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ICTR-98-44D-T
30-03-2011
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 30 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON DEFENCE EXTREMELY URGENT MOTION FOR
RECONSIDERATION OR CERTIFICATION OF THE 'DECISION ON DEFENCE
URGENT MOTION TO HEAR TESTIMONY OF DR.SUSAN THOMSON VIA VIDEO-
LINK' OF 9 MARCH 2011**
Rules 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Counsel for Callixte Nzabonimana

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INTRODUCTION

Defence Motion for Reconsideration and/or Certification for Leave to Appeal

1. On 24 February 2011, the Defence filed a Motion requesting that proposed expert witness, Dr. Susan Thomson (Dr. Thomson), be permitted to testify via video-link from Hampshire College in the USA or from The Hague, Netherlands.¹
2. On 28 February 2011, the Prosecution filed a response stating that it did not oppose the Defence Motion.²
3. On 9 March 2011, the Trial Chamber denied the Defence Motion ("Impugned Decision").³
4. On 16 March 2011, the Defence filed the instant Motion requesting reconsideration and/or certification to appeal the Impugned Decision.⁴
5. On 22 March 2011, the Prosecution filed a response to the Instant Motion opposing the request to grant reconsideration of the Impugned Decision or certification for leave to appeal.⁵
6. On 25 March 2011, the Defence filed a Reply.⁶

SUBMISSIONS OF THE PARTIES

Defence Motion

Criteria for Reconsideration

7. The Defence submits that Impugned Decision warrants reconsideration and/or certification for leave to appeal because of errors of fact and law which will prejudice the fair trial rights of the Accused.⁷
8. On the specific issue of Reconsideration, the Defence advances five arguments that: i) the interests of justice dictate that the Chamber exercise its discretion in its favour by

¹ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Defence Urgent Motion for Video-Link Testimony of Expert Witness Dr. Susan Thomson ("Original Motion"), 24 February 2011.

² *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Prosecutor's Response to Defence Urgent Motion for Video-Link Testimony of Expert Witness Dr. Susan Thomson ("Response to Original Motion"), 28 February 2011.

³ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Decision on Defence Motion to Hear Testimony of Expert Witness Dr. Susan Thomson Via Video-Link ("Impugned Decision"), 9 March 2011.

⁴ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the 'Decision on Defence Urgent Motion to Hear Testimony of Dr. Susan Thomson via Video-Link' Rendered on 9 March 2011 ("Instant Motion"), 16 March 2011.

⁵ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Prosecutor's Response to Defence Urgent Motion for Video-link Testimony of Expert Witness Dr. Susan Thomson ("Response"), 22 March 2011.

⁶ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Defence Reply to Prosecutor's Response to Defence Urgent Motion for Video-link Testimony of Expert Witness Dr. Susan Thomson ("Reply"), 25 March 2011.

⁷ Instant Motion, para. 6 (i - iv).

granting reconsideration; ii) that the Impugned Decision is prejudicial to Nzabonimana's fair trial rights; iii-iv) that there are errors of law and fact in the Impugned Decision; v) that prior correspondences between the Defence and Dr. Thomson attached to the Instant Motion will clarify concerns raised in the Impugned Decision.⁸

9. Regarding the first argument, the Defence submits that failure by the Chamber to positively exercise its discretion will occasion a gross injustice to the Accused as Dr. Thomson will decline to travel to Arusha to testify thus depriving the Accused of her important testimony.⁹ As the proceedings are in the final stages, the Defence will not be able to find as compelling an Expert Witness as Dr. Thomson to testify on the same issues.¹⁰ Further, to compel Dr. Thomson by subpoena would be unfair and unprecedented particularly as her reluctance to come to Arusha is based on genuine fear.¹¹ Moreover, issuing a subpoena will not guarantee the appearance of Dr. Thomson and will waste Tribunal resources.¹²

