



UNITED NATIONS
NATIONS UNIES

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 April 2012

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL OFFICE
ICTR
KIGALI

2012 APR 30 A 10: 20

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR
CERTIFICATION OF THE "ORDER TO THE PARTIES CONCERNING
SUBMISSIONS ON POTENTIALLY EXCULPATORY MATERIAL CONTAINED
ON THE CD-ROM DISCLOSED BY THE PROSECUTION ON 17 FEBRUARY 2012"
OF 4 APRIL 2012**

Pursuant to Rule 73(B) and 54 of the Rules of Procedure and Evidence

Office of the Prosecution:

Paul Ng'arua
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Defence Counsel

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Philippe Laroche, Co-Counsel

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INTRODUCTION

1. On 14 February 2012, the Defence sent a letter to the Prosecution requesting the disclosure of testimony from three previous ICTR trials and witness statements.¹ On 17 February 2012 the Prosecution responded and sent to the Defence a CD-ROM containing the requested material ("CD-ROM").²
2. On 12 March 2012, the Defence filed "Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence" ("Motion I").³ The Prosecution filed a Response on 14 March 2012 ("Response I").⁴
3. On 15 March 2012, the Trial Chamber issued a *Proprio Motu* Order ("Proprio Motu Order"), ordering the Defence to file specific and comprehensive submissions regarding potentially exculpatory material contained on the CD-ROM by 19 March 2012 and the Prosecution to respond by 23 March 2012.⁵
4. In lieu of complying with this Order, on 19 March 2012, the Defence filed "Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012" ("Motion II").⁶ The Prosecution filed its Response on 21 March 2012 ("Response II").⁷ On 23 March 2012, the Defence filed its Reply ("Reply II").⁸
5. On 22 March 2012, the Chamber invited the Registrar to make submissions on the human and material resources available to the Defence in 2012.⁹ On 26 March 2012, the Registrar filed its submissions ("Registrar's Submissions").¹⁰ The Registrar informed the Chamber that Defence Counsel and Detention Management Section ("DCDMS") received a

¹ Letter from Defence Counsel to Prosecution Counsel, dated 14 February 2012.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecution Response to Defence Request Dated 14 February 2012, 17 February 2012.

³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 12 March 2012.

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 14 March 2012.

⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, *Proprio Motu* Order to the Parties Concerning Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 15 March 2012.

⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 19 March 2012.

⁷ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 21 March 2012.

⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor's Response to Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 23 March 2012.

⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 22 March 2012.

¹⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar's Submission in Respect of the Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 26 March 2012.

request from Lead Counsel on 8 February 2012 for additional resources to comprehensively address the disclosures contained on the CD-ROM.¹¹ On 10 February 2012, Defence Lead Counsel recommended to DCDMS an allocation of 150 hours for one Legal Assistant or alternatively 75 hours for each of two Legal Assistants and 30 hours for Lead Counsel or Co-Counsel.¹² On 13 February 2012 DCDMS accepted the Defence request as it was considered reasonable in terms of material and human resources.¹³ On 14 and 16 February 2012, the contracts of two Legal Assistants were renewed for a period ending on 31 March 2012, and for a total allocation of 150 hours.¹⁴ The Registrar also submitted that Lead Counsel is assigned for all stages of the case and that Co-Counsel is assigned for the whole trial stage and should remain available until judgement delivery.¹⁵ Neither Lead Counsel nor Co-Counsel need be reassigned.¹⁶

6. On 30 March 2012, the Defence requested leave to file a response to the Registrar's Submissions.¹⁷ On the same day, the Chamber issued an Order granting the Defence leave to respond to the Registrar's Submissions ("Order II").¹⁸ On 2 April 2012, the Defence filed a Motion entitled "Motion in Response to the Registrar's Submissions dated 26 March 2012" ("Defence Response Submissions") and the Prosecution filed submissions on the same day ("Prosecution Response Submissions").¹⁹ On 3 April 2012, the Registrar filed further submissions ("Registrar's Further Submissions").²⁰ In its Further Submissions, the Registrar stated that the Registry approved in its entirety the 8 February 2012 Defence request for additional resources. The Defence did not request additional resources after the disclosure of the CD-ROM and did not request that the contracts of support staff be renewed after their contracts expired on 31 March 2012.²¹

¹¹ Registrar's Submissions, para. 4. The Chamber notes that this date precedes the date the CD-ROM was delivered, on 17 February 2012.

