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UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence

Registrar: Adama Dieng

Date: 14 March 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
ICTR

2007 MAR 14 P 4: 57

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
DECISION ON WITNESS PROOFING**

Rule 73(B) of the Rules of Procedure and Evidence

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INTRODUCTION

1. The trial in this case started on 19 September 2005. On 15 December 2006, the Trial Chamber, composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam, denied the Defence motions to prohibit the Prosecution from “proofing” its witnesses before they testify.¹ The Defence for Nzirorera applied to that Chamber for certification to appeal the decision. The Prosecution opposed the Motion.²

2. On 19 January 2007, Judge Short decided to withdraw from the case. In accordance with Rule 15 *bis* (D) of the Rules, the remaining Judges decided on the continuation of the proceedings with a substitute judge.³ The President also authorized the Trial Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.⁴

DISCUSSION

3. Rule 73(B) of the Rules of Procedure and Evidence provides that decisions rendered on motions filed by the parties under Rule 73 are without interlocutory appeal. However, the same provision confers a discretion on the Trial Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must show (i) how the Impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an “immediate resolution by the Appeals Chamber may materially advance the proceedings”.

4. The moving party must demonstrate that both requirements of Rule 73(B) are satisfied, and even then, certification to appeal must remain exceptional.⁵

¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing (TC), 15 December 2006 (“Impugned Decision”).

² See Defence for Nzirorera, Application for Certification to Appeal Decision on Defence Motions to Prohibit Witness Proofing, 18 December 2006 (“Nzirorera’s Application”); Prosecutor’s Response to Nzirorera’s Motion for Certification to Appeal the Trial Chamber III Decision on Defence Motions to Prohibit Witness Proofing of 15 December 2006, 20 December 2006 (“Prosecutor’s Response”).

³ *Karemera et al.*, Decision on Continuation of the Proceedings (TC), 6 March 2007 (“Decision on Continuation of the Proceedings”).

⁴ See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

⁵ *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. 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’ (TC), 18 March 2004, at para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko’s Request for Reconsideration (AC), 27 September 2004, at para. 10.

5. The Prosecution argues that the purpose of Rule 73(B)'s threshold is to restrict interlocutory appeals to issues that are genuinely controversial⁶ and that as witness proofing forms an established practice of both this Tribunal and the International Criminal Tribunal for former Yugoslavia ("ICTY"), it does not constitute an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.⁷ Moreover, the Prosecution submits that Nzirorera's application fails to demonstrate that the Impugned Decision is inadequate or that it involved an error in the exercise of the Trial Chamber's discretion.⁸

6. The Chamber, however, is of the view that the issue of witness proofing in the Impugned Decision satisfies both criteria for certification. Firstly, this issue is one that would significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. Should the Appeals Chamber rule that the practice of witness proofing is always inadmissible, this would touch upon the fair trial rights of the Accused as well as the standards of professional conduct and ethics which apply to the parties when conducting interviews with witnesses and impact upon the admissibility of witness testimony.

7. Secondly, an immediate resolution of the witness proofing issue by the Appeals Chamber would materially advance the proceedings in this case. Indeed, the resolution of this issue would avoid the serious consequences of proceeding through the entire prosecution case on an incorrect legal footing should the practice of witness proofing be disallowed on appeal from the final judgment. What is more, in reference to the *Bagosora* Decision of 29 July 2005, the determination of this issue by the Appeals Chamber, which could significantly impact the methods of proof and professional standards and ethics in the present case as well as in other cases before the Tribunal, has the potential to affect the admissibility of broad categories of evidence and crucial matters of procedure and evidence.⁹

8. The Prosecution further argues that in light of the non-binding nature of the opposite International Criminal Court decision and the marked differences in procedure between that Court and the *ad hoc* Tribunals on this issue, an Appeals Chamber decision would reiterate the principles set out by the ICTY in the *Milutinovic* case.¹⁰

⁶ Prosecutor's Response, at para. 5.

⁷ *Ibid.*, paras. 6-7.

⁸ *Ibid.* at para. 4 (referring to *Prosecutor v. Milosevic*, Case No. IT-02-54-AR.6, Decision on the Interlocutory Appeal by Amici Curiae Against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20 January 2004, at para. 16).

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, at para. 2.

¹⁰ *Ibid.*, paras. 8-9.

9. The Chamber holds the view that the preceding arguments do not correspond to the two-pronged test for reconsideration established under Rule 73(B). It is not for the Chamber to speculate neither as to the correctness of the Impugned Decision nor as to the prospect of success of an appeal. Indeed, this Chamber has already decided that the merits should not be considered when addressing an application for certification¹¹ and other Trial Chambers have also taken the same position.¹²

FOR THOSE REASONS, THE CHAMBER GRANTS the Defence Motion.

Arusha, 14 March 2007, done in English.



Dennis C. M. Byron

Presiding Judge



With the consent and on behalf of
Gberdao Gustave Kam

Judge
(absent at the time of the signature)

[Seal of the Tribunal]



¹¹ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5.

¹² See, e.g., *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, 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, at para. 28. "The *Bizimungu* Chamber agreed that whether there was an error of law or abuse of discretion is not an issue to be considered by the Trial Chamber in its determination of a certification to appeal. It emphasized, however, that the word "significant" in the first prong of the Rule, intends the exclusion of minor or trivial issues that arise in the course of the trial; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence (TC), 4 February 2005, at para. 11; *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 (TC), 20 June 2005, at para. 4.

