decision."[15]

47. Furthermore, the Chamber recalls the Appeals Chamber Decision of 2 July 2004. [16]

> Pursuant to Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence.

48. The Chamber notes that the Defence for Nyiramasuhuko, referring to the *Bagosora* Decision of 21 July 2005[17], argues that certification may be appropriate where "broad categories of evidence" are affected by a decision.[18] Furthermore, the Defence for Ntahobali contends that on 1 June 2006, the Chamber granted a certification to appeal because "similar issues may arise in the future and [ ] an immediate resolution of this matter by the Appeals Chamber may therefore materially advance the proceedings."[19] The Chamber notes that the *Bagosora* Decision dealt with the violation of witness protection orders and the Chamber's Decision of 1 June 2006 related to "Custodial Interviews" of an accused person. These subject matters are clearly distinguishable from that of the Impugned Decisions and therefore cannot form a basis for deciding the matters at issue"

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[14] *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Arsène Ntahobali's motion for certification to appeal the decision of 29 June 2007, 20 August 2007, para. 12; *Prosecutor v. Nyiramasuhuko* et *al.*, Case No. ICTR-97-21-T, "Decision on Defence Motion for certification to appeal the "Decision on Defence Motion for a stay of proceedings and abuse of process", 19 March 2004 paragraphs 12-16; *Prosecutor v. Ntahobali and 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", 18 March 2004, paras. 14-17.

[15] *Prosecutor v. Nyiramasuhuko* et al., Case No. Case No. ICTR-97-21-AR73, Decision on "Appeal of Arsène Shalom Ntahobali against the decision on Kanyabashi's oral motion to cross-examine Ntahobali using Ntahobali's statements to Prosecution investigators in July 1997", 27 October 2006, para. 10. See furthermore *Prosecutor v. Prlić* et al., IT-04-74-AR73.6, Decision on appeals against decision admitting transcript of Jadranko Prlić's questioning into evidence, 23 November 2007, para. 8.

[16] *Prosecutor v. Nyiramasuhuko* et al., 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 QBZ inadmissible, 2 July 2004, para. 15. See furthermore *Prosecutor v. Nyiramasuhuko* et al., Case No. ICTR-97-21-AR73, Decision on Pauline Nyiramasuhuko's Appeal on the admissibility of evidence, 4 October 2004 paras 5 -7.

[17] see above Fn. 3; *Bagosora* et al, Certification of Appeal concerning Prosecution investigation of protected Defence witnesses, 21 July 2005, para. 6.

[18] *Prosecutor v. Setako*, Decision on defence motion for certification to appeal the decision on defence motions for rule 68 disclosure, 8 November 2007, para. 6.

[19] see above Fn. 10; *Prosecutor v. Nyiramasuhuko* et al., Case No 89-42-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 Interviews, 1 June 2006.

49. In any event, the Chamber notes that the Impugned Decisions deal with a relatively narrow segment of material, namely parts of the anticipated evidence included in the will says of Witness D-20-H and D-13-O. Moreover, The Chamber recalls that cross-examination within the defined scope of Rule 90 (G)(i) and as further delineated in the *Bagosora* Decision of 1 September 2006,[20] is a fundamental right and cannot be restricted. The Chamber is satisfied that the Prosecution's cross-examination, subject to the Impugned Decision of 12 November 2007, was within the scope of Rule 90 (G)(i). Therefore, the Chamber is satisfied that the Impugned Decisions were rendered within its discretionary limits.

50. Finally, the Chamber notes that a request for certification to appeal a decision is not the proper forum to deal with the general legal questions as raised in Nyiramasuhuko's Motion.[21] Moreover, the Chamber considers that the Defence has generally revisited the thrust of its previous arguments which led to the Impugned Decisions rather than demonstrating the conditions required for the Chamber to grant certification to appeal.

51. The Chamber finds therefore that the Defence has failed to satisfy the criteria for granting certification to appeal under Rule 73(B).

**FOR THE ABOVE REASONS, THE TRIBUNAL,**

**DENIES** the Motions.

Arusha, 7 December 2007

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

[20] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on severance or exclusion of evidence based on prejudice arising from testimony of Jean Kambanda, 11 September 2006, para. 2: "Rule 90 (G)(i) [of the Rules of Procedure and Evidence ("the Rules")] constrains the scope of cross-examination to three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case". This last category must [be] read in light of Rule 85 (A)(i), which prescribes that "the trial shall be presented in the following sequence: (i) Evidence of the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder ...." This sequence implies that ... matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case. The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas."

[21] See above paras. 19, 20.