¹² Registrar's Submissions, para. 6.

¹³ Registrar's Submissions, para. 7.

¹⁴ Registrar's Submissions, para. 10.

¹⁵ Registrar's Submissions, para. 8.

¹⁶ Registrar's Submissions, para. 8.

¹⁷ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 30 March 2012.

¹⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order on Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 30 March 2012.

¹⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Motion in Response to the Registrar's Submissions dated 26 March 2012, 2 April 2012; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Submissions Pursuant to Order on Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 2 April 2012.

²⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar's Further Submissions on Resources Available to the Defence in 2012, 3 April 2012.

²¹ Registrar's Further Submissions, paras. 2-3.

7. On 4 April 2012, the Trial Chamber ordered the Defence to file specific and comprehensive submissions regarding the potentially exculpatory material contained on the CD-ROM on or before 13 April 2012 and the Prosecution to respond by 16 April 2012 ("4 April 2012 Order").²²
8. On 11 April 2012, the Defence filed a motion for reconsideration and certification of the 4 April 2012 Order ("Motion").²³
9. On 17 April 2012, the Prosecution filed its response ("Response").²⁴
10. On 19 April 2012, the Defence filed its reply ("Reply").²⁵

SUBMISSIONS OF THE PARTIES

Defence Motion

11. The Defence requests the Trial Chamber to reconsider or grant certification to appeal the 4 April 2012 Order, which the Defence refers to as the "Impugned Decision".²⁶ The Defence argues that there has been a material change in circumstances since the 4 April 2012 Order was issued.²⁷ It submits that in an email on 6 April 2012, it requested the Registrar to grant it additional resources to analyse the materials in the CD-ROM in accordance with the 4 April 2012 Order.²⁸ On 11 April 2012, the Registrar denied the Defence's requests.²⁹ This material change in circumstances warrants reconsideration.³⁰ The Defence claims the Chamber should reconsider the time limit imposed by the 4 April 2012 Order because the Chamber did not consider the time for processing a request for resources.³¹

²² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012, 4 April 2012.

²³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Urgent Motion for Reconsideration or Certification of the "Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012", 4 April 2012, 13 April 2012.

²⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Urgent Motion for Reconsideration or Certification of the "Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012", 4 April 2012, 17 April 2012.

²⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Reply to the Prosecutor's Response to Nzabonimana's Urgent Motion for Reconsideration or Certification of the "Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the DC-ROM Disclosed by the Prosecution on 17 February 2012," 4 April 2012.

²⁶ Motion, paras. 1, 12.

²⁷ Motion, para. 17.

²⁸ Motion, para. 20.

²⁹ Motion, para. 21.

³⁰ Motion, para. 21.

³¹ Motion, para. 21.

12. The Defence further submits that the 4 April 2012 Order is erroneous and constitutes an abuse of discretion that has occasioned a gross prejudice against Nzabonimana.³² The 4 April 2012 Order is erroneous because it ordered the Defence to work without resources.³³ The contracts of the two legal assistants had expired and the hours allocated had been used prior to the issuance of the 4 April 2012 Order. The Defence asserts that it stated that these resources were insufficient to review the documents on the CD-ROM.³⁴ And notes that it informed the Chamber and DCDMS of the need for resources.³⁵ Although the Defence had the CD-ROM in its possession for seven weeks, the Defence channelled its resources to other tasks necessary to protect Nzabonimana's rights.³⁶ The Defence recalls that it was allocated 150 hours for the two assistants and 30 hours for Counsel.³⁷ This amounts to 75 hours per month to be divided between assistants (*i.e.* 37.5 hours) and 7.5 hours per month for each Counsel.³⁸ Both Lead Counsel and Co-Counsel were granted 500 US Dollars per month for January through March 2012 to carry out all tasks.³⁹ It thus argues that the allocated budget was insufficient to cover all the work carried out by the Defence in 2012.⁴⁰

