

7613  
Am



OR: ENG

### TRIAL CHAMBER III

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

**Registrar:** Adama Dieng

**Date:** 10 May 2011

## THE PROSECUTOR

V.

**Callixte NZABONIMANA**

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

**DECISION ON DEFENCE MOTION FOR LEAVE TO APPEAL THE TRIAL  
CHAMBER'S DECISION ON THE DEFENCE REQUEST TO CALL  
PROSECUTION INVESTIGATORS**

**Office of the Prosecution**  
Paul Ng'arua  
Memory Maposa  
Simba Mawere  
Diana Karanja  
Marie Ka

**Defence Counsel for Callixte Nzabonimana**  
Vincent Courcelle-Labrousse  
Philippe Laroche

62

## INTRODUCTION

1. Defence Witness Jean Marie Vianney Mporanzi testified before the Trial Chamber in the instant proceedings on 25, 26, 27 and 31 May 2010. During his testimony he alleged that when he was interviewed by investigators from the Office of the Prosecutor ("OTP") of the Tribunal in 1998 in Gitarama *préfecture*, certain monies were disbursed to him through the intermediary of the local government by a *sous-préfet* named "Marguerite".<sup>1</sup>
2. On 10 August 2010, the Prosecution filed a motion seeking to admit an "affidavit" by OTP Chief of Investigations Alfred Kwende and a "declaration" by Marguerite Mukansanga, a *sous-préfet* in Gitarama *préfecture* at the time of Mr. Mporanzi's interview in 1998.<sup>2</sup> Both declarants strenuously denied the allegations raised by Mr. Mporanzi during his testimony. However, the Trial Chamber denied the motion in a decision issued on 16 September 2010.<sup>3</sup>
3. On 21 January 2011, the Prosecution filed a motion seeking to recall Mr. Mporanzi for further cross-examination regarding the alleged disbursements.<sup>4</sup> In support of its motion, the Prosecution attached "affidavits" from Prosecution investigators Adamou Allagouma and Almahamoud Sidibe, as well as the previously-submitted "declaration" of Marguerite Mukansanga, all denying that any disbursements were made to prospective OTP witnesses through Rwandan officials. On 14 February 2011, the Trial Chamber granted the motion.<sup>5</sup>
4. On 2 March 2011, the Defence filed a motion seeking disclosure of records pertaining to disbursements paid to Mr. Mporanzi when he was interviewed

<sup>1</sup> See generally, Transcript of Trial Proceedings (English), 25-27 and 31 May 2010 ("Transcript").

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion for admission of Marguerite Mukansanga and Alfred Kwende's affidavits pertaining to the testimony of Jean-Marie Mporanzi, 10 August 2010.

<sup>3</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor's Motion for the Admission of Marguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi, 16 September 2010.

<sup>4</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 21 January 2011.

<sup>5</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 14 February 2011.

7611

by OTP Investigators in 1998.<sup>6</sup> On 28 March 2011, the Prosecution disclosed to the Defence several documents outlining, *inter alia*, the transfer of 245,000 Rwandese Francs between Prosecution Investigator Adamou Allagouma; Immaculée Mukamsabo, a *sous-préfet* of Gitarama *préfecture*; and the Finance Section of the Tribunal.

5. On 29 March 2011, the Defence filed a motion seeking reconsideration of the Chamber's decision to recall Mr. Mporanzi,<sup>7</sup> to which the Prosecution did not object.<sup>8</sup> The motion was declared moot in an oral decision issued by the Trial Chamber on 4 April 2011 and Mr. Mporanzi was excused from the Tribunal prior to the commencement of his recall testimony.
6. On 1 April 2011, the Defence filed a motion seeking to summon OTP Investigators Adamou Allagouma and Almahamoud Sidibe, as well as Ms. Immaculée Mukamsabo, for the purpose of testifying as to further particulars of the financial arrangements exposed by the documents disclosed by the Prosecution.<sup>9</sup>
7. On 7 April 2011, the Trial Chamber denied the Defence Motion stating that pursuit of the matters raised would be more appropriately addressed pursuant to Rules 77 and/or 91 ("Impugned Decision").<sup>10</sup>

<sup>6</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi's Recall, 2 March 2011.

