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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:** 1 July 2009

JUDICIAL  
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**THE PROSECUTION**

v.

**Édouard KAREMERA  
Matthieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

**DECISION ON ÉDOUARD KAREMERA'S APPLICATION FOR CERTIFICATION  
TO APPEAL THE DECISION DENYING HIS MOTION FOR ADMISSION OF AN  
EXPERT WITNESS**

*Rule 73 bis of the Rules of Procedure and Evidence*

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[Signature]

## INTRODUCTION

1. On 6 May 2009, Édouard Karemera moved the Chamber, on the basis of Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules"), to admit Dr. Xavier Bangamwabo as an expert witness in this case.<sup>1</sup> On 22 May 2009, the Chamber found that it did not require the assistance of expert testimony to resolve the questions of fact which Dr. Bangamwabo was called to testify on and that Dr. Bangamwabo's testimony should therefore not be admitted as expert testimony within the meaning of Rule 94 *bis*.<sup>2</sup>
2. On 28 May 2009, Édouard Karemera filed his motion for certification to appeal the aforementioned decision.<sup>3</sup> The Prosecution does not oppose Karemera's Motion.<sup>4</sup>

## DELIBERATIONS

3. Rule 73(B) of the Rules provides that certification to appeal may only be granted if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the 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>5</sup> The moving party must demonstrate that both requirements of Rule 73(B) are satisfied, and even then, certification to appeal must remain exceptional.<sup>6</sup>

<sup>1</sup> Requête aux fins d'acceptation d'un témoin-expert, filed on 6 May 2009 ("Karemera's Motion").

<sup>2</sup> *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Édouard Karemera's Motion for the Admission of an Expert Witness, 22 May 2009 ("Impugned Decision").

<sup>3</sup> Requête aux fins de certification d'Appel contre la décision du 22 mai 2009 relative à la requête d'Édouard Karemera aux fins d'acceptation d'un témoin expert, filed on 28 May 2009 ("Karemera's Application").

<sup>4</sup> Prosecutor's Response to « Requête aux fins de certification d'appel contre la décision du 22 mai 2009 relative à la requête d'Édouard Karemera aux fins d'acceptation d'un expert témoin, » filed on 2 June 2009 ("Prosecution's Response"). Although the Prosecution asserts that Karemera's failure to comply with the formal requirements of Rule 94 *bis* is a sufficient basis for denying certification (*Ibid.*, para. 4), it concedes that similar matters have been certified, and thus defers to the Chamber on the final decision (*Ibid.*, para. 6).

<sup>5</sup> *The Prosecutor v. Theoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, ICTR-98-41-T ("*Bagosora et al.*"), Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4.

<sup>6</sup> *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Vlastimir, Dordevic, and Sreten Lukić*, Case No. IT-05-87-T ("*Milutinović et al.*"), Decision on

4. In the Chamber's opinion, Édouard Karemera has not satisfied the first requirement of Rule 73(B): that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Karemera argues that the Impugned Decision affects his fair trial rights including his rights to have adequate time and facilities for the preparation of his defence and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him. However, Karemera has not shown that the Impugned Decision is one which could have an effect on his ability to present his case.<sup>7</sup> The Application does not include any factual or legal indications on how the denial of Dr. Bangamwabo's admission as an expert witness affects his fair trial rights.<sup>8</sup>

5. Additionally, Édouard Karemera's argument that the Impugned Decision violates the principle of the equality of arms is unfounded. The Chamber denied the Prosecution's request for the expert testimony of Alison Des Forge, André Guichaoua and Binaifer Nowrojee, on issues overlapping the proposed testimony of Dr. Bangamwabo.<sup>9</sup> The Chamber denied the Prosecution and Defence's motions on similar grounds: the assistance of expert testimony was not required because the Chamber has already taken judicial notice or already heard testimony on issues the expert testimony proposed to address.<sup>10</sup> Therefore, the Chamber has remained evenly handed in its decisions to exclude expert testimony.

6. Assuming *arguendo* the Defence met the first requirement, the Chamber finds that the second requirement that an immediate resolution by the Appeals Chamber would materially

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Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006.

<sup>7</sup> See *Milutinović et al.*, Decision Denying Prosecution's Request for Certification of Rule 73 *Bis* Issue for Appeal, 30 August 2006 (The Chamber found that without any legal citation or factual indication that exclusion of the crimes sites did or would seriously impact the fair and expeditious conduct of the outcome of the Prosecution's case, the first prong of Rule 73(B) has not been satisfied.)

<sup>8</sup> *Ibid.*, para. 4.

<sup>9</sup> *Karemera et al.*, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007, paras. 22, 28 and 35.

<sup>10</sup> *Ibid.*, paras. 24, 25, 29 and 34; Impugned Decision, para. 8. See also *Prosecutor v. Aloys Simba*, ICTR-01-76-I, Decision on Prosecutor's Request for Certification to Appeal Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness, 16 August 2004 (The Chamber found that as similar evidence was available through other witness, the appeal did not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.)

advance the proceedings has also not been satisfied. The question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings "requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue."<sup>11</sup> This may include the Chamber committing an error as to the applicable law; making a patently incorrect conclusion of fact; or making a decision that was so unfair or unreasonable as to constitute an abuse of the Chamber's discretion.<sup>12</sup>

7. The Appeals Chamber has held that interlocutory appeals under Rule 73 (B) are exceptional and has underscored the primacy of Trial Chamber rulings involving an exercise of discretion.<sup>13</sup> The Appeals Chamber has noted that a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure."<sup>14</sup>

8. Here, the Chamber has exercised its discretion squarely in one of the situations the Appeals Chamber noted: evaluating evidence. The Defence has only raised the vague argument that the Impugned Decision goes against the equality of arms, but has not sought to

<sup>11</sup> *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, citing: *Bagosora et al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 December 2005, para. 7.

<sup>12</sup> *Ibid.*, para 4.

<sup>13</sup> *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 5; See also *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, fn. 7.

<sup>14</sup> *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3. See also *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 5.


show that the Chamber abused its discretion or used an incorrect principle of law when relying on its discretion to deny admission of the expert witness.<sup>15</sup>

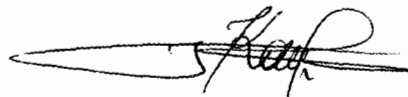
9. Additionally, the admission of expert witnesses should be done on a case-by-case basis. The Chamber must find that each expert meet certain requirements before they can be considered for admission as an expert witness.<sup>16</sup> Therefore, the resolution of the issue will not materially advance the proceedings because each witness must be reviewed on a case-by-case basis and there is a clear standard under which to review each motion for admission.<sup>17</sup>

**FOR THE FOREGOING REASONS,**

**THE CHAMBER DENIES the Motion in its entirety.**

Arusha, 1 July 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

[Seal of the Tribunal]



<sup>15</sup> *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para. 4 (The Chamber found in the absence of any reasonably articulated ground of appeal, certification could not materially advance the proceedings.)

<sup>16</sup> *Karemera et al.*, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007, paras. 13-15.

<sup>17</sup> See *Bagosora et al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 December 2005 (The Chamber held that the determination to allow cross-examination of a witness by a Defence team will continue to require a case-by-case analysis and consequently the resolution of the matter by the Appeals Chamber would not materially advance the proceedings.)