13. The Defence also submits that the Chamber has abused its discretion,⁴¹ arguing that while the Chamber granted nine additional days to the Defence to make submissions on the material contained in the CD-ROM, there was no provision for the additional resources requested by the Defence.⁴² The Defence claims that the 4 April 2012 Order implied that the Defence should work *pro bono* and in an extremely short amount of time.⁴³

14. The Defence submits that in rendering the 4 April 2012 Order, the Chamber relied on the Registrar's submissions as to the resources available.⁴⁴ The Defence submits that the Registrar was incorrect in saying that the 8 February 2012 request for additional resources was meant to be used for review of the CD-ROM.⁴⁵ The resources requested on 8 February 2012 were to request disclosure from the Prosecution, prepare motions and perform other

³² Motion, paras. 17, 22.

³³ Motion, para. 22.

³⁴ Motion, para. 22.

³⁵ Motion, para. 22.

³⁶ Motion, para. 22.

³⁷ Motion, para. 39.

³⁸ Motion, para. 39.

³⁹ Motion, para. 39.

⁴⁰ Motion, para. 39.

⁴¹ Motion, para. 23.

⁴² Motion, para. 23.

⁴³ Motion, paras. 24, 31.

⁴⁴ Motion, para. 25.

⁴⁵ Motion, paras. 25, 44

tasks necessary to preserve Nzabonimana's rights.⁴⁶ The Defence claims that the Chamber disregarded the Defence submissions regarding the delayed disclosure of a large quantity of documents.⁴⁷

15. The Defence asserts that in its 12 March 2012 Motion, it requested "that the case be reopened and the Defence be given reasonable time to meet and interview the witnesses to whom the exculpatory material related".⁴⁸ The Chamber ignored this request and instead focused upon the Registrar's "misleading" information on resources.⁴⁹

16. The Defence also submits that the Chamber abused its discretion in relying on the Registrar's 3 April 2012 submissions without giving the Defence an opportunity to reply.⁵⁰

17. The Defence further asserts that the Chamber abused its discretion by ignoring: (1) the Prosecution's habit of disclosing documents with great delay; (2) that the Defence's 6 March 2012 and 15 February 2012 Motions are still pending; (3) that the Defence team is no longer intact; and (4) that the Defence has been active with other matters pertaining to the case than the CD-ROM. The Defence asserts that the Chamber focused upon the Registrar's submissions instead of realising that the matter "is much graver and greater".⁵¹

18. The Defence observes that the rights of the accused should not be undermined simply because of the late stage of proceedings.⁵² It recalls that Article 20(4)(b) guarantees that an accused has adequate time and facilities for the preparation of his defence.⁵³ The Directive on the Assignment of Defence Counsel ("Directive on Assignment of Defence Counsel") provides that the Tribunal shall meet the costs and expenses of legal representation that are necessarily and reasonably incurred.⁵⁴ Also, the Tribunal shall pay costs of measures taken for the production of evidence to assist or support the Defence.⁵⁵

19. The Defence asserts that it suffered prejudice because a significant amount of relevant documents need to be reviewed before the Judgment is pronounced.⁵⁶ The Defence reiterates that the Prosecutor's conduct has denied Nzabonimana's right to a fair trial.⁵⁷

⁴⁶ Motion, para. 44.

⁴⁷ Motion, para. 25.

⁴⁸ Motion, paras. 25, 45.