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana's Motion for Reconsideration of the "Decision on Prosecutor's Motion for the recall of Defence witness Jean-Marie Vianney Mporanzi" issued on 14 February 2011 and admission of documents, 29 March 2011.

<sup>8</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Callixte Nzabonimana's Motion for Reconsideration of the "Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi" issued on 14 February 2011 and Admission of Documents, 31 March 2011.

<sup>9</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana's Motion for summon of OTP Investigators Adamou Allagouma and Almahamoud Sidibe, *sous-préfet* Ms. Immaculée Mukamasabo, 1 April 2011.

<sup>10</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on "Callixte Nzabonimana's Motion for summon of OTP Investigators Adamou Allagouma and Almahamoud Sidibe, *sous-préfet* Ms. Immaculée Mukamasabo", 7 April 2011.

R

7610

8. On 13 April 2011, the Defence filed a motion requesting leave to appeal the Impugned Decision ("Motion").<sup>11</sup>
9. On 18 April 2011, the Prosecution filed a response opposing the Defence Motion ("Response").<sup>12</sup>
10. On 21 April 2011, the Defence filed a reply.<sup>13</sup>

## DELIBERATIONS

### *Applicable Law*

11. With respect to certification to appeal, 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.

12. The correctness of a decision is a matter for the Appeals Chamber to decide.

"...[A] Trial Chamber is not concerned with the correctness of its own decision when determining whether to grant leave to appeal."<sup>14</sup> Instead, in

<sup>11</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion for Certification of Decision on "Callixte Nzabonimana's Motion for Summon of OTP investigators, Adamou Allagouma and Almahamoud Sidibe, Sous-Préfet Ms. Imaculée Mukamasabor, dated 7 April 2011, 13 April 2011.

<sup>12</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, The Prosecutor's Response to Defence Motion for Certification of Decision on "Callixte Nzabonimana's Motion for Summon of OTP investigators, Adamou Allagouma and Almahamoud Sidibe, Sous-Préfet Ms. Imaculée Mukamasabor dated 7 April 2011, 18 April 2011.

<sup>13</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Reply to the Prosecutor's Response to Defence Motion for Certification of Decision on "Callixte Nzabonimana's Motion for Summon of OTP investigators, Adamou Allagouma and Almahamoud Sidibe, Sous-Préfet Ms. Imaculée Mukamasabor dated 7 April 2011 ("Reply"), 21 April 2011.

<sup>14</sup> *Prosecutor v. Bagasora et al.*, ICTR-98-44-T, Decision on Motion for Reconsideration concerning standards for granting Certification of Interlocutory Appeal, 16 February 2006, para. 4, citing *Milosevic*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 3 ("A request for certification is not concerned with whether a decision was correctly reasoned or not. This is a matter for appeal, be it an interlocutory appeal or one after the final Judgement has been rendered"). *Bi zimungu et al.*, 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, para. 28 ("All other

88

determining whether 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.<sup>15</sup> Even where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber,<sup>16</sup> and certification remains an exceptional measure.<sup>17</sup> As noted in *Ntahobali*, "Rule 73(B)... provides... that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of [its] decisions".<sup>18</sup>

*Test for certification for interlocutory appeal*

13. Rather than applying the test for certification for interlocutory appeal as prescribed by Rule 73 (B), the Defence employs the standard of review applied by the Appeals Chamber when asked to review a Trial Chamber Decision. Specifically, the Appeals Chamber has held that it will only overturn Trial Chamber decisions if 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

---

considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber"); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 21 ("The Chamber notes that the Defence submissions on the Chamber's alleged errors in law and fact, in Impugned Decisions I and II, are not relevant at the certification stage").

<sup>15</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>16</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>17</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>18</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.

7608

the Trial Chamber's discretion.<sup>19</sup> The Prosecution does not challenge the use of this test in seeking certification, and indeed rebuts the Defence on each point using the same test. The Defence relies on the same test in its reply.

14. In other words, both parties have constructed their arguments as if they were addressing the Appeals Chamber with respect to the merits of the Impugned Decision rather than seeking leave from the Trial Chamber to appeal the Impugned Decision.

