

ICTR-07-91-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: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 19 February 2009

JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

**DECISION ON DEFENCE MOTION FOR CERTIFICATION OF THE TRIAL
CHAMBER'S 'DECISION ON THE DEFENCE'S URGENT MOTION FOR A
SUBPOENA TO MS. LORETTA LYNCH'**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'arua
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

INTRODUCTION

1. On 10 February 2009, this Trial Chamber issued a decision ("Impugned Decision")¹ denying the Defence Motion to subpoena Ms. Loretta Lynch, who was Special Counsel for the Prosecution appointed to investigate potential false testimony in the *Kamuhanda* proceedings.²
2. The Impugned Decision found that the Defence had not shown that Ms. Lynch has information which can materially assist the Chamber in respect of clearly identified issues relevant to this trial. In particular, the Chamber held that the Defence had not shown that Ms. Lynch would have information which would materially assist the Chamber in determining whether Prosecution Witnesses GAA and GEX were suborned by the Accused, nor with regard to Witness GAA's credibility.³
3. On 16 February 2009, the Defence filed a motion for certification of the Impugned Decision.⁴

DISCUSSION

Law on Certification to Appeal

4. Pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("Rules"), 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 Chamber may materially advance the proceedings." However, the decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.⁵
5. The correctness of the impugned decision is a matter for the Appeals Chamber. Trial Chambers need not consider the merits of the impugned decision; but rather, whether the

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-2007-91-T, Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 10 February 2009.

² *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision, 19 May 2005.

³ Impugned Decision, paras. 8-9.

⁴ *Nshogoza*, Defence Motion for Certification of the Trial Chamber's 'Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch', 16 February 2009 ("Motion").

⁵ *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 et al.*, 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.



moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.⁶ 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.⁷ Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.⁸ Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.⁹

Are the Criteria for Certification to Appeal met?

6. The Defence submits that the Impugned Decision involves an issue that will significantly affect the expeditious conduct of proceedings. More specifically, the Defence submits that Ms. Lynch's investigations are directly relevant to whether Prosecution Witnesses GAA and GEX are credible witnesses, and whether they fabricated their testimony before the Appeals Chamber in the *Kamuhanda* proceedings.¹⁰ According to the Defence, without Ms. Lynch's testimony, "the defence will be forced to elicit the evidence Ms. Lynch could herself easily and efficiently provide, pieced together through the cross-examination of prosecution witnesses and the examination of numerous defence witnesses. Put simply, Ms. Lynch's testimony has the ability to dramatically reduce the length of these proceedings."¹¹

7. The Defence further submits that the Impugned Decision involves an issue which would significantly affect the outcome of the trial as Ms. Lynch's report of the investigation into the *Kamuhanda* proceedings ("Lynch Report") is exculpatory material, "particularly combined with other evidence which the defence intends to lead during the presentation of its evidence in March 2009. To finally be granted access to Ms. Lynch and her knowledge and materials related to her investigation would change the course of this trial and put before the Chamber a wealth of relevant information collected contemporaneously with the events in question in this case."¹²

⁶ *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 Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame, 15 May 2008, para. 2; *Niyitegeka*, 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; *Bizimungu et al.*, 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.*, 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).

⁷ *Bagosora et al.*, 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; *Bizimungu et al.*, 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 et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

⁸ *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

⁹ *Ndindiliyimana et al.*, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 7.

¹⁰ Motion, para. 18.

¹¹ *Ibid.*

¹² Motion, para. 19.



8. The Chamber will now turn to consider the Defence submissions in light of the criteria under Rule 73 (B).

9. With regard to the submission that Ms. Lynch's testimony is relevant to assessing the credibility of Witnesses GAA and GEX, the Chamber does not consider that this would significantly affect the expeditious conduct of proceedings. The Chamber considers that the opinion of Ms. Lynch, which would be of limited evidentiary value, if any, would not assist it in assessing the credibility of Witnesses GAA and GEX. Therefore, the Chamber considers that the Impugned Decision does not involve an issue that would affect the expeditious conduct of proceedings as maintained by the Defence.


10. With respect to the Defence submission that the Lynch Report is exculpatory, and that access to this information and other material, would affect the outcome of the trial, the Chamber recalls that the Prosecutor maintains that no such report exists.¹³ The Chamber further recalls its previous decision that the Defence failed to demonstrate how the Lynch Report, and related material, are exculpatory or potentially exculpatory.¹⁴ The Defence has proffered no other submission on how the issue of the Chamber ordering the subpoena of Ms. Lynch would significantly affect the outcome of the trial.


11. In view of the Chamber's finding that the Impugned Decision does not involve an issue that would significantly affect the fair and expeditious conduct of proceedings, or the outcome of the trial, the Chamber need not proceed to consider the second requirement under Rule 73 (B), namely, whether immediate resolution of this matter by the Appeals Chamber would materially advance the proceedings.

FOR THESE REASONS, the Chamber


DENIES the Defence Motion.

Arusha, 19 February 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Aydin Sefa Akay
Judge


[Seal of the Tribunal]

¹³ Nshogoza, T. 30 October 2008, pp. 10-11.

¹⁴ Nshogoza, Decision on Defence Motions for Disclosure, 22 December 2008, para. 38, and Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 22 December on Disclosure, 19 February 2009.



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