⁴⁹ Motion, para. 45.

⁵⁰ Motion, para. 41-43.

⁵¹ Motion, paras. 23-45.

⁵² Motion, para. 36.

⁵³ Motion, para. 37.

⁵⁴ Motion, para. 37.

⁵⁵ Motion, para. 37.

⁵⁶ Motion, para. 47.

⁵⁷ Motion, para. 48.

20. In support of its request for certification, the Defence reiterates its submissions for reconsideration.⁵⁸ It notes that the disclosed material is exculpatory.⁵⁹ This evidence is not part of the record and therefore the fairness of the proceedings is affected, as the Chamber is currently deliberating on the Judgment.⁶⁰ It submits that the Chamber does not have all the relevant information before it during its deliberations.⁶¹ The Defence asserts that immediate resolution by the Appeals Chamber may materially advance the proceedings.⁶²

21. The Defence submits that re-opening the case will ensure Nzabonimana's right to a fair trial.⁶³ It is unduly prejudicial to deprive the Defence of the proper time and resources to assess all documents, thus constituting an abuse of discretion.⁶⁴ The Defence reiterates its request to sanction the Prosecution for the delayed disclosure because the Prosecution's conduct has persistently affected the fair and expeditious conduct of the proceedings.⁶⁵

Prosecution Response

22. The Prosecution submits that the instant Motion should be denied⁶⁶ as there is no new fact and no exceptional or material change in the circumstances since the 4 April 2012 Order was rendered.⁶⁷

23. The Prosecution asserts that the Chamber already considered the resources available to the Defence.⁶⁸ It notes that the Registrar's refusal to provide additional resources does not amount to an exceptional or material change in circumstances since the 4 April 2012 Order was rendered.⁶⁹ Furthermore, the Prosecution recalls that although the Defence knew that it was essential to review the 17 February 2011 disclosures, the Defence only requested additional resources on 6 April 2012.⁷⁰ Whether or not the Defence had additional resources three days before the filing deadline for its submissions does not amount to an exceptional or material change in circumstances.⁷¹

⁵⁸ Motion, para. 49.

⁵⁹ Motion, para. 50.

⁶⁰ Motion, para. 50.

⁶¹ Motion, para. 50.

⁶² Motion, para. 53.

⁶³ Motion, para. 52.

⁶⁴ Motion, para. 52.

⁶⁵ Motion, para. 52.

⁶⁶ Response, para. 1.

⁶⁷ Response, para. 1.

⁶⁸ Response, para. 16.

⁶⁹ Response, para. 16.

⁷⁰ Response, para. 18.

⁷¹ Response, paras. 18-19.

24. The Prosecution submits that the 4 April 2012 Order was not erroneous as the Chamber considered the resources available to the Defence.⁷² It recalls that a previous request for resources had been approved in its entirety on 14 and 16 February 2012 for two legal assistants through to 31 March 2012.⁷³ Furthermore, at the time the 4 April 2012 Order was issued, the Defence had not requested any further resources. Therefore, the Defence does not have a valid claim regarding lack of resources.⁷⁴ Thus there was no discernible error in the 4 April 2012 Order and no prejudice caused to the Defence.⁷⁵

25. The Prosecution submits that the Chamber did not err in not granting the Defence a right to comment on the Registrar's 3 April 2012 filing and that there was no prejudice.⁷⁶ The Prosecution asserts that the review of the CD-ROM was not too large a task for the Defence as much of the information was known to the Defence or easily available.⁷⁷

26. Regarding certification of appeal, the Prosecution submits that certification is to be granted sparingly, and should be denied under the instant circumstances.⁷⁸ It argues that the Defence has failed to show that the fairness and expeditiousness of the proceedings or the outcome of the trial would be significantly affected by the 4 April 2012 Order.⁷⁹ The Defence has also not shown that immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings.⁸⁰

27. The Prosecution also submits that several issues raised in the instant motion are irrelevant factors for reconsideration and certification of the 4 April 2012 Order, *inter alia* the sanctioning of the Prosecution, the setting of a deadline for Defence submissions and taking into consideration the Registrar's small budget.⁸¹ It thus requests the motion be dismissed.

