



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 14 July 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
“DECISION ON THIRD URGENT DEFENCE MOTION REQUESTING AN ORDER
DIRECTED AT FRANCE”**

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

Office of the Prosecution

Paul Ng’arua
Memory Maposa
Simba Mawere
Diana Karanja
Marie Ka

Defence Counsel for Callixte Nzabonimana

Vincent Courcelle-Labrousse
Philippe Larochelle

INTRODUCTION

1. On 11 June 2010, the Defence filed a Motion¹ pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) requesting certification to appeal the Trial Chamber (“Chamber”) Decision of 4 June 2010 denying a Defence motion seeking an order for cooperation directed at the Government of France (“France”) (“Impugned Decision”).²

2. On 15 June 2010, the Prosecution filed its response opposing the instant Motion.³

3. On 18 June 2010, the Defence filed a reply.⁴

Submissions of the Parties

4. The Defence seeks certification to appeal the portion of the Impugned Decision denying its request that the Chamber instruct France to facilitate the interview of 31 persons named in material disclosed by France on 16 March 2010.⁵ The Defence contends that the Impugned Decision denies it the possibility of interviewing potential alibi witnesses and that this significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. It further argues that an immediate resolution of the issue will materially advance the proceedings.⁶

5. The Defence recalls that on 27 May 2010, the Chamber ruled that “France’s failure to cooperate has compromised its ability to call witnesses to support its alibi Defence,”⁷ and that the Chamber has previously recognised the importance of calling alibi witnesses for the fair and expeditious conduct of the proceedings.⁸ It stresses that it has indicated its intent to rely on an alibi defence since January 2009.⁹ The Defence therefore contests the Chamber’s ruling in paragraph 18 of the Impugned Decision that “the Defence has not explained why it requires that France facilitate

¹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Motion for Certification of Trial Chamber’s “Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France” (“Motion”), 11 June 2010.

² *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France, 4 June 2010 (“Impugned Decision”)(TC).

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Motion for Certification of the Trial Chamber’s “Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France” (“Response”), 15 June 2010.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor’s Response to Motion for Certification of the Trial Chamber’s “Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France” (“Reply”), 18 June 2010.

⁵ Motion, para. 4.

⁶ Motion, para. 6.

⁷ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Certification to Appeal the Decision of 23 April 2010, para. 21, (“27 May 2010 Decision”).

⁸ Motion, para. 9.

⁹ Motion, para. 7.

interviews with the individuals who worked at the French Embassy in Kigali in 1994.”¹⁰ The Defence concludes that the Impugned Decision contradicts the Chamber’s decision of 27 May 2010.¹¹

6. The Defence further asserts that the Impugned Decision disregarded the many *Notes Verbales* it sent to France beginning on 19 June 2009,¹² and therefore improperly concluded that it had made insufficient efforts to obtain France’s collaboration.¹³ This conclusion is erroneous,¹⁴ since “it was stated in other decisions of this Tribunal that unanswered requests for certain information constituted [*sic*] sufficient efforts to obtain voluntary cooperation...”¹⁵

7. The Defence also submits that the Impugned Decision makes the threshold for granting an Article 28 motion impossibly high.¹⁶ Hence, the Impugned Decision provides no incentive for future French cooperation.¹⁷ France’s obstruction deprives the Accused Nzabonimana the opportunity to select potential alibi witnesses¹⁸ and this impinges on his fair trial rights.¹⁹ Finally, the Defence argues that a positive Chamber decision on the motion for cooperation would materially advance the proceedings.²⁰

8. In response, the Prosecution submits that the Defence failed to satisfy the criteria for an Article 28 request in its 17 May 2010 application.²¹ It recalls that it previously suggested that the Defence prepares questionnaires to limit the unnecessary burden on France to facilitate 31 unsubstantiated interviews.²² It recalls that the Defence opposed this approach.²³

¹⁰ Motion, para. 10 citing para. 18 of Impugned Decision.

¹¹ Motion, para. 12.

¹² Motion, paras. 12, 16-17.

¹³ Motion, para. 18.

¹⁴ Motion, para. 20.

¹⁵ Motion, para. 24, citing *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW, 25 July 2005, para. 7; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion Regarding Cooperation with the Government of Burundi, 30 October 2008, para. 14.

¹⁶ Motion, para. 34.

¹⁷ Motion, para. 31.

¹⁸ Motion, para. 31.

