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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: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 3 February 2009

JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
CHAMBER'S DECISION OF 2 JANUARY 2009

Rules 73, 77 and 93 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

INTRODUCTION

1. The Defence brought a motion seeking the removal of Witness BLP from the Prosecutor's list of witnesses on the basis that the inclusion of Witness BLP violates Rule 93 of the Rules of Procedure and Evidence ("Rules").¹ The Chamber issued a Decision denying the Defence motion on 10 November 2008.²

2. On 27 November 2008, after the Prosecutor filed his Pre-Trial Brief, which referred to meetings between the Accused and Witness BLP,³ the Defence brought a further motion for the removal of Witness BLP from the Prosecutor's list of witnesses.⁴ On 2 January 2009, the Chamber issued a Decision denying the Defence motion ("the Impugned Decision").⁵

3. The Defence now seeks certification to appeal the Impugned Decision, submitting that the Chamber erred in law by concluding, without any analysis, that Rule 93 applies to contempt proceedings.⁶

4. The Prosecutor objects to the Motion, submitting that the Defence has not demonstrated how the issue in question would significantly affect the fair and expeditious conduct of the trial.⁷

DISCUSSION

The Applicable Law

5. Rule 73 (B) of the Rules provides that decisions on motions brought pursuant to Rule 73 are without interlocutory appeal, unless certified by the Trial Chamber.

6. The Chamber may grant certification "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals

¹ *Prosecutor v. Nshogoza*, "Defence Motion to Have Witness BLP Removed from Prosecution List of Witnesses and for Prosecution to File Pre-Trial Brief," filed 29 October 2008.

² *Nshogoza*, Decision on Defence Motion to Have Witness BLP Removed from Prosecution List of Witnesses and for the Prosecution to File a Pre-Trial Brief, 10 November 2008. The Chamber concluded, at paragraph 6, that the request to have Witness BLP removed from the list of witness was moot because the Prosecutor had already indicated that he no longer intended to call the witness.

³ *Nshogoza*, "Prosecutor's Pre-Trial Brief," filed 25 November 2008. Witness BLP was discussed in a section entitled "Evidence of a Pattern of Conduct," p. 29-30.

⁴ *Nshogoza*, "Defence Further Motion for a Court Order to the Prosecutor to Remove Witness BLP from his Witness List," filed 27 November 2008.

⁵ *Nshogoza*, Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from his Witness List, 2 January 2009.

⁶ *Nshogoza*, "Defence Application for Certification of the Trial Chamber's Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from his Witness List on Application of Rule 93," filed 9 January 2009 ("Motion").

⁷ *Nshogoza*, "Prosecutor's Response to 'Defence Application for Certification of the Trial Chamber's Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from his Witness List on (sic) Application of Rule 93,'" filed 14 January 2009 ("Response").

Chamber may materially advance the proceedings.”⁸ However, the decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.⁹

7. The correctness of the decision is a matter for the Appeals Chamber. Trial Chambers need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.¹⁰ However, in the process of determining whether the criteria for certification to appeal are met, the Trial Chamber can revisit the substance of the impugned decision.¹¹ Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.¹² Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.¹³

8. A Trial Chamber may grant certification to appeal a decision in its entirety, or limit the certification to one or more specific issues in the decision.¹⁴

⁸ Rule 73 (B).

⁹ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 15; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-T, Decision on Jerome Bicamumpaka’s Application for Certification to Appeal the Trial Chamber’s Decision on the Rule 92 *bis* Admission of Faustin Nyagahima’s Written Statement, 22 August 2007, para.3 (citations omitted); *Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October 2007, para. 6; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Request for Certification to Appeal the Chamber’s Decision of 29 February 2008, 22 May 2008, para. 3.

¹⁰ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Karemera et al.*, Decision on Joseph Nzirorera’s Application for Certificatoin to Appeal Decision on Motion for Subpoena to President Paul Kagame, 15 May 2008, para. 2; *Niyitegeka*, Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 17 *Prosecutor v. Theoneste Bagosora et. al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4.; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-T, Decision on Jerome Bicamumpaka’s Application for Certification to Appeal the Trial Chamber’s Decision on the Rule 92 *bis* Admission of Faustin Nyagahima’s Written Statement, 22 August 2007, para. 4; *Bizimungu et. al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi’s Motion for Certification to Appeal the Decision on Mugenzi’s Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para. 6 (citations omitted).

¹¹ *Bagosora et. al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para 5; *Prosecutor v. Bizimungu et. al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi’s Motion for Certification to Appeal the Decision on Mugenzi’s Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para 11; *Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

¹² *Bagosora et. al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

¹³ *Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Request for Certification to Appeal the Chamber’s Decision of 29 February 2008, 22 May 2008, para. 7.

¹⁴ *Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 3.

Should the Chamber Certify the Impugned Decision for Appeal?

