UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 8 August 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

DECISION ON DEFENCE MOTION FOR CERTIFICATION OF THE TRIAL CHAMBER 12 JULY 2011 DECISION ON DEFENCE MOTION TO TAKE JUDICAL NOTICE OF ADJUDICATED FACTS

Office of the Prosecution:
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INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 20 June 2011, the Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) filed a motion requesting the Chamber to take judicial notice of certain adjudicated facts.[1] Specifically, the Defence requested that the Chamber take notice of adjudicated facts surrounding Tharcisse Muvunyi's role as a superior at ESO as determined by the Trial Chamber in his case.[2] The Defence submitted that the facts "are no longer appealable and the Appeals Chamber has declined to consider them on appeal," justifying the taking of judicial notice.[3] The Defence lastly contended that judicial notice should be resolved "in favour of the Accused, because judicial notice is only restricted when there is a risk that it infringes on the rights of the Accused."[4]

3. On 27 June 2011, the Office of the Prosecutor ("Prosecution") filed its response.[5] The Prosecution submitted that the criteria for Rule 94(B) of the Rules of Procedure and Evidence ("Rules") had not been met,[6] and that the facts of which the Defence sought to obtain judicial notice had not been finally determined.[7] The Defence did not file a reply.

4. On 12 July 2011, the Chamber rendered its Decision.[8] The Chamber declined to take judicial notice of the adjudicated facts on the basis that it did not consider the facts contained in the first Muvunyi trial judgement to have been "finally determined".[9]

5. On 19 July 2011, the Defence filed a motion requesting certification of the Impugned Decision.[10] The Defence submits that the fairness of the trial against the Accused is affected by the denial of the Chamber to take judicial notice of adjudicated facts contained in the first Muvunyi judgement, because it "denies the Accused the opportunity to expose incoherent

[1] Motion to Take Judicial Notice of Adjudicated Facts ("Motion"), 20 June 2011.
[2] Motion, paras. 20-22.
[3] Motion, para. 23.
[4] Motion, para. 24.
[5] Prosecutor's Response to the Defence Motion to Take Judicial Notice of Adjudicated Facts ("Response"), 27 June 2011.
[6] Response, para. 4.
[7] Response, paras. 4-18.
[8] Decision on Motion to Take Judicial Notice of Adjudicated Facts ("Impugned Decision"), 12 July 2011.
[9] Impugned Decision, paras. 10-11.
[10] Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts ("Motion for Certification"), 19 July 2011.

prosecutorial policies."[11] The Defence argues that the Accused is being tried on the exact same facts as were alleged against Colonel Muvunyi, because the Prosecution lost its case against Muvunyi for failure to provide notice.[12] The Defence contends that the failure by the Chamber to take notice of the adjudicated facts effectively means that Colonel Muvunyi could be retried on the same facts contained in the first trial judgement.[13] The Defence further submits that both the expeditiousness and the outcome of the trial is affected, as the issues surrounding the Accused's authority, command and control go to the heart of this case.[14] The Defence lastly contends that a decision by the Appeals Chamber would materially advance the proceedings, "while serving the purpose of harmonization of judgements and judicial certainty on an important issue."[15]

6. On 25 July 2011, the Prosecution filed its response.[16] The Prosecution submits that the Defence fails to establish the criteria necessary for certification.[17] In particular, the Prosecution contends that its policies are far from incoherent, as it is possible to accuse multiple people with the same elements of authority.[18] According to the Prosecution, the Defence cannot assert *res judicata* rights held only by Colonel Muvunyi, and cannot claim on the basis thereof that the fairness of the proceedings in this case is affected.[19] The Prosecution further submits that the Defence cannot claim that a review by the Appeals Chamber will expedite the proceedings, considering the advanced stage of the trial.[20] The Prosecution contends that the failure to take judicial notice of facts contained in the Muvunyi trial judgement does not deprive the Defence of the means to enter evidence regarding the Accused's role at ESO, and therefore does not significantly affect the outcome of the trial.[21] The Prosecution lastly submits that the Defence has not demonstrated how the Impugned Decision involves an issue of which an immediate resolution will materially advance the proceedings.[22]

7. The Defence did not file a reply.

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[11] Motion for Certification, para. 10.
[12] Motion for Certification, para. 11.
[13] Motion for Certification, para. 12.
[14] Motion for Certification, paras. 13, 15-17.
[15] Motion for Certification, paras. 17-19.
[16] Prosecutor's Response to Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts ("Prosecution Response to Motion for Certification"), 25 July 2011.
[17] Prosecution Response to Motion for Certification, paras. 12-24.
[18] Prosecution Response to Motion for Certification, paras. 12-14.
[19] Prosecution Response to Motion for Certification, para. 16.
[20] Prosecution Response to Motion for Certification, paras. 17-19.
[21] Prosecution Response to Motion for Certification, paras. 20-22.
[22] Prosecution Response to Motion for Certification, paras. 23-24.

DELIBERATIONS

Law on Certification

8. The Chamber recalls that certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.[23] Indeed, decisions rendered under Rule 73 "are without interlocutory appeal save with certification by the Trial Chamber." According to Rule 73(B) the Chamber may grant certification to appeal a decision 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.[24] Certification to appeal may be granted only if both criteria are satisfied.[25]

9. In considering whether to grant certification for appeal, the Chamber need not determine whether the Impugned Decision is correct.[26] Rather, the Chamber must determine whether the issue is one that merits certification under Rule 73(B).[27]

10. The Chamber notes at the outset that, unlike Rule 94(A), the taking of judicial notice of facts from another proceeding pursuant to Rule 94(B) is a matter of discretion, rather than obligation.[28] The Chamber further recalls that the Appeals Chamber has previously held that

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[23] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case (TC), 14 May 2008, para. 4 ("The Appeals Chamber recognizes the discretionary powers of the Trial Chamber over Rule 73(B) procedures and regularly emphasizes that requests for certification to appeal are only warranted under exceptional circumstances."). *See also Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal (TC) ("Niyitegeka Decision"), 13 May 2008, para. 15; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 22 May 2007, para. 6.

[24] *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98*bis* (TC), 24 April 2007, para. 5.

[25] *Ibid.*

[26] *Prosecutor v. Karemera et al*., Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007, para. 4; Niyitegeka Decision of 13 May 2008, para. 17; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para 4; *Prosecutor v. Bizimungu et al*., Case No. ICTR-99-50-T, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92*bis* Admission of Faustin Nyagahima's Written Statement (TC), 22 August 2007, para. 4; *Prosecutor v. Bizimungu et al*., Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence (TC), 23 July 2008, para. 6 (citations omitted).

[27] *Prosecutor v. Nizeyimana,* Case No. ICTR-2011-55C-PT, Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi (TC), 2 December 2010, para. 5.

[28] *See Prosecutor v. Karemera et al*., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC) ("Karemera Appeals Decision"), 16 June 2006, para. 41.

the Trial Chamber, as trier of fact, bears the primary responsibility for admission of evidence and that certification must be "the absolute exception when deciding on the admissibility of evidence."[29]

11. The Defence contends that the Accused's right to a fair and expeditious trial are affected by its inability to expose the prosecutorial inconsistencies, particularly with respect to facts related to the authority, command and control of the Accused at ESO. The Chamber recalls that it declined to take judicial notice of the facts in the first Muvunyi trial judgement, because they do not constitute facts "which have been finally determined."[30] Indeed, the Defence also acknowledges that "the Appeals Chamber declined to consider" these facts, but nonetheless argues that they "are still *res judicata*". The Defence does not cite any jurisprudence in support of this submission.[31]

12. Even if the facts contained in the first Muvunyi trial judgement were considered final for purposes of judicial notice, the Chamber is vested with broad discretion to decline the admission thereof.[32] Certification on the grounds advanced by the Defence would not, in the Chamber's view, be appropriate in respect to the Chamber's decision to decline to take judicial notice of facts which have not been finally determined.

13. Moreover, the Defence has had ample opportunity to present evidence in relation to the Accused's alleged authority, command and control at ESO, and will have further opportunity to detail its submissions with respect to this issue in its final brief and oral arguments. The Chamber is therefore of the view that its decision to decline to take judicial notice of the facts does not significantly affect the fairness of the proceedings and thus does not consider the first prong of Rule 73(B) to have been satisfied.

14. In the present case, the Chamber is not satisfied that the Impugned Decision raises an issue the immediate resolution of which by the Appeals Chamber would materially advance the proceedings. Consequently, the Chamber does not find that the Defence has discharged its burden of demonstrating the existence of exceptional circumstances warranting certification of the Impugned Decision pursuant to Rule 73(B).

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[29] *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5. *See also Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417 (TC), 15 November 2006, para. 2.
[30] Impugned Decision, paras. 10-11.
[31] Motion for Certification, para. 8.
[32] Rule 94(B). *See also* Karemera Appeals Decision, paras. 40, 55.

FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 8 August 2011, done in English.

Lee Gacuiga Muthoga Presiding Judge	Seon Ki Park Judge	Robert Fremr Judge
	[Seal of the Tribunal]	
[Absent at the time of signature]	[Absent at the time of signature]	