

ICTR-05-82-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: 14 August 2009

THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

JUDICIAL DEPARTMENT
RECORDS SECTION

2009 AUG 14 A 11: 53

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE CHAMBER'S DECISION OF 31 JULY 2009**

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

Office of the Prosecutor:

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INTRODUCTION

1. On 21 July 2009, the Defence filed a motion¹ requesting postponement of the Defence case, which is scheduled to commence on 14 September 2009.² The Defence further requested the postponement of deadlines set by the Chamber during a Pre-Defence Conference held on 26 May 2009 ("Order of 26 May 2009"), for the filing of:

- (i) a pre-Defence brief including a list of witnesses the Defence intends to call to testify with the name or pseudonym of each witness, a summary of facts upon which each witness will testify, the points in the indictment as to which each witness will testify and the estimated length of time required for each witness;
- (ii) admissions of facts not in dispute;
- (iii) a list of exhibits the Defence intends to offer; and
- (iv) copies of witness statements of each witness whom it intends to call.³

2. On 31 July 2009, the Chamber issued a Decision denying the Defence Motion for Postponement ("Impugned Decision").⁴ The Chamber held that the Defence had failed to demonstrate how the Accused's fair trial rights were compromised by the interval of three and a half months between the Prosecution and Defence case. Further, taking into consideration the fact that: (i) this is a single accused case with only three counts, of which one is pleaded in the alternative; (ii) the Prosecution called 12 witnesses over 12 trial days; and (iii) the Defence team is staffed with four lawyers, the Chamber found the three and a half month interval as being consistent with the Accused's fair trial rights, in particular, his right to adequate time to prepare his defence.⁵

3. On 5 August 2009, the Defence filed a Motion seeking certification to appeal the Impugned Decision.⁶

4. The Prosecution did not respond to the Motion for Certification.

¹ *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Requête en urgence de la Défense aux fins de report des délais fixés pour le dépôt du mémoire préalable au procès de la Défense et le début de la présentation de la preuve de la Défense, 21 July 2009 ("Motion for Postponement").

² On 12 May 2009, following a Status Conference on 4 May 2009, the Chamber ordered that the Defence case would commence on 14 September 2009. The Chamber noted the Defence oral submission that the earliest possible date it could commence its case was 1 September 2009. See Scheduling Order Regarding Preparation For and Commencement of the Defence Case, 12 May 2009 ("Scheduling Order"). See also, *Ntawukulilyayo*, T. 4 May 2009, pp. 3, 5-6.

³ The Pre-Defence Conference was held pursuant to Rule 73ter of the Rules of Procedure and Evidence. The deadline for the filing of items (i) to (iv) was 7 August 2009. The Order of 26 May 2009 further ordered the Defence to file, by 24 August 2009, any motions for the admission of written statements in lieu of oral testimony under Rule 92bis or for the transfer of detained witnesses under Rule 90bis. See *Ntawukulilyayo*, T. 26 May 2009, pp. 1-4.

⁴ Decision on Urgent Defence Motion for Postponement of Deadlines for Filing of Pre-Defence Brief and the Opening of the Defence Case, 31 July 2009.

⁵ Impugned Decision, para. 11.

⁶ Requête de la Défense en certification d'appel contre la décision de la Chambre du 31 juillet 2009, 5 August 2009 ("Motion for Certification").

DISCUSSION*Law Regarding Certification to Appeal*

5. Rule 73 (B) of the Rules states that leave to file an interlocutory appeal of a decision may be granted if the issue involved “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and where “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.⁷

6. 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 moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.⁸ However, the Trial Chamber may 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.⁹ Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.¹⁰ Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.¹¹

⁷ See e.g., *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Request for Certification to Appeal the Decision on Casimir Bizimungu’s Motion in Reconsideration of the Trial Chamber’s Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, para. 6.

⁸ *Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Certification to Appeal the Chamber’s Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009 (“Nshogoza Decision”), para. 6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, 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; *Prosecutor v. 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; *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 2008, para. 6 (citations omitted).

⁹ *Nshogoza* Decision, para. 6; *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 Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

¹⁰ *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3; and *Nshogoza* Decision, para. 6.

¹¹ *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. 7; and *Nshogoza* Decision, para. 6.

Should the Chamber Certify the Impugned Decision for Appeal?

7. The Chamber will first address the Defence submissions on whether the Impugned Decision involves an issue which would affect the fair and expeditious conduct of the proceedings, or outcome of the trial.

8. The Defence submits that the current judicial calendar in this case is likely to endanger the rights of the Accused, and particularly the right to adequate time and facilities for the preparation of his defence. The Motion for Certification states that the Defence has not completed its missions to date, including missions abroad and especially to Rwanda, for the purposes of collecting statements of potential witnesses. The Defence submits that it faces serious obstacles beyond its control, particularly in Rwanda, with regard to the access of documents that would exonerate the Accused. The Defence states that it is therefore extremely difficult for it to comply with the Chamber's deadlines of 7 and 24 August and for it to be prepared for commencement of trial on 14 September 2009.¹² According to the Defence, if it were to file a list of witnesses and exhibits at this stage, it would be incomplete, and if it were to commence its case on 14 September 2009, Defence Counsel would be forced to rush their preparation for the examination of Defence witnesses.¹³

9. The Defence submits that the aforementioned reasons sufficiently establish that the judicial calendar in this case is causing material prejudice to the Accused, compromises his fair trial rights, and would affect the outcome of the trial. The Defence therefore argues that the first condition for certification to appeal under Rule 73 (B) has been met.

10. The Chamber observes that there are still 30 days to the commencement of the Defence case. Additionally, the Chamber notes that where further investigations are necessary in a case, a party may apply to its Trial Chamber to amend its witness or exhibit list, or to supplement its pre-trial or pre-defence brief, and the Chamber considers the merits of such requests at that time. Similarly, a Chamber may consider the merits of a request for additional time to file any Rule 90*bis* or Rule 92*bis* motions. With respect to the commencement of the Defence case, as there are 30 days remaining for the Defence to prepare for its case, it is not possible to conclude at this stage that the scheduled date for commencement would significantly affect the fairness of proceedings or the outcome of the trial.

11. Accordingly, the Chamber finds that neither the Rule 73*ter* deadlines imposed by the Chamber, nor the scheduled date for commencement of the Defence case, significantly affect the fair and expeditious conduct of the proceedings, or outcome of the trial. Indeed, the Chamber considers that at this stage, any indefinite postponement of the Rule 73*ter* deadlines,¹⁴ or commencement of the Defence case, as requested by the Defence in its Motion for Postponement, would not best serve the requirements of fairness and expediency.



¹² With regard to the deadlines of 7 and 24 August 2009, *see supra* footnote 3.

¹³ Motion for Certification, paras. 12-16.


¹⁴ The Defence Motion for Postponement did not state any alternative dates with which it could comply.

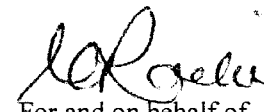
12. Since the Chamber is not satisfied that the Impugned Decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, it need not proceed to consider whether an immediate resolution by the Appeals Chamber would materially advance the proceedings. The Chamber therefore finds that the Defence has failed to meet the criteria for certification under Rule 73 (B).


FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

14 August 2009


Khalida Rachid Khan
Presiding Judge


For and on behalf of
Lee Gacuiga Muthoga
Judge


For and on behalf of
Aydin Sefa Akay
Judge

