



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:** 9 November 2009

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Matthieu NGIRUMPATSE  
Joseph NZIRORERA**  
*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION  
TO APPEAL DECISION ON SELECTIVE PROSECUTION DOCUMENTS**

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

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## INTRODUCTION

1. On 30 September 2009, the Chamber dismissed *Joseph Nzirorera's Seventh Rule 66(B) Motion: Selective Prosecution Documents*.<sup>1</sup> Joseph Nzirorera now applies for certification to appeal the Chamber's Decision.<sup>2</sup> The Prosecution opposes Nzirorera's Application.<sup>3</sup>

## DELIBERATION

2. Rule 73(B) of the Rules of Procedure and Evidence provides that a party can seek certification for interlocutory appeal for a decision on a motion advanced after the initial appearance by the Accused, where: (i) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. It is established jurisprudence that even when the two requirements of Rule 73(B) are established, granting certification must remain an exceptional measure.<sup>4</sup>

3. Joseph Nzirorera claims that the Impugned Decision affects the fairness of the trial and its outcome by denying him access to documents that he contends can be used to reduce his sentence, if found guilty.<sup>5</sup> Nzirorera also refers to a previous motion by the Prosecution which advocated that issues concerning the duty of disclosure should be viewed as relating to the fairness and expeditiousness of the trial.<sup>6</sup> Nzirorera implies that the Chamber's decision to grant certification to appeal in that instance<sup>7</sup> supports the contention that issues of disclosure will categorically satisfy the requirements of Rule 73(B).

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<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents (TC), 30 September 2009 ("Impugned Decision").

<sup>2</sup> Joseph Nzirorera's Application for Certification to Appeal Decision on Selective Prosecution Disclosure, filed 5 October 2009 ("Application").

<sup>3</sup> Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal Decision on Selective Prosecution Disclosure, filed 7 October 2009.

<sup>4</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 16<sup>th</sup> Notice of Rule 68 Violation (TC), 8 September 2009; *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Vlastimir, Dorđević, and Sreten Lukić*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report (TC), 30 August 2006.

<sup>5</sup> Application, para. 4.

<sup>6</sup> Application, para. 6, referring to the Prosecution Motion for Certification to Appeal Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, filed 22 February 2006.

<sup>7</sup> T. 28 Feb. 2006, p. 41. However, while the Chamber granted certification in that case, it made no specific reference to this statement.

4. Joseph Nzirorera further argues that an immediate resolution by the Appeals Chamber on this issue would materially advance the proceedings because it would enable him to avoid "harm" that he would otherwise incur. Specifically, Nzirorera argues that if the Trial Chamber is found to have erred, he will have access to the documents before sentencing, thus potentially enabling him to reduce any sentence ordered.<sup>8</sup>

5. In the Impugned Decision, the Chamber found that Joseph Nzirorera had not sufficiently demonstrated the materiality of the documents sought for his Defence case<sup>9</sup> because it was not satisfied that he had made a *prima facie* showing that there had been selective prosecution.<sup>10</sup> The documents did not therefore come within the Prosecution's disclosure obligations set out in Rule 66(B) and the Chamber accordingly dismissed Nzirorera's motion.

6. In considering whether to grant certification for appeal, the Chamber need not concern itself with the issue of whether or not the documents could materially support a claim for selective prosecution. Rather, the concern is whether disclosure of the documents is an issue that merits certification under Rule 73(B).

7. The Impugned Decision does not touch upon the fair and expeditious conduct of the proceedings or outcome of the trial. The Chamber accepts that evidence which affects the determination of the Accused's sentence should be seen as forming part of the Defence case. However, the Chamber found that the documents referred to in the original motion were not material to Nzirorera's Defence. Accordingly, even if the documents were admitted, they would have no effect on Nzirorera's sentence, or any other aspect of his Defence.

8. The Chamber further notes that the Impugned Decision does not impose any imbalance or discrimination between parties, or affect continuing rights or obligations in a way that could be said to touch upon the fairness of the trial.<sup>11</sup>

9. A final defect in Joseph Nzirorera's attempt to satisfy the first limb of Rule 73(B) concerns the issue of expeditiousness. The Impugned Decision concerned findings regarding specific documents, and future decisions on this point will need to be made on a case-by-case

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<sup>8</sup> Application, para. 5.

<sup>9</sup> Impugned Decision, para. 12. The Chamber went on, at paragraph 14, to set out that to establish selective prosecution, Nzirorera needed to establish: (1) any unlawful or improper motive for his prosecution; and (2) that other similarly situated persons were not prosecuted.

<sup>10</sup> Impugned Decision, paras. 13-15.

<sup>11</sup> See, eg. *Karemera et al.*, Decision on Prosecutor's Application for Certification to Appeal (TC), 2 October 2007, (holding that a Decision resulting in asymmetry of disclosure obligations between parties did touch upon the fairness of the proceedings for the purposes of Rule 73(B)).

basis. An Appeals Chamber resolution is thus not likely to prevent this issue from arising for deliberation in the future, and cannot be said to significantly affect the expeditious conduct of the proceedings or outcome of the trial. This point also adversely impacts on Nzirorera's ability to show that appealing the Decision will materially advance proceedings.<sup>12</sup> However, as the first limb of Rule 73(B) is not made out, the Chamber need not further consider the issue of material advancement.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** Joseph Nzirorera's Application in its entirety.

Arusha, 9 November 2009 done in English.

Dennis C. M. Byron  
Presiding Judge

Gberdao Gustave Kam  
Judge

Vagn Joensen  
Judge

[Seal of the Tribunal]

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<sup>12</sup> *Karemera et al.*, Decision on Édouard Karemera's Application for Certification to Appeal the Decision Denying his Motion for Admission of an Expert Witness (TC), 1 July 2009, para. 9.