Impugned Decision contains errors of fact and law

10. In respect of its third and fourth arguments, the Defence argues that the Trial Chamber committed an error of fact by characterising Dr. Thomson's sworn "affidavit" as a mere "statement" thus unduly diminishing the "veracity" of her allegations.¹³ This error is significant as this Trial Chamber has previously accorded greater weight to an affidavit than to a statement.¹⁴ Moreover, the Prosecution did not contest Dr. Thomson's sworn affidavit and thus its contents should be regarded as *prima facie* evidence.
11. Further the Defence argues that the Chamber committed an error of fact by finding that Dr. Thomson "made no mention of having contacted local or national law enforcement agencies." It submits that Dr. Thomson did report incidents to the Campus police and security at Hampshire and Dalhousie University, who are entrusted with the duty to maintain law and order locally.¹⁵ She also made a report to the Ottawa Police but did not follow up as she felt they were incompetent.¹⁶

⁸ Instant Motion, para. 16.

⁹ Instant Motion, paras. 17, 21 and 24.

¹⁰ Instant Motion, para. 18.

¹¹ Instant Motion, paras. 19-22.

¹² Instant Motion, para. 22.

¹³ Instant Motion, paras. 25-27, 33.

¹⁴ Instant Motion, paras. 28, 30-31, Recalling *Prosecution v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Urgent Motion for the Appointment of An Amicus Curiae to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 9 July 2010, paras. 14-15.

¹⁵ Instant Motion, para. 58.

¹⁶ Instant Motion, paras. 60-61.

12. The Defence submits that the Trial Chamber committed an error in law by applying the wrong standard in determining whether the witness could testify via video-link. The jurisprudence establishes that when 'the minimum conditions' to grant a motion for video-link testimony are met, the interests of justice dictates that the motion be allowed.¹⁷ The Defence argues that Dr. Thomson has given credible reasons for her reluctance to come and testify in Arusha.¹⁸

Correspondences between the Defence and Dr. Thomson after the Impugned Decision

13. In response to the concerns noted by the Trial Chamber in the Impugned Decision regarding Dr. Thomson's affidavit, the Defence attaches to its Motion a draft of an early version of Dr. Thomson's report regarding the threats made against her. The Defence suggests that Annex A should not be read separately from her definitive affidavit of 23 February 2011. Annex B contains four emails between Defence Co-Counsel and Dr. Thomson demonstrating her unwillingness to continue being part of the case, and the Defence's unsuccessful attempts to obtain supporting documentation of threats and intimidation suffered by her.¹⁹

14. In the Impugned Decision the Trial Chamber observed that Dr. Thomson had furnished no documentation whatsoever to support her allegations that she had received threatening letters. The Defence's correspondences with Dr. Thomson reveal that she is not in possession of any documents to support threats made against her.²⁰ The threats cited in the affidavit should suffice.²¹

Concerns raised in Impugned Decision

15. In response to the Trial Chamber's concerns expressed in the Impugned Decision that it was not clear why Dr. Thomson would feel safer testifying in the United States or Europe than in Tanzania, the Defence submits that "from [Dr. Thomson's] correspondence with the Defence team, it emerges that the reason Dr. Thomson feels safer testifying from North America is because she does not believe the Rwandan operatives in North America have the intention or resources to kill her as their primary

¹⁷ Instant Motion, para. 63, citing *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Muvunyi's Amended Motion to have Defence Witnesses M005, M015, M036, M040 and M073 testify by Closed – Video Link, 7 February 2006, para. 22.

¹⁸ Instant Motion, para. 64.

¹⁹ Instant Motion, paras. 38 & 40.

²⁰ Instant Motion, paras. 41-43.

²¹ Instant Motion, paras. 44-45.

purpose is to intimidate and silence her.”²² The Defence then enumerates a number of reasons why Dr. Thomson might feel safer testifying in the United States than in Tanzania.²³

16. The Defence also submits that it never asked for protective measures for the witness because the witness was originally willing to testify in Tanzania despite the threats made against her in North America. This changed when on or around 9 January 2011 “Rwandan authorities” approached Dr. Thomson’s colleagues in Kenya enquiring about her scheduled trip to Tanzania. The Defence then acted in reasonable time to request for her to testify via video-link, which in itself is a protective measure.²⁴

