

ICTR-98-44-T
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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
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 15 May 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL PANEL OF APPELLATE
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**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION
TO APPEAL DECISION ON MOTION FOR SUBPOENA TO PRESIDENT PAUL
KAGAME**

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

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Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. Joseph Nzirorera applies to appeal the portion of a previous decision of this Chamber, which denied his motion to issue a subpoena to the President of Rwanda, Paul Kagame, directing him to submit to an interview by Counsel for Nzirorera.¹ He contends that the Chamber: 1) erred in concluding that the assassinations of President Habyarimana, Emmanuel Gapyisi and Félicien Gatabazi ("The Assassinations") are irrelevant to the case ("Relevance Issue"); and 2) applied the wrong standard for subpoenas for interviews – applying a higher standard for obtaining evidence than for the admissibility of evidence – when interpreting the requirement that the prospective testimony "can materially assist his case" ("Standards Issue"). The Prosecution opposes the motion.²

DELIBERATIONS

The Standard for certifying an interlocutory appeal under Rule 73(B)

2. Rule 73(B) of the Rules of Procedure and Evidence ("Rules") provides that leave for an interlocutory appeal may be granted when the applicant demonstrates that the following two conditions are met: 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 2) "an immediate resolution by the Appeals Chamber – in the view of the Trial Chamber – may materially advance the proceedings." A Trial Chamber may grant certification to appeal a decision in its entirety or limit the certification to part of the decision or to one or more particular issues in the decision. Certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.³ The Appeals Chamber has repeatedly emphasized the primacy of Trial Chamber rulings involving an exercise of discretion, insisting that interlocutory appeals under Rule 73(B) are only warranted in exceptional circumstances.⁴

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera, ("Karemera et al.")* Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame (TC) ("Impugned Decision"), 19 February 2008. See also Application for Certification to Appeal Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed on 25 February 2008 ("Nzirorera's Application"); Reply Brief: Application for Certification to Appeal Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed on 5 March 2008 ("Nzirorera's Reply").

² Prosecutor's Response to Nzirorera's Application for Certification to Appeal, filed on 3 March 2008 ("Prosecutor's Response").

³ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses (TC), filed on 28 September 2005, para. 3.

⁴ See *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, ("Bagosora et al.")* Decision on Kabiligi Application for Certification concerning Defence Cross examination after Prosecution Cross Examination (AC), 2 December 2005, para. 5.

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The Relevance Issue

3. In regard to the first prong of Rule 73(B), Joseph Nzirorera submits that a key Prosecution contention in this case is that the Accused and their fellow members of the joint criminal enterprise obstructed the implementation of the Arusha Accords and the swearing in of the Broad Based Transitional Government, as part of the plan for extermination of the Tutsis. Since the assassination of Felicien Gatabazi was a serious effort to obstruct the Arusha Accords and the swearing-in of the government, proof that it was the RPF who was responsible for the Assassinations will make it less likely that the Accused are guilty of planning the extermination of the Tutsis. He argues that the impugned decision in effect precludes him from obtaining evidence of RPF responsibility for these events.

4. It is a fact that the Accused are not charged with involvement in the Assassinations. Further, even if the possible responsibility of the RPF for the Assassinations would otherwise be relevant to the defence of the Accused, Joseph Nzirorera has not demonstrated that an interview with Paul Kagame would be the only – or even the most adequate – means to obtain evidence on the matter. The Chamber is therefore not satisfied that the impugned decision significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

5. In regard to the second prong of Rule 73(B), Joseph Nzirorera argues that he is intending to call a number of witnesses on this issue, and that the impugned decision is inconsistent with other findings made by this and other Chambers to the effect that the Assassinations were of some relevance to the role of other members of the alleged joint criminal enterprise.

6. If the arguments of Joseph Nzirorera were accepted, the issue could be qualified as relating to a particularly crucial matter of evidence, the immediate resolution of which by the Appeals Chamber could materially advance the proceedings. The Chamber, however, recalls that the scope of the impugned decision is limited to the issue whether the Chamber should compel the President of Rwanda, Paul Kagame, to submit to an interview by Counsel for Nzirorera on the possible responsibility of the RPF for the Assassinations. The reference in the decision to, among other things, the fact that the Accused are not charged with involvement in the Assassinations, does not amount to a ruling that all evidence on this matter shall be excluded. Therefore, the impugned decision does not provide an appropriate basis for the Appeals Chamber to rule on the general relevance of evidence on the matter.

The Standards Issue

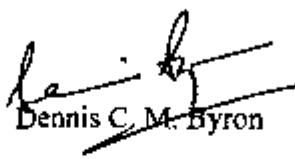
7. Joseph Nzirorera contends that the Chamber misinterpreted the requirement for the issuance of a *subpoena*, which states that the applicant must demonstrate that the prospective testimony can materially assist the applicant in respect of clearly identified issues relevant to the trial. He claims that this error resulted in a higher standard for obtaining evidence than for the admissibility of evidence, which will block him from obtaining and presenting important evidence at the trial, and thwart his defence.

8. In relation to the second prong of Rule 73 (B), the Chamber notes that it based the impugned standard on references to jurisprudence from both *ad hoc* Tribunals. Joseph Nzirorera does not demonstrate that the impugned standard is not in accordance with consistent jurisprudence, but seems to challenge the standard in itself. Thus, he touches upon an issue of relevance to broad categories of evidence, the immediate resolution of which by the Appeals Chamber could materially advance the proceedings.

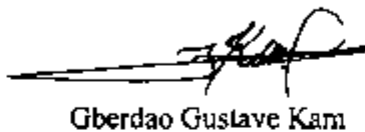
9. The Chamber, however, is not convinced that "there is serious doubt as to the correctness of the legal principles at issue".⁵ Furthermore, it has already been established that the first prong of Rule 73 (B) has not been satisfied. Joseph Nzirorera's application therefore falls to be rejected.

FOR THESE REASONS, THE CHAMBER DENIES Joseph Nzirorera's application for certification of an interlocutory appeal.

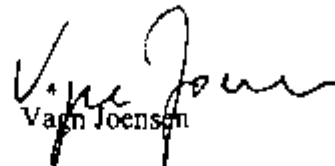
Arusha, 15 May 2008, done in English.


Dennis C. M. Byron

Presiding Judge


Gberdao Gustave Kam

Judge


Vagn Joensen

Judge

[Seal of the Tribunal]



⁵ *Bagosora et al.*, Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003, para. 6. See also *Bagosora et al.*, Decision on Certification of Appeal Concerning With-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10.