¹⁹ Motion, para. 32.

²⁰ Motion, paras. 33, 37-41.

²¹ Response, para. 12.

²² Response, paras. 13, 14.

²³ Response, para. 15.

9. The Prosecution also submits that rather than propose any helpful avenues to meet the established threshold for an Article 28 request, as set out by the jurisprudence of the Tribunal,²⁴ the Defence instead seeks certification to appeal, a remedy of last resort.²⁵

10. In its reply, the Defence contends that the Prosecution offered no response to the arguments advanced in support of the Defence request for certification.²⁶ With regards to the Prosecution submissions suggesting the use of questionnaires, the Defence reiterates its prior argument that the Prosecution’s approach to use questionnaires is unwarranted and not supported by any authorities even the Rules.²⁷

DELIBERATIONS

Applicable Law

11. Rule 73(B) of the Rules of procedure and Evidence provides that:

“Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification 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.”

12. Thus, in order to grant certification to appeal one of its Decisions, a Trial Chamber must find that: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²⁸ Even where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber,²⁹ and certification remains an exceptional measure.³⁰

²⁴ Response, para. 16.

²⁵ Response, para. 16.

²⁶ Reply, paras. 5-13.

²⁷ Reply, para. 18.

²⁸ *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para.16; *citing Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

²⁹ *Prosecutor v. Augustin Ngirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17; *See Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

³⁰ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-NZ, Decision on Joseph Nizorera’s Application for Certification to Appeal Decision on the 24th Rule 66 Violation, 20 May 2009, para. 2; *see also Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber’s Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4 (citation omitted); in *Prosecutor v. Augustin Ngirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17.

13. The Chamber recalls that it need not address the merits of parties’ arguments when addressing an application for certification to appeal a prior decision but rather that it must assess whether the moving party has satisfied the provisions of Rule 73(B).³¹

On Certification to Appeal the Impugned Decision

14. The Defence contends that the Impugned Decision deals with an issue which significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial because it denies the Defence the possibility of interviewing potential alibi witnesses, and thus that an immediate resolution of the issue would materially advance the proceedings.

15. The Chamber notes at the outset that the Prosecution has made no submissions opposing the Defence request for certification to appeal, but rather that it has merely reiterated submissions it previously made on 21 May 2010.³²

16. As the Defence itself recognises, the Chamber has always accepted that the ability of the Defence to interview and call potential alibi witnesses is inextricably linked to the fair trial rights of the Accused. The Chamber considers that what is at issue in the Impugned Decision is not the right to interview or call such witnesses, but the procedure for approaching them. The Impugned Decision explicitly stated:

The Chamber observes that the Defence has not explained why it requires that France facilitate interviews with the individuals who worked at the French Embassy in Kigali in April 1994. The Defence has not indicated that it made efforts to arrange such interviews on its own accord or that it has encountered obstacles in attempting to do so. While the Defence, in its reply, asserts that “...the French authorities have well established rules concerning interviews of French persons...,”³³ it does not explain what they are or attach any document laying out the alleged procedures. Thus the Chamber considers that the

³¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5; *See, e.g., Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material (TC)”, 4 February 2005, at para. 28; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor’s Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence (TC), 4 February 2005, at para. 11;

³² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Urgent Third Motion of Callixte Nzabonimana for an Order Directed at France, 21 May 2010.

³³ Reply, para. 30.

Defence has not demonstrated its efforts to obtain the [information] have been unsuccessful.³⁴

17. The Trial Chamber again stresses that the Defence has not provided the Chamber with evidence demonstrating that it is unable to approach the persons it seeks to interview without the assistance of the French authorities. Thus, the issue is not whether or not the Chamber is interfering with the fair trial rights of the Accused, but whether the Defence is asking for the Chamber's assistance without demonstrating good cause. If this issue is affecting the expeditious conduct of proceedings, as the Defence alleges, it is because the Defence has opted to seek leave to appeal the Impugned Decision rather than provide the Chamber with evidence demonstrating that it is unable to approach the persons it seeks to interview without the prior approval of the French authorities.

18. As the Defence has not demonstrated that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber might materially advance the proceedings, pursuant to Rule 73 (B), the Chamber concludes that certification to appeal is not warranted.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 14 July 2010, done in English.

Solomy Balungi Bossa
Presiding Judge

Bakhtiyar Tuzmukhamedov
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]

³⁴ Impugned Decision, para. 18.