Certification for leave to appeal

17. On the specific issue of certification, the Defence argues that the issue significantly affects the fair and expeditious conduct of proceedings as Dr. Thomson insists that she will not testify except via video-link at this last stage of this Trial.²⁵ Moreover, it notes that the issue would significantly impact the outcome of trial particularly as the Impugned Decision recognises the importance of Dr. Thomson’s testimony.²⁶ Finally, it asserts that because the likelihood of Dr. Thomson giving testimony is now uncertain as she categorically refuses to travel to Arusha to testify, the immediate resolution of this issue “would materially advance the proceedings.”²⁷

Prosecution Response

18. Although the Prosecution did not contest the Original Motion, in reviewing Dr. Thomson’s reasons for her inability to travel to Arusha to testify and her inability to provide supporting documents to substantiate the alleged fears and intimidation, it concurs with the Impugned Decision and accordingly opposes the Defence request for reconsideration and/or certification.²⁸

19. Specifically, it submits that considering the circumstances of this case, the Trial Chamber’s analysis of law and fact was neither erroneous nor an abuse of its discretion.²⁹ The Prosecution avers that the Defence has been inconsistent in the

²² Instant Motion, para. 50 referring to Annex A.
²³ Instant Motion, para. 51.
²⁴ Instant Motion, paras. 53-56.
²⁵ Instant Motion, para. 7(i).
²⁶ Instant Motion, para. 7(ii).
²⁷ Instant Motion, para. 7 (iii).
²⁸ Response, para. 12.
²⁹ Instant Motion, para. 6.

management of any alleged fears and intimidation faced by Dr. Thomson since 2007. It notes that the Defence has known of these fears and intimidation since March 2009³⁰ and never requested protective measures earlier.³¹

20. The Prosecution contends that the characterisation by the Trial Chamber of Annex A to the Original Motion as a statement as opposed to an affidavit would not have changed the conclusions reached in the Impugned Decision because the issue at hand relates to the inconsistent and inexplicable conduct of the Defence in handling their "vulnerable expert witness."³²

21. In response to the Defence contention that Dr. Thomson is not in possession of any documentary evidence of threats against her, the Prosecution asserts that this is untrue as in her email of 9 March 2011; Dr. Thomson stated that "I am not willing to share any more documentary evidence than I already have. I am not willing to expose me, my children and the Rwandans that inform my research (both in and out of the country) to more harassment and intimidation."³³

22. Regarding the Defence assertion that Dr. Thomson communicated with WVSS, the Prosecution asks that in event reconsideration is granted, the Trial Chamber invoke Rule 33 and request the Registrar to investigate the matter and accordingly report to the Chamber and the parties.³⁴

23. In conclusion, the Prosecution contends that the Defence submission do not meet the requirements for reconsideration and/or certification to appeal and must therefore fail.³⁵

Defence Reply

24. In its Reply, the Defence reiterates its belief that it has satisfied the test for reconsideration of the Impugned Motion and argues that the Prosecution has misunderstood the test for certification of leave to appeal.³⁶

25. It further claims that it is unable to substantiate Dr. Thomson's fears with documentary evidence.³⁷

³⁰ Response, para. 17.
³¹ Response, para. 15.
³² Response, para. 18.
³³ Response, paras. 23-24; See Also Annex B to the Instant Motion
³⁴ Response, para. 26.
³⁵ Response, para. 28.
³⁶ Reply, paras. 8-21.
³⁷ Reply, paras. 22-23, 36-41.

26. Finally, the Defence argues that the Chamber has granted blanket protective measures to Prosecution witnesses which are more extensive than the protective measures sought in this instance.³⁸

DELIBERATIONS

Applicable Law

Reconsideration of prior decisions

27. 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.³⁹

Certification for leave appeal

28. 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.

29. 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 immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.⁴⁰ Even where both factors are

³⁸ Reply, paras. 32-34.

³⁹ 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.