9. Rule 93 (A) of the Rules provides that “[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.” In the Impugned Decision, the Chamber concluded that, pursuant to Rule 77 (E), Rule 93, which falls within Parts Four to Eight of the Rules, applies *mutatis mutandis* to contempt proceedings.¹⁵

10. According to the Defence, the Impugned Decision warrants certification because it “will keep the evidence to that related to the indictment and the elements in support of the indictment and not waste the Chamber’s time.” The Defence asserts that the issue affects the fair and expeditious conduct of the proceedings or outcome of the trial because it would ensure that the Accused is not tried for irrelevant conduct which has been previously adjudicated in another proceeding.¹⁶

11. The Defence also makes submissions comparing Rule 72 of the Rules to Rule 93 of the Rules, both of which fall within parts Four to Eight of the Rules, and asserts that these are “the only rules that specifically refer to ‘serious violations’.” On this basis, the Defence asserts that if Rule 72 does not apply to contempt proceedings, nor should Rule 93. The Defence submits that the applicability of Rule 93 to contempt proceedings is an important legal issue, a resolution of which will “govern all future cases” before both *ad hoc* Tribunals.¹⁷

12. The Prosecutor responds that the test for certification is not met; that no evidence has yet been admitted in this case; that the Prosecutor anticipates that he will seek admission of a limited piece of evidence; and that there has been no error of law and no submission by the Defence on how an intervention by the Appeals Chamber would materially advance the proceedings.¹⁸

13. The Chamber notes that, contrary to the Defence submissions, Rule 72 does not contain the phrase “serious violations of international humanitarian law,” nor does such language relate to the non-applicability of Rule 72 to challenge jurisdiction in contempt proceedings. Further, the Defence misrepresents this Chamber’s decisions when it submits that the Chamber held that Rule 72 does not apply to contempt proceedings. This Chamber has not made any such finding, but has rather acknowledged that Rule 72 cannot be used as a basis to challenge the jurisdiction of the Tribunal to prosecute individuals for contempt.¹⁹

¹⁵ Rule 77 (E) provides that Parts Four to Eight of the Rules apply *mutatis mutandis* to contempt proceedings.

¹⁶ Motion, para. 19.

¹⁷ Motion, paras. 17-18.

¹⁸ Response, paras. 3-10. The Prosecutor submits, at paragraph 9, that the comparison between Rule 72 and Rule 93 of the Rules is not correct and that the Defence’s reliance on Rule 72 to challenge the authority of the Prosecutor “was misplaced, as a matter of law.”

¹⁹ *Nshogoza*, Decision on Defence Preliminary Challenges and Subsidiary Motion to Dismiss the Indictment, 12 December 2008, paras. 15-17. It is a settled matter of Appeals Chamber jurisprudence that Rule 72 (A) (i) cannot be used to challenge the jurisdiction of the Tribunal for contempt proceedings because, as the Appeals Chamber held, “the jurisdiction of the Trial Chamber to conduct contempt proceedings arises from its inherent authority to ensure the integrity of its own proceedings...”. See *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings, 29 August 2005. The Accused sought to challenge the jurisdiction of the ICTY on the basis of Rule 72 (D) of the ICTY Rules, which like Rule 72 (D) of the Rules, defines what constitutes a challenge to jurisdiction under Rule 72. The Appeals Chamber concluded, at paragraph 35, that the rule was “clear and unambiguous in its terms and is inapplicable to

14. The Chamber considers that the applicability of Rule 93 to contempt proceedings is distinct from the issue of whether the evidence will be admitted. The Chamber will determine whether or not to admit the evidence, taking into account the relevance and probative value of the evidence, and whether it is in the interests of justice for such evidence to be admitted.²⁰ As the Chamber has made no determination on the admissibility of the evidence, the objections raised by the Defence are premature. Further, the Chamber considers that the application amounts to a challenge to the clear and unambiguous language of Rule 77 (E). The Chamber deprecates the practice of filing such motions.

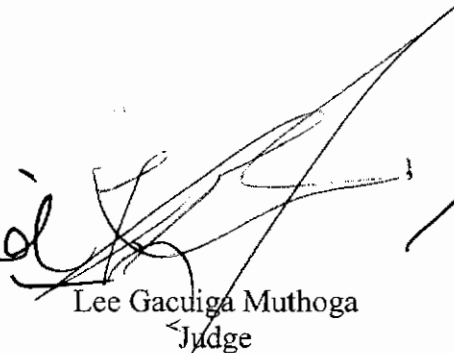
15. The Chamber is therefore not satisfied that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. Accordingly, the criteria for certification under Rule 73 (B) have not been met.


FOR THESE REASONS, the Chamber

DENIES the Motion in its entirety.

Arusha, 3 February 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacigira Muthoga
Judge


With the consent, and
on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]



proceedings to contempt." See also *Prosecutor v. Marijan Krizic*, Case No. IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 2 March 2006, para. 4. Motions can only be brought pursuant to Rule 72 on the basis of the grounds enumerated in that provision. See *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003, where the Appeals Chamber held that a motion which challenged the jurisdiction of the Tribunal over the appellant based on the illegality of his arrest, but not on any of the grounds listed in Rule 72 (D) was not properly brought under Rule 72.

²⁰ Rule 93 (A) of the Rules provides that "[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice."