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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:** 16 September 2010

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**  
*Case No. ICTR-98-44D-T*

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JUDICIAL RECORDS ARCHIVES  
RECEIVED  
UNICTR  
S. A. Dieng

**DECISION ON MOTION FOR RECONSIDERATION OR CERTIFICATION OF THE  
TRIAL CHAMBER'S ORAL DECISION OF 6 JULY 2010 ON WITNESS T134'S  
TESTIMONY**

*(Rules 73 (B), 89 (C), 90 (F) and 92 bis of the Rules of Procedure and Evidence)*

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INTRODUCTION

1. On 26 March 2010, the Trial Chamber issued a Decision in which it ordered the Defence to file, no later than 31 March 2010, a list of 30 Defence witnesses ("26 March Order").<sup>1</sup>
2. On 31 March 2010, the Defence filed a list of 184 witnesses, as well as information concerning the facts and points in the Indictment to which most of those witnesses would testify ("Proofing Chart").<sup>2</sup> The Defence also filed a separate list of 30 witnesses, which purported to comply with the 26 March Order ("List of 30 Witnesses").<sup>3</sup>
3. According to the Defence Proofing Chart, Witness T134 would testify with respect to 8 paragraphs of the Indictment,<sup>4</sup> including paragraphs 47 and 51.<sup>5</sup> However, T134 was not included in the List of 30 Witnesses.<sup>6</sup>
4. On 4 June 2010, the Trial Chamber issued a Decision allowing the Defence to, *inter alia*, increase its list of witnesses from 30 to 38 as well as add T134 to this revised list of witnesses, but restricted T134's testimony to paragraph 47 of the Indictment ("Variation Decision").<sup>7</sup> Paragraph 47 reads as follows: "In May 1994, in *Masango* commune, **Callixte NZABONIMANA** ordered persons who included MRND supporters of *Mq̄sango* commune to completely destroy the houses abandoned by Tutsi and to plant crops in order to wipe out all signs of the massacre of Tutsi".<sup>8</sup>
5. On 11 June 2010, the Defence filed a motion for Reconsideration or Certification of the Variation Decision, contesting, *inter alia*, the Trial Chamber's restriction of T134's testimony to paragraph 47.<sup>9</sup> On 14 July 2010, the Trial Chamber issued a Decision denying

<sup>1</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 26 March 2010.

<sup>2</sup> Annexe I (strictement confidentielle), contained in confidential email from Philippe Larochelle dated 31 March 2010.

<sup>3</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Filing in Compliance with the 26 March 2010 Trial Chamber Decision, 31 March 2010.

<sup>4</sup> Paras. 8, 9, 10, 11, 12, 38, 47, 51.

<sup>5</sup> Proofing Chart, p. 25.

<sup>6</sup> See generally, List of 30 Witnesses.

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Variation of its List of Witnesses, 4 June 2010, para. 40 and Disposition.

<sup>8</sup> Emphasis in original.

<sup>9</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for Reconsideration and/or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010, 11 June 2010.

the majority of the relief sought by the Defence, including the request to expand the scope of T134's testimony ("Reconsideration Decision").<sup>10</sup>

- 6. On 6 July 2010, T134 testified before this Trial Chamber.<sup>11</sup> During examination-in-chief, the Defence posed the following question ("Disallowed Question"): "Still with respect to Mpamo, prior to the genocide, do you have anything to tell the Chamber about Mpamo with respect to what has been referred to as 'the *Interahamwe*'?".<sup>12</sup> The Prosecution objected that the question was beyond the purview of paragraph 47.<sup>13</sup> After hearing submissions and deliberating,<sup>14</sup> the Chamber sustained the objection ("Impugned Decision").<sup>15</sup>
- 7. On 13 July 2010, the Defence filed a motion for Reconsideration or Certification of the Impugned Decision ("Motion").<sup>16</sup>
- 8. On 19 July 2010, the Prosecution filed a response to the Defence Motion ("Response").<sup>17</sup>
- 9. On 22 July 2010, the Defence a filed a reply to the Prosecution Response ("Reply").<sup>18</sup>

**SUBMISSIONS OF THE PARTIES**

*Motion*

10. The Defence opens its argument by asserting that only one Prosecution Witness, CNAC, testified in support of paragraph 47. The Defence cites a portion of CNAC's testimony in which he identified an individual named Mpamo as having allegedly relayed orders between the Accused and the *Interahamwe* in Masango *commune* for the purpose of committing the

<sup>10</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for Reconsideration/and or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010, 14 July 2010.

<sup>11</sup> See transcript of trial proceedings, 6 July 2010, in English at pp. 15-62 ("English Transcript") and French at pp. 14-70 ("French Transcript").

<sup>12</sup> English Transcript, p. 24, ll. 10-11 (closed session). For the original version of the question (which was posed in French), see French Transcript, p. 27, ll. 22-23 (closed session).

<sup>13</sup> English Transcript, p. 24 l. 13 (closed session).

<sup>14</sup> English Transcript, p. 24, l. 15 – p. 27, l. 27 (closed session); French Transcript, p. 27, l. 29 – p. 31, l. 22 (closed session).

<sup>15</sup> English Transcript, p. 27, l. 29 – p. 28, l. 6 (closed session).

<sup>16</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion for Reconsideration or Certification of the Trial Chamber's Oral Decision of 6 July 2010 on Witness T134's Testimony, 13 July 2010.

<sup>17</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Reconsideration or Certification of the Trial Chamber's Oral Decision of 6 July 2010 on Witness T134's Testimony, 19 July 2010.

<sup>18</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Motion for Reconsideration or Certification of the Trial Chamber's Oral Decision of 6 July 2010 on Witness T134's Testimony, 22 July 2010.

acts depicted in paragraph 47 of the Indictment.<sup>19</sup> The Defence then refers to a witness statement of CNAC, in which he declares that the *Interahamwe* of Masango generally held public meetings in front of Mpamo's home.<sup>20</sup> The Defence also cites an excerpt from the oral testimony of Defence Witness T133, where T133 denies that Mpamo had supervision or control over *Interahamwe* "during the multiparty period".<sup>21</sup>

11. In light of the above, the Defence argues that the "motivation for [the Disallowed Question] was three-fold: (i) to undermine Witness CNAC's credibility by contradicting his statement linking Mr. Mpamo to the *Interahamwe*; (ii) to corroborate Defence Witness T133's testimony denying any link between Mr. Mpamo and the *Interahamwe*; and (iii) to provide another version of the facts to the Chamber for its eventual findings of fact on both paragraphs 47 and 51 of the Indictment".<sup>22</sup> The Defence reasons that although the question "was outside the scope of paragraph 47's text, it was within the ambit of the version of those events as elaborated by Witness CNAC, which link Mr. Mpamo to the *Interahamwe*".<sup>23</sup> To demonstrate this "link", the Defence avers that the question "concerned the specific area (Masango *commune*) and one of the central actors (Mr. Esdras Mpamo) of paragraph 47, although admittedly not the specified time-frame (May 1994)".<sup>24</sup>

### Reconsideration

12. On the specific issue of Reconsideration, the Defence advances three arguments: 1) a new fact has been discovered since the issuance of the Impugned Decision that was not known by the Trial Chamber; 2) the Trial Chamber committed an error of law resulting in an injustice; and 3) the Trial Chamber abused its discretion resulting in an injustice.<sup>25</sup>
13. With respect to the discovery of a new fact, the Defence argues that because the Trial Chamber "based its Decision on oral – and not written – arguments by the parties"<sup>26</sup>, "the Chamber did not have time to first consult Witness CNAC's transcripts and declarations",<sup>27</sup> which would have revealed that CNAC had mentioned the *Interahamwe* "as a group, in

<sup>19</sup> Motion, para. 3.

<sup>20</sup> Motion, para. 4.

<sup>21</sup> Motion, para. 5.

<sup>22</sup> Motion, para. 6.

<sup>23</sup> Motion, para. 8. (emphasis in original)

<sup>24</sup> Motion, para. 8.

<sup>25</sup> Motion, para. 13.

<sup>26</sup> Motion, para. 14.

<sup>27</sup> Motion, para. 14.

relation to paragraph 47".<sup>28</sup> According to the Defence, because this "was not cited by the parties in their oral arguments", this constitutes a "new fact" that was "not considered by – or known to – the Chamber" at the time it issued the Impugned Decision.<sup>29</sup>

14. As to whether the Trial Chamber committed an error of law, the Defence, citing Rule 90 (F) of the Rules of Procedure and Evidence ("Rules"), argues that "[s]ince T134 was prevented from addressing Mr. Mpamo's connection, if any, to the *Interahamwe*, the Chamber has but one, uncontested, perspective"<sup>30</sup> on this issue. Therefore, the Chamber hindered the "ascertainment of the truth",<sup>31</sup> and "erred in law in quashing the question simply because the Defence posed it in a 'generalised way'".<sup>32</sup> The Defence further argues that there is overlap between the subject matter of paragraphs 47 and 51 of the Indictment, and because "[t]he Defence had always announced that T134 would testify on paragraphs 47 and 51",<sup>33</sup> the Chamber improperly disallowed a question that pertained to both paragraphs.

15. On the issue of whether the Trial Chamber abused its discretion, the Defence cites two excerpts from a witness statement of T134, which refer to the lack of *Interahamwe* in Masango and the absence of any public meetings by *Interahamwe* in front of Mpamo's home. The Defence then submits that the Chamber abused its discretion by "choosing not to allow a question whose answer was [contained] directly in the disclosed declaration".<sup>34</sup>

16. Regarding the injustice incurred, the Defence reiterates that "the Chamber has but one, uncontested, perspective"<sup>35</sup> regarding any connection between Mpamo and the *Interahamwe* of Masango. Thus, the Accused's fair trial rights are at risk because "[t]he Chamber is more likely to believe this statement since it has not heard information to the contrary".<sup>36</sup>

#### Certification

17. The Defence argues that Certification would significantly affect the fair conduct of proceedings because "[t]he Appeals Chamber must provide guidance on whether it is permissible, under Rule 90 (F)... for a Chamber to restrain a Defence witness's testimony to

<sup>28</sup> Motion, para. 15.

<sup>29</sup> Motion, para. 15.

<sup>30</sup> Motion, paras. 16-17.

<sup>31</sup> Motion, para. 17.

<sup>32</sup> Motion, para. 18.

<sup>33</sup> Motion, para. 18.

<sup>34</sup> Motion, paras. 19-20.

<sup>35</sup> Motion, para. 22.

<sup>36</sup> Motion, para. 22.

the text of a paragraph of the Indictment, or whether, instead, the scope for questions is all the evidence previously provided by the Prosecutor and Defence on this paragraph".<sup>37</sup> Moreover, the issue would also affect the expeditious conduct of proceedings because "[t]he Defence will likely attempt to ask questions on Prosecution witness' declarations and testimony to each Defence witness", which will occasion further Prosecution objections and consequent litigation.<sup>38</sup> As to whether the issue would significantly impact the outcome of trial, the Defence re-invokes its arguments in support of Reconsideration.<sup>39</sup> Finally, because future Defence witnesses will be subject to the restrictions of the Variation Decision, "it would materially advance the proceedings for the Trial [sic] or Appeals Chamber to pronounce itself on the... issue immediately, before the appearance of these... witnesses".<sup>40</sup>

Remedy

18. If the Defence's Motion is successful on the merits, it seeks admission, under Rules 89 (C) or 92 bis, of a written affidavit by T134 stating the answer that witness would have provided to the Disallowed Question, had the Chamber not issued the Impugned Decision.<sup>41</sup>

*Response*

19. The Prosecution responds that "[t]he Trial Chamber properly exercised its powers under Rule 90(F) of the Rules".<sup>42</sup> As a preliminary argument, the Prosecution asks that the Motion "be dismissed *ab initio* for being improper, and an abuse of the court process",<sup>43</sup> because "[t]he motion seeks to misrepresent the legal and factual position between the parties and the issues arising from that legal position".<sup>44</sup> In this regard, the Prosecution maintains that the Motion is essentially an attempt to: 1) re-litigate the crux of the Variation Decision (which had already been addressed in the Reconsideration Decision);<sup>45</sup> 2) mislead the court by portraying CNAC's testimony on Mpamo and the *Interahamwe* as an expansion of paragraph 47 of the Indictment, when that testimony is actually connected to paragraph 51;<sup>46</sup> and thus 3) introduce impermissible evidence regarding paragraph 51—which is already

<sup>37</sup> Motion, para. 29.

<sup>38</sup> Motion, para. 31.

<sup>39</sup> Motion, para. 32.

<sup>40</sup> Motion, para. 33.

<sup>41</sup> Motion, paras. 34-39.

<sup>42</sup> Response, para. 38.

<sup>43</sup> Response, para. 39.

<sup>44</sup> Response, para. 40.

<sup>45</sup> Response, paras. 41-45.

<sup>46</sup> Response, paras. 46-49.

overrepresented by Defence witnesses—through the use of a “back door method”.<sup>47</sup> The Prosecution also notes that the Defence already presented rebuttal evidence with respect to Mpamo through Witness T133.<sup>48</sup> For these reasons, the Defence Motion should be “struck out without reference to the merits, for being improperly before the court”.<sup>49</sup>

20. In the alternative, the Prosecution argues that the Defence Motion should fail on the merits.<sup>50</sup>

The Prosecution submits the test for Reconsideration is not met, because: 1) the statements made by CNAC do not amount to “new facts”, since all parties and the Trial Chamber had notice of them;<sup>51</sup> 2) the onus lay with the Defence, after hearing the testimony of CNAC, “to within the time designated raise any concerns it had with respect to the anticipated testimony of T134 as a result of the [Variation Decision]”,<sup>52</sup> and 3) the trial record clearly demonstrates that the Defence obtained ample opportunity to rebut the allegations in paragraph 47, hence the Chamber did not abuse its discretion or hinder “the ascertainment of truth”.<sup>53</sup> The Prosecution also dismisses as “not relevant” the Defence argument that it was prohibited from questioning T134 about matters contained in his witness statement, since the Variation Decision “effectively limited evidence permissible on the said Declaration”.<sup>54</sup>

21. The Prosecution re-asserts its arguments opposing Reconsideration<sup>55</sup> to support the conclusion that no good cause has been shown for Certification,<sup>56</sup> as the issue at stake does not concern the fair conduct of proceedings,<sup>57</sup> and appellate intervention will not materially advance or affect the outcome of the instant proceedings.<sup>58</sup>

*Reply*

22. In its Reply, the Defence: 1) contests the Prosecution argument that the Disallowed Question falls exclusively within the scope of paragraph 51;<sup>59</sup> 2) rejects the Prosecution characterisation of the Motion as impermissible “re-litigating” of an issue that was

<sup>47</sup> Response, paras. 50-54.

<sup>48</sup> Response, para. 55.

<sup>49</sup> Response, para. 56.

<sup>50</sup> Response, para. 57.

<sup>51</sup> Response, paras. 59-60, 63.

<sup>52</sup> Response, paras. 61-62.

<sup>53</sup> Response, paras. 64-68, 70.

<sup>54</sup> Response, para. 69.

<sup>55</sup> Response, paras. 72-74, 78-80.

<sup>56</sup> Response, paras. 71, 75.

<sup>57</sup> Response, para. 76.

<sup>58</sup> Response, para. 77.

<sup>59</sup> Reply, paras. 5-12, 16.

conclusively disposed of by the Variation Decision and counters that the Motion deals with the "practical application" of the "abstract" restrictions imposed by that Decision;<sup>60</sup> 3) seeks to "clarify" that its Motion did not claim the Defence could examine its witness regarding anything contained in a prior statement, irrespective of a binding order restricting the scope of the witness' testimony;<sup>61</sup> 4) emphasises that the test for Reconsideration does not require the Defence to demonstrate the occurrence of an injustice to the Accused, but merely the "potential" of an injustice;<sup>62</sup> and 5) stresses that, in any event, an injustice has in fact been occasioned against the Accused, namely the heightened risk that the Trial Chamber will ultimately find CNAC credible because the Defence was not allowed to "mount the strongest defence it can in the circumstances, in order to raise a reasonable doubt".<sup>63</sup>

**DELIBERATIONS**

*Applicable Law*

Reconsideration

23. As affirmed in *Karemera*, Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.<sup>64</sup>

Certification

24. Rule 73 (B) states:

Decisions rendered on... 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.

Thus, in order to grant Certification to appeal one of its Decisions, a Trial Chamber must find: 1) that the decision in question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and 2) that an

<sup>60</sup> Reply, paras. 13-14.

<sup>61</sup> Reply, paras. 15-16.

<sup>62</sup> Reply, para. 17.

<sup>63</sup> Reply, paras. 18-19.

<sup>64</sup> See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

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immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.<sup>65</sup> Even where both factors are present, Certification is not automatic, but at the discretion of the Trial Chamber,<sup>66</sup> and Certification remains an exceptional measure.<sup>67</sup> As was noted in *Ntahobali*, "Rule 73(B)... provides... that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of [its] decisions".<sup>68</sup>

Control of Proceedings

25. Rule 90 (F) states:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) Make the interrogation and presentation of evidence effective for the ascertainment of truth; and (ii) Avoid needless consumption of time.

26. As the Appeals Chamber has acknowledged in *Bizimungu*, "[a] Trial Chamber exercises its discretion in many different situations, including when deciding points of practice or procedure",<sup>69</sup> and that the issue of whether a Trial Chamber properly exercised its discretion does not turn on whether the conclusion reached is agreed with, "but rather whether the Trial Chamber has reasonably exercised its discretion in reaching that decision".<sup>70</sup> The applicable standard is whether the challenged decision "was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".<sup>71</sup>

*Preliminary Matters*

27. At the outset, the Trial Chamber wishes to address two preliminary matters. First, the statement of Witness CNAC referred to by the Defence in its Motion has never been

<sup>65</sup> *Prosecutor v. Ngirabatware*, 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*, 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.

<sup>66</sup> *Ngirabatware*, para. 17. See also *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

<sup>67</sup> *Prosecutor v. Karemera et al.*, ICTR-98-44-NZ, Decision on Joseph Nizorera's Application for Certification to Appeal Decision on the 24<sup>th</sup> Rule 66 Violation, 20 May 2009, para. 2. See also *Prosecutor v. Nshogoza*, 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; *Ngirabatware*, para. 17.

<sup>68</sup> *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 13-15.

<sup>69</sup> *Prosecutor v. Bizimungu et al.*, ICTR-99-50-AR73, Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005, para. 3

<sup>70</sup> *Bizimungu*, para. 3; citing *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9.

<sup>71</sup> *Bizimungu*, para. 3; citing *Milošević*, para. 10.

introduced as an exhibit in the present proceedings. Therefore, it does not form part of the evidentiary record before this Trial Chamber in this trial, and the fact that the statement was "alluded to"<sup>72</sup> during proceedings before this Chamber does not alter this situation. Second, despite the representations of the Defence to the contrary, the statement of CNAC is not appended to its Motion.<sup>73</sup> Because the burden of persuasion lies on the Defence, these two factors ought to be fatal shortcomings in the Defence Motion.

28. That being said, the Trial Chamber has no desire to see this issue re-litigated *ad nauseam* if and when the Defence is able to cure these evidentiary deficiencies. Therefore, in the interests of justice, the Trial Chamber will exercise its discretion to consider the present Motion on the merits.

*Analysis*

**Reconsideration**

Whether a "new fact" has been discovered

29. The Trial Chamber dismisses the strained argument that a "new fact" warranting Reconsideration has arisen because the Trial Chamber issued an in-court ruling, with respect to an objection raised regarding the permissibility of a question posed to a witness, after having "only" considered the oral submissions of the parties. First, this argument ignores the routine practice of this Tribunal (and countless other judicial bodies) with respect to such quotidian procedural matters. Second, it completely overlooks the fact that the Defence, in making its submissions prior to the issuance of the Impugned Decision, explicitly requested an adjournment in order to consult the very documents it presently wishes to invoke in its Motion, and to present written submissions in support of its position.<sup>74</sup> The Trial Chamber, in issuing the Impugned Decision, explicitly rejected that request when it ruled

that all parties should come prepared for whatever session of examination they are supposed to undertake. And we see no reason now why counsel, who should have come prepared, should ask for an adjournment to apprise himself of the evidence of the witness whom he has called the current witness to contradict. We, therefore, deny the request for adjournment.<sup>75</sup>

<sup>72</sup> Motion, para. 4.

<sup>73</sup> At Motion, para. 4, the Defence states that the "declaration [of CNAC] dated 11 November 2008" is attached to the Motion as "Annex B". However, a cursory inspection of Annex B reveals that is in fact a witness statement provided by Defence Witness T134, dated 19 November 2009. The witness statement of CNAC is not appended to the Motion under any Annex.

<sup>74</sup> English Transcript, p. 26, ll. 16-34 (closed session); French Transcript, p. 30, ll. 1-24 (closed session).

<sup>75</sup> English Transcript, p. 27, l. 35 – p. 28, l. 2 (closed session).



The Defence's insistence on making written submissions the Chamber has already declined to receive, in order to refer to documents the Chamber has already been apprised of, hardly constitutes a "new fact" warranting the exceptional remedy of Reconsideration.

Whether the Chamber committed an error of law

30. First and foremost, the Defence argument that the Trial Chamber committed an error of law is incongruous with the evidentiary record, when it states that not allowing T134 to answer the Disallowed Question leaves the Chamber with "but one, uncontested, perspective"<sup>76</sup> regarding the correlation, if any, between Mpamo and the *Interahamwe* in Masango commune. Not only is the assertion that the Chamber was left without any "information to the contrary"<sup>77</sup> demonstrably untrue, but the Defence in fact contradicts itself on this point in both its Motion<sup>78</sup> and Reply.<sup>79</sup> Indeed, the purported need "to corroborate Defence Witness T133's testimony denying any link between Mr. Mpamo and the *Interahamwe*" was one of three central justifications for why the Disallowed Question was posed in the first place.<sup>80</sup>

31. Furthermore, in its insistence that "[s]ome of the evidence concerning paragraph 47 is applicable to paragraph 51 as well" and that a question could "incidentally" touch upon both paragraphs,<sup>81</sup> the Defence appears oblivious to the fact that the Trial Chamber has already considered, and rejected, the possibility that the Disallowed Question, as framed, fits within the purview of paragraph 47. Rule 90 (F) clearly bestows upon the Trial Chamber the type of discretion involving "points of practice or procedure" envisioned by the Appeals Chamber in *Bizimungu*.<sup>82</sup> Recalling that precedent, the Trial Chamber reiterates that mere disagreement with the Trial Chamber's ruling does not, *ipso facto*, mean that the Trial Chamber committed an error of law under Rule 90 (F). Moreover, the Trial Chamber is not at all persuaded that in sustaining an objection to a question that the Defence concedes was outside the text of paragraph 47 and lacked any temporal nexus to that paragraph,<sup>83</sup> the Chamber reached a conclusion that was "based on a patently incorrect conclusion of fact" or "so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".<sup>84</sup>

<sup>76</sup> Motion, paras. 17, 22.

<sup>77</sup> Motion, para. 22.

<sup>78</sup> Motion, paras. 5-6, 18, 24, 32.

<sup>79</sup> Reply, paras. 18-19.

<sup>80</sup> Motion, para. 6.

<sup>81</sup> Motion, para. 18.

<sup>82</sup> See para. 26, *supra*.

<sup>83</sup> Motion, para. 8.

<sup>84</sup> See para. 26, *supra*.

Whether the Chamber abused its discretion

32. In two terse paragraphs of its Motion, the Defence asserts that the Trial Chamber abused its discretion "in choosing not to allow" the Defence to pose a question to T134 regarding issues that were contained in the witness' prior statement.<sup>85</sup> This assertion is flawed for at least two reasons. First, it is not an argument but rather a conclusory statement, devoid of any supporting reasoning or authority. Second, the Defence, with the benefit of hindsight, appears to have retracted this argument in its Reply, when it concedes that the content of a witness statement cannot overrule a binding order of the Trial Chamber as to the permissible scope of testimony to be proffered by a witness.<sup>86</sup>

33. However, the Chamber considers the Defence's attempt to "clarify" its submission on this issue in its Reply to be nothing more than a rehash of the running theme that the Disallowed Question was pertinent to both paragraphs 47 and 51 of the Indictment.<sup>87</sup> Once again, the Trial Chamber recalls its reasoning in the Impugned Decision and reiterates the *Bizimungu* principles expounded above.

Whether any injustice was occasioned

34. The jurisprudence of this Tribunal has established that Reconsideration requires that an injustice be occasioned by either an error of law or an abuse of discretion. Because the Trial Chamber is not satisfied that the Defence has demonstrated that the Trial Chamber committed either an error of law or an abuse of discretion, there is no need to consider whether the Accused has suffered any injustice. In any event, the Trial Chamber concludes that the above analysis demonstrates that no injustice was suffered by the Accused as a result of the Impugned Decision.

Certification

35. The Trial Chamber recalls that Certification is an exceptional remedy that requires the requesting party to demonstrate: 1) 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 2) that an immediate resolution of the issue by the Appeals Chamber may

<sup>85</sup> Motion, paras. 19-20.

<sup>86</sup> Reply, para. 15.

<sup>87</sup> Reply, para. 16.

materially advance the proceedings. Even where both factors are present, Certification remains an exceptional remedy within the absolute discretion of the Trial Chamber.<sup>88</sup>

36. As the Prosecution has aptly demonstrated in its Response,<sup>89</sup> the Defence was afforded ample opportunity to rebut the Prosecution case with respect to paragraph 47 of the Indictment. Given this, the Trial Chamber rejects the argument that the Chamber's refusal to allow the Defence to pose a single question, which clearly lacked any temporal nexus to paragraph 47, would significantly affect the fair conduct of proceedings, or the outcome of trial. The Trial Chamber is equally unconvinced that the issue at hand would significantly affect the expeditious conduct of proceedings or that immediate appellate intervention would materially advance the instant proceedings. The Defence's arguments in this regard essentially consist of forebodings that the Defence intends to test the parameters of permissible witness testimony established by the Variation Decision, which will result in objections and consequent litigation. However, adjudicating objections to contentious questions is a routine function of Trial Chambers presiding over adversarial proceedings, and this Trial Chamber sees no reason why it should abdicate a duty that clearly falls within its province and competence. For these reasons, the request for Certification is denied.

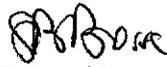
#### Admission of Witness T134's Affidavit

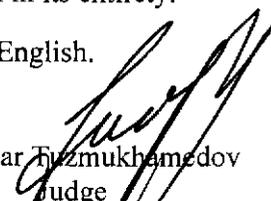
37. Because the Trial Chamber finds no merit in the arguments advanced by the Defence for Reconsideration or Certification, the Chamber sees no need to address whether the affidavit of Witness T134 that the Defence appended to its Motion is admissible under the Rules.

#### **FOR THESE REASONS, THE CHAMBER**

**DENIES** the Defence Motion in its entirety.

Arusha, 16 September 2010, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Bakhtiyar Tuzmukhamedov  
Judge



  
(Read and approved)  
Mparany Rajohnson  
Judge  
(Absent at the time of signature)

<sup>88</sup> See para. 24, *supra*.

<sup>89</sup> Response, para. 66.