⁴⁰ *Prosecutor v. Ntirabatware*, 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,

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present, Certification is not automatic, but at the discretion of the Trial Chamber,⁴¹ and Certification remains an exceptional measure.⁴² 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".⁴³

Analysis

Test for reconsideration

- 30. At the outset, the Trial Chamber observes that the Instant Motion more resembles a "response" to the Impugned Decision than a request for reconsideration or certification for leave to appeal. The Defence raises no new "facts" or "circumstances" in the Instant Motion; it simply refers to existing facts or circumstances that it did not choose to refer to in its original motion. Moreover, the Defence does not allege that the Chamber abused its discretion. On the contrary, it argues that the Chamber should exercise its discretion and reconsider the Impugned Decision.
- 31. In alleging that the Chamber made an error in law, the Defence cites decisions by other Trial Chambers. However, the Defence has not made the case that these decisions were binding on this Chamber nor has it made the case that this Chamber has adopted a different legal standard. Indeed, in one of the cases cited by the Defence the Chamber found that the witness was "extraordinarily vulnerable" before authorising the use of video-link for his testimony.⁴⁴
- 32. Thus, the Instant Motion fails the test for reconsideration, as further elaborated below.

Importance of the Witness' testimony and its impact on Accused fair Trial Rights

33. The Defence argues that "the testimony of Dr. Thomson will affect the outcome of the trial given the Trial Chamber's recognition that her testimony was important."⁴⁵ This is a misreading of the Impugned Decision. The Trial Chamber is not in a position to

Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

⁴¹ *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.

⁴² *Prosecutor v. Karemera et al.*, 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*, 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.

⁴³ *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.

⁴⁴ *Prosecutor v. Bagasora et al.*, ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004, para. 8.

⁴⁵ Instant Motion, para. 7 (ii). See also Reply para. 16.

determine whether the witness' testimony is objectively important, certainly not before having heard the testimony. Each party determines which witnesses it considers important to its own case, and the Trial Chamber, in the Impugned Decision, simply accepted the Defence submission that this particular witness was important to its case.⁴⁶

34. The Defence also argues that failure to reconsider the Impugned Decision will occasion a gross injustice to the Accused as Dr. Thomson will decline to travel to Arusha to testify thus depriving Nzabonimana of her important testimony.⁴⁷ The Trial Chamber considers that the Defence has not demonstrated that this witness' testimony will significantly impact the outcome of the trial. As the Defence has failed to substantiate its allegation that an injustice may result from the Impugned Decision, it declines to exercise its discretion in favour of the Defence.

Alleged error of fact- statement vs. affidavit

35. The Defence argues that the Chamber erred in determining that the Annex A of the Original Motion was a *statement* rather than an *affidavit* and that this error "had a material impact on its decision..."⁴⁸ The Trial Chamber recalls that nowhere in the Impugned Decision did it suggest that it would not accord weight to the witness' allegations because they were presented in the form of a statement rather than an affidavit. Thus, this issue clearly did not have a material impact on the Impugned Decision. Moreover, as the Defence itself concedes, Dr. Thomson's allegations in Annex A of the original statement were not sworn before a competent legal authority. The Defence has therefore not established that the Trial Chamber committed an error of fact.

Whether Annexes A and B amount to a "new" facts or circumstances

36. As a "new" fact, the Defence proffers an early version of Dr. Thomson's report on the allegations made against her on which comments are made both by the Defence and by Dr. Thomson. Rather than support the Defence submissions, this "new" information undermines them as it suggests that the Defence expressed to Dr. Thomson many of the concerns raised in the Impugned Decision, and that Dr. Thomson was unresponsive. In particular, the "new" information makes it clear that the Defence itself considered it would be helpful to have further information regarding the steps taken by the witness to

⁴⁶ Impugned Decision, para. 17.

⁴⁷ Instant Motion, paras. 17, 21 and 24.

⁴⁸ Instant Motion, subheading of paras. 28-36 of the Instant Motion.

address the threats made against her, and copies of any related documentation.⁴⁹ Yet none of these questions asked of Dr. Thomson were answered in the original motion. The Trial Chamber observes that in response to an unknown question, Thomson answered "No, I do not keep records of this and try to downplay the magnitude to my college sot hey [sic] don't ask me to stop my work because of liability concerns for the college." The Trial Chamber considers this explanation to be unpersuasive as it does not explain the witness' failure to keep copies of threatening letters.

37. The Trial Chamber notes at the time it filed the Original Motion, the Defence had in its possession Annex A of the Instant Motion. The Defence opted not to provide this information to the Chamber to demonstrate its efforts to secure further information and clarification from Dr. Thomson regarding threats she may have been exposed to. In conclusion, the Trial Chamber does not accept that Annex A constitutes "new information" warranting reconsideration of the Impugned Decision.

38. Annex B of the Instant Motion consists of an exchange of emails between Philippe Larochelle, Defence Co-counsel, and Dr. Thomson. In a first email, Co-counsel informs Dr. Thomson that the Chamber denied the motion to hear her testimony by video-link. He proposes that she provide documents substantiating the threats made against her and that the Defence file a Motion for reconsideration on that basis.⁵⁰ Dr. Thomson responded that she is not "will [sic] to share any more documentary evidence than I already have."⁵¹ The Defence contends that this sentence should be interpreted in light of the documents she provided to the Defence team, namely "her affidavit, her expert report and not documentary proof of threat."⁵² However, the Trial Chamber is unable to conclude on the basis of this exchange that Dr. Thomson is *unable* to substantiate the allegations against her as it is equally plausible that she is simply unwilling to do so.

⁴⁹ See Instant Motion, Annex 1, registry number 6125, in which the Defence puts the following questions to Dr. Thompson (i) "Susan...would you elaborate as to why you believed this was a death threat?... what was the outcome of the case?" (ii) Susan, do you still have a copy of the report made by the Police by any chance?" (iii) "Susan: Would you have more details as to when this phone call was received..? Do you have your phone log by any chance? Did you report this to the police? If yes, do you have a police report?" (iv) "Susan, do you think you could give us a bit more details [sic] as to how the Tribunal has been unresponsive? Did you write to the UN? File a complaint? And when this issue was raised with WVSS...what was their reaction?" (v) "Susan, since you've been suffering threats since 2006/2007, we need to explain why you initially agreed to testify in person. In other words, we need to make clear which of the threats became your turning point? Was it the Ambassador?"

⁵⁰ Instant Motion, Annex B, Email I.

⁵¹ Mr. Larochelle to Dr. Thomson: "The Trial Chamber would like more documentary evidence regarding the threats alleged in your affidavit. Do you think it is possible to obtain such documents? We would like to...base our reconsideration request on some of these documents" Instant Motion, Annex B, Email I. Response from Dr. Thomson to Larochelle: "I am not will [sic] to share any more documentary evidence than I already have...I am not willing to expose me [sic], my children and the Rwandans...to more harassment and intimidation." Instant Motion, Annex B, Email II.

⁵² Reply, para. 41.

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Further, the Trial Chamber notes that the entire exchange in Annex B took place after the Chamber rendered the Impugned Decision so it is unable to accord any particular weight to her comments regarding the intimidation of her family and colleagues.

39. In conclusion, the Trial Chamber considers that the Defence has failed to establish that the "new" information provided in Annexes A and B of the Instant Motion constitute new facts or circumstances warranting reconsideration of the Impugned Decision. More specifically, it finds that the Defence has not satisfied any of the criteria required for reconsideration of a prior decision.

Certification for Leave to Appeal


40. The Trial Chamber recalls that Certification is an exceptional remedy that requires that the requesting party 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 materially advance the proceedings. Even where both factors are present, Certification remains an exceptional remedy within the absolute discretion of the Trial Chamber.⁵³

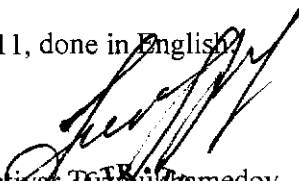

41. As concluded above, the Defence has not demonstrated that the failure of this witness to provide testimony to the Tribunal will affect the fair conduct of the proceedings. Thus, the Instant Motion has failed the first of two tests for certification to appeal the Impugned Decision.

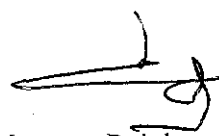
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Dated in Arusha, this 30 of March 2011, done in English


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tokhtommedov
Judge

[Seal of the Tribunal]


Mparany Rajohnson
Judge

⁵³ See para. 26, *supra*.