Defence Reply

28. The Defence reiterates the submissions made in its Motion. It emphasises that it is continuously being denied resources and is thus having to conduct its work on a *pro bono*

⁷² Response, para. 20.

⁷³ Response, para. 20; 4 April 2012 Order, para.6.

⁷⁴ Response, para. 21.

⁷⁵ Response, para. 23.

⁷⁶ Response, para. 23.

⁷⁷ Response, para. 24.

⁷⁸ Response, paras. 25, 27.

⁷⁹ Response, para. 26.

⁸⁰ Response, para. 26.

⁸¹ Response, para. 28.

9697

basis.⁸² The Defence reiterates that its two legal assistants and Counsel were granted limited hours to complete tasks arising prior to and separate from the 17 February 2012 disclosures.⁸³

29. The Defence asserts that in the 4 April 2012 Order, the Chamber erroneously reasoned that it was given resources to deal with the 17 February 2012 disclosures. The resources granted to the Defence in February and March 2011, were intended for other tasks and not for reviewing the disclosures. Thus, the fact that the Defence was in possession of the material for seven weeks is immaterial as the resources allocated were not intended to analyse the disclosures.⁸⁴

30. The Defence submits that the Registrar's Submissions leading to the 4 April 2012 Order and the Registrar's Further Submissions were contradictory and no explanation was offered by the Registrar. It argues that prior to rendering the 4 April 2012 Order the Chamber was under the impression that resources had been allocated to the Defence for the review of the 17 February 2012 disclosures whereas this was not the case.⁸⁵

31. It denies the Prosecution contention that the issues raised in its Motion were irrelevant.⁸⁶ The Defence notes that as of the date of the filing of its Reply, it has no resources to review the 267 files.⁸⁷ It requests its Motion be granted.

DELIBERATIONS

Applicable Law

Reconsideration

32. 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.⁸⁸

⁸² Reply, para. 4.

⁸³ Reply, para. 7.

⁸⁴ Reply, para. 9.

⁸⁵ Reply, para. 12.

⁸⁶ Reply, paras. 13, 17-21.

⁸⁷ Reply, para. 14.

⁸⁸ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Case No. ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Case No. 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.

818

33. The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁸⁹

Certification to Appeal

34. Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") 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.

35. Thus, in order to grant Certification to appeal a decision, 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.⁹⁰ Even where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber,⁹¹ and certification remains an exceptional measure.⁹²

Analysis

Reconsideration

Whether a new fact or circumstance arose after the original decision

36. The Defence argues that there has been a material change in circumstances since the 4 April 2012 Order was issued.⁹³ It asserts that on 6 April 2012, it made a request to the Registrar for additional resources in order to analyse the materials in the CD-ROM.⁹⁴

⁸⁹ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007, para. 6.

⁹⁰ *Prosecutor v. 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.

⁹¹ *Ngirabatware*, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 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.

⁹² *Karemera et al.*, Decision on Joseph Nzirorera'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 Lynne, 19 February 2009, para. 4; *Ngirabatware*, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, para. 17.

⁹³ Motion, para. 17.

⁹⁴ Motion, para. 20.

However, on 11 April 2012, the Registrar denied the request.⁹⁵ The Defence submits that this amounts to a material change in circumstances and warrants reconsideration.⁹⁶

37. The Chamber recalls that the Defence had the CD-ROM in its possession for seven weeks as of the date its final submissions on the material were due, 13 April 2012. When the Defence received the CD-ROM it had resources available which had been approved by the Registrar, and which it applied to other matters pertaining to the case. The Defence did not ask for any additional resources until after the Chamber issued its 4 April 2012 Order. The Chamber considers that diligent counsel would have taken steps to request additional resources as soon as the CD-ROM was received. Thus, the Chamber considers that the Registrar's refusal to grant additional resources does not constitute a new circumstance. Rather, the circumstances display dilatory conduct on the part of the Defence. Accordingly, the Chamber does not consider that the Defence has demonstrated that there is a new circumstance warranting reconsideration.

