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**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Filed on:** 20 June 2011

**THE PROSECUTOR  
v.  
ILDEPHONSE NIZEYIMANA**

**Case No. ICTR-00-55C-T**

JUDICIAL RECORDS ARCHIVES  
ICTR  
2011 JUN 20 P 5:45

**Prosecutor's Response to Defence Motion for Certification of the  
Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to  
Present Evidence in Rebuttal to the Alibi Defence**

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**May it Please the Trial Chamber:**

**A. Procedural History & Nature of the Motion**

1. On 7 June 2011, the Trial Chamber issued its *Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence* (the “Impugned Decision”).

2. On 10 June 2011, the Defence filed a motion for reconsideration of the Impugned Decision (the “Reconsideration Motion”) to which the Prosecution filed a response on 13 June 2011 (the “Reconsideration Response”). On 14 June 2011, the Defence filed a reply (the “Reconsideration Reply”).

3. On 13 June 2011, the Defence filed the *Defence Motion for Certification of the Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence* (the “Certification Motion”).

4. On 15 June 2011, the Trial Chamber granted the Reconsideration Motion in part, reconsidering the timing of the hearing of the rebuttal witnesses (the “Reconsideration Decision”). The Reconsideration Decision effectively renders many aspects of the Certification Motion moot.

5. The Prosecutor hereby respectfully submits the Prosecutor’s Response to the *Defence Motion for Certification of the Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence* dated 17 June 2011 (the “Certification Response”).

6. The Prosecutor opposes the Certification Motion and submits that the application fails to establish that an immediate resolution of the issue in the Impugned Decision will significantly affect the fair *and* expeditious conduct of the proceedings or the outcome of trial. Nor does the application establish that an appeal would materially advance the proceedings. The threshold for certification has not been met.

**B. Legal Threshold**

7. Rule 73(B) provides that decisions rendered on motions filed by the parties under Rule 73 are without interlocutory appeal<sup>1</sup>. However, the same provision confers discretion on the Trial Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled. The applicant must show:

- (i) 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*

<sup>1</sup> Rule 73 (B) of the Rules of Procedure and Evidence.

(ii) an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>2</sup>

8. The onus is on the moving party to demonstrate that both the requirements of Rule 73(B) are satisfied.<sup>3</sup> Even where both Rule 73(B) criteria are met, the decision to certify remains discretionary and exceptional.<sup>4</sup>

9. Further, “[a]rguments which were not advanced in the original motion cannot form the basis for certification to appeal. Nor is the burden of proving the criteria for certification discharged by merely repeating the arguments advanced in the original motion.”<sup>5</sup>

10. The Trial Chamber need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73(B) have been met. Even though the Trial Chamber may at the certification stage revisit the substance of a decision, it does so strictly to the extent of determining whether the Rule 73(B) criteria are met.<sup>6</sup>

<sup>2</sup> See *The Prosecutor v. Edouard Karemera et al.* Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Selective Prosecution Documents, 9 November 2009, para. 2; Rule 73(B) of the Rules of Procedure and Evidence (emphasis added).

<sup>3</sup> *Prosecutor v. Edouard Karemera et al.* Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October, 2007, para. 6. See also: *The Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Application for Certification to Appeal the Chamber’s Decision of 19 October 2009, 10 November 2009, para. 5; *Bizimungu et al.*, 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, 22 May 2007, para. 6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44 T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para. 4; *The Prosecutor v. Eliezer Niyitegeka.* Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliezer Niyitegeka for Disclosure of Closed Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May, 2008, para 15.

<sup>4</sup> *The Prosecutor v. Gatete*, Case No. ICTR-2000-61-T;

a) Decision on Defence Application for Reconsideration or Certification to Appeal the Decision of 24 June 2010, 14 July 2010, para. 26 and footnote 36;

b) Decision on Defence Application for Certification to Appeal the Chamber’s Decision of 19 October 2009, 10 November 2009, para. 5;

See also *Prosecutor v. Edouard Karemera et al.* Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October, 2007, para. 6. *Bizimungu et al.*, 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, 22 May 2007, para. 6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44 T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para. 4; *The Prosecutor v. Eliezer Niyitegeka.* Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliezer Niyitegeka for Disclosure of Closed Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May, 2008, para 15.

<sup>5</sup> *Prosecutor v. Jean Baptiste Gatete.* Case No. ICTR-00-61-T, Decision on Defence Application for Certification to Appeal the Chamber’s Decision of 19 October 2009, 10 November 2009, para. 6.

<sup>6</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Protective Measures for Witness ADE (TC), 7 June, 2006 para 5; *Nshogoza*, Decision on Defence Motion for Certification to Appeal the Chamber’s Decision of 17 December 2008 on Defence Preliminary Challenges, para 6; *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Interlocutory Appeal, 16 February 2006, para. 4; *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 5; *Bizimungu et al.*, Decision on Justin Mugenzi’s