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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:** 11 March 2009

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**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-T**

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE  
CHAMBER'S DECISION DENYING A ONE WEEK POSTPONEMENT OF  
THE DEFENCE CASE**

*Rules 54, 73, and 77 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Paul Ng'aura  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

## INTRODUCTION

1. By way of motion filed on 20 February 2009, the Defence sought to postpone the commencement of the Defence case by one week because the Prosecutor's case "lasted nearly two (2) weeks rather than the four days originally scheduled."<sup>1</sup> On 26 February 2009, the Chamber issued a decision denying the Defence motion.<sup>2</sup> The Defence sought reconsideration of the Chamber's 26 February 2009 Decision denying the Defence request for postponement of its case,<sup>3</sup> which the Chamber denied ("the Impugned Decision").<sup>4</sup>

2. The Defence now seeks certification to appeal the Chamber's Decision denying its motion for reconsideration.<sup>5</sup>

3. In light of the imminent commencement of the Defence case, the Chamber will issue a Decision without awaiting a response from the Prosecutor.

## DISCUSSION

### *The Applicable Law*

4. 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.

5. 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."<sup>6</sup> However, the decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.<sup>7</sup>

6. 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

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, "Preliminary List of Defence Witnesses and Motion for One-Week Postponement of Defence Case," filed 20 February 2009, para. 2.

<sup>2</sup> *Nshogoza*, Decision on Defence Motion for Postponement of Defence Case, 26 February 2009.

<sup>3</sup> *Nshogoza*, "Defence Request for Reconsideration of the 'Decision on Defence Motion for Postponement of the Defence Case' and Request to Postpone the Filing of the Pre-Defence Brief," filed 2 March 2009.

<sup>4</sup> *Nshogoza*, Decision on Defence Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case, 4 March 2009.

<sup>5</sup> *Nshogoza*, "Defence Motion for Certification to Appeal the Trial Chamber's 'Decision on Defence Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case'," filed 6 March 2009 ("Motion").

<sup>6</sup> Rule 73 (B).

<sup>7</sup> *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.

has demonstrated that the criteria set out in Rule 73 (B) have been met.<sup>8</sup> However, the Trial Chamber can revisit the substance of the impugned decision to the extent that this is done within the context of determining whether the Rule 73 (B) criteria are met.<sup>9</sup> Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.<sup>10</sup> Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.<sup>11</sup>

7. 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.<sup>12</sup>

*Should the Chamber Certify the Impugned Decision for Appeal?*

(i) *Does the decision involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial.*

8. The Defence asserts that the Impugned Decision affects the fair and expeditious conduct of the proceedings, and outcome of the trial, because a postponement of the Defence case would save time “if the Defence is allowed to conduct its preparations according to the original plan” and avoid the need to possibly conduct further investigations after the commencement of the Defence case.<sup>13</sup>

9. The Chamber finds that the Defence has failed to show that denying the Defence request to postpone its case by one week is an issue which would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial.<sup>14</sup> The Chamber has already indicated that if, after the commencement of the Defence case, the Defence submits

<sup>8</sup> *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 Nziroera’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 Bicaumupaka’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 2008, para. 6 (citations omitted).

<sup>9</sup> *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 2008, para. 11; *Karemera et al.*, Decision on Joseph Nziroera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

<sup>10</sup> *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

<sup>11</sup> *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.

<sup>12</sup> *Karemera et al.*, Decision on Joseph Nziroera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 3.

<sup>13</sup> Motion, para. 15.

<sup>14</sup> *Nshogoza*, Decision on Defence Motion for Postponement of Defence Case, 26 February 2009; Impugned Decision, para. 15: As the Chamber explained in its previous decisions, there were various factors that went into determining the trial schedule.


that further investigations are required, the Chamber will consider the merits of any such submissions at that time.<sup>15</sup> The Chamber considers that such an approach best serves the requirements of both fairness and expediency.

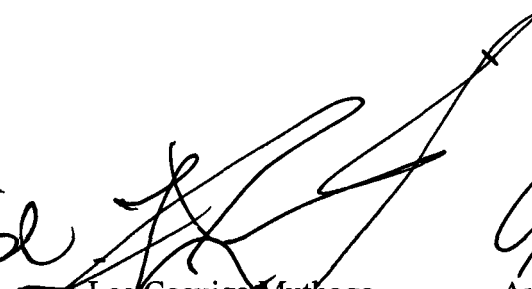
10. Since the Chamber is not satisfied that the Impugned Decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, it need not proceed to consider whether an immediate resolution by the Appeals Chamber would materially advance the proceedings.


**FOR THESE REASONS**, the Chamber

**DENIES** the Motion in its entirety.

Arusha, 11 March 2009

  
Khalida Raehid Khan  
Presiding Judge

  
Lee Gacuiga Muthoga  
Judge

  
Aydin Sefa Akay  
Judge

[Seal of the Tribunal]



<sup>15</sup> Impugned Decision.