Whether there was an error of law or abuse of discretion

38. The Defence submits that the 4 April 2012 Order is erroneous and constitutes an abuse of discretion because it did not have adequate resources to review the materials.⁹⁷ It asserts that the Chamber continues to ignore the Prosecution's habit of disclosing documents with great delay and ignoring that the Defence's 6 March 2012 and 15 February 2012 Motions are still pending.⁹⁸ It thus argues that Nzabonimana is prejudiced.⁹⁹

39. The Chamber recalls that in the 4 April 2012 Order, it considered the volume of the materials contained in the CD-ROM. In the interests of justice the Chamber allowed the Defence additional time to make specific and comprehensive submissions on the potentially exculpatory material.¹⁰⁰ The Chamber observes that the Defence acknowledges that it has been able to conduct a *prima facie* review of the documents contained on the CD-ROM.¹⁰¹ The Chamber also recalls that it deferred its Decision on the pending Defence Motions until receipt of the Parties' submissions. Given these circumstances, the Chamber considers that the Defence has not demonstrated that it abused its discretion.

⁹⁵ Motion, para. 21.

⁹⁶ Motion, para. 21.

⁹⁷ Motion, para. 22.

⁹⁸ Motion, paras. 27-30.

⁹⁹ Motion, para. 17.

¹⁰⁰ 4 April 2012 Order, para. 16.

¹⁰¹ Motion, para. 32.

88

0494

40. The Defence also submits that the Chamber abused its discretion in relying on the Registrar's 3 April 2012 Further Submissions without giving the Defence an opportunity to reply.¹⁰² The Chamber recalls that after the Registrar made its initial submissions the Defence requested leave to file a response and the Chamber allowed the request in the interests of justice.¹⁰³ The Defence did not request leave from the Chamber to file a reply to the Registrar's Further Submissions. Moreover, the Chamber notes that the Parties cannot file an endless number of responses. Accordingly, the Chamber does not consider that it abused its discretion. In light of the above reasoning, the Chamber concludes that the Defence has not demonstrated that reconsideration of the 4 April 2012 Order is warranted.

Certification to Appeal

41. The Defence submits that the fairness of the proceedings is affected because exculpatory material is not part of the record as the Chamber deliberates upon the Judgement.¹⁰⁴ It submits that the Chamber does not have all the relevant information before it during its deliberations.¹⁰⁵ The Defence asserts that immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁰⁶

42. The Chamber reiterates that the 4 April 2012 Order requested submissions from the parties regarding the potentially exculpatory nature of the material contained on the CD-ROM. This Order was not a disposition on whether the materials were in fact potentially exculpatory. The Chamber therefore considers the Defence request for certification to be premature.

43. Based on the foregoing analysis, the Chamber is not convinced that the issue raised by the Defence would significantly affect the expeditious conduct of proceedings or that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Accordingly, the Chamber denies the Defence request for certification to appeal.

¹⁰² Motion, paras. 41-43

¹⁰³ *Prosecutor v. Nzabonimana*, Order on Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012.

¹⁰⁴ Motion, para. 50.

¹⁰⁵ Motion, para. 50.

¹⁰⁶ Motion, para. 53.

Decision on Defence Motions for Reconsideration or Certification of the "Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012," of 4 April 2012

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 30 April 2012, done in English.



Solomy Balungi Bossa

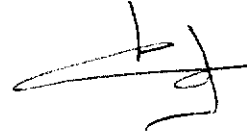
Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge

(absent at time of signature)



Mparany Rajohnson

Judge