15. The Trial Chamber could therefore deny the Motion on the basis of these legal errors. However, in the interests of justice, the Chamber will apply the arguments of the parties to the correct test in order to make a determination on this matter.

*Issue that would significantly affect the fair and expeditious conduct of the proceedings*

16. According to the Defence, the parties agree that the documents regarding the payments made to Witness Jean Marie Vianney Mporanzi raise "valid questions about the integrity of the Office of the Prosecutor."<sup>20</sup> The Defence further contends that there exists a "sinister reality...that a number of Prosecution witnesses are likely to have also been 'indemnified' by the Rwandan authorities on behalf of the OTP investigators," and that these irregular procedures resulted in a "calumnious [sic] Indictment."<sup>21</sup> In other words, the issue of the payments to Prosecution witnesses may touch on the credibility of "each and every Prosecution witness," and is therefore a matter for determination by the Trial Chamber in the main trial.<sup>22</sup> The Defence further contends that had the Prosecution acknowledged before the start of trial the existence of the receipts and disclosed them to the Defence, the

<sup>19</sup> Defence Motion, para. 12. See for example, *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal on the Trial Chamber's Assignment of Defence Counsel, 17 November 2004, *Prosecutor v. Karamera et al.*, ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecution Witness BTH for false testimony, 16 February 2010, para. 15.

<sup>20</sup> Motion, paras. 17, 41.

<sup>21</sup> Motion, paras. 24, 41-48.

<sup>22</sup> Motion, paras. 39, 42.

88

7607

Defence would have been in a position to cross-examine each Prosecution witness in detail on the payments disbursed when they provided statements to the Prosecution.<sup>23</sup> Finally, the Defence submits that ventilating the issues in separate proceedings pursuant to Rule 77 would “expose [the accused] to an unnecessary lengthening of the proceedings” thereby violating his right to fair and expeditious proceedings.<sup>24</sup>

17. The Prosecution responds that the Chamber did not fail to heed Defence concerns. Rather, it concluded that it would be more appropriate to ventilate the issues in dispute in ancillary proceedings than in the main trial.<sup>25</sup> Thus, the Defence cannot argue that the Trial Chamber abused its discretion when it has not “exhausted the remedy prescribed by the Trial Chamber.”<sup>26</sup> Finally, the Prosecution notes that the evidence phase of the case against the accused is scheduled to close on 6 May 2011. Therefore, airing the issue of payments in ancillary proceedings will not violate the right of the accused to expeditious proceedings.<sup>27</sup>

18. The Trial Chamber has found that the concerns raised by the Defence would best be addressed in ancillary proceedings. The Chamber is aware of no rule or jurisprudence that would prevent it from considering conclusions in separate proceedings prior to issuing its final judgement if the conclusions are deemed relevant to the main trial.<sup>28</sup> Therefore the Trial Chamber concludes that the matter does not affect the fair and expeditious conduct of proceedings. On the contrary, the evidence phase of the main trial closed on 6 May 2011. Hearing the issues raised by the Defence in the context of the main trial would require that the proceedings be re-opened thereby interfering with the expeditious conduct of proceedings.

<sup>23</sup> Reply, para. 23.

<sup>24</sup> Motion, para. 41.

<sup>25</sup> Response, paras. 16-21.

<sup>26</sup> Response, para.24.

<sup>27</sup> Response, paras. 51-52.

<sup>28</sup> One the contrary, see for example Rule 92 bis (D).


88

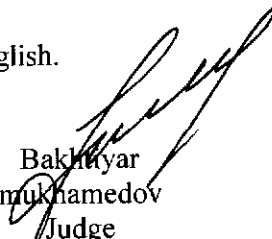
7606

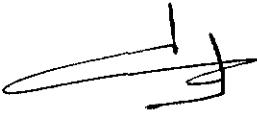
19. The Chamber has therefore determined that the Defence has failed to satisfy the first prong of the Rule 73 (B) test for certification, therefore it is not required to review the second prong of the test. In any case, it notes that neither party has addressed the second prong of the test.

**FOR THESE REASONS, THE TRIAL CHAMBER  
DENIES the Defence Motion.**

Arusha, 10 May 2011, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Bakhtiyar  
Tuzmukhamedov  
Judge

  
Mparany Rajohnson  
Judge

[Seal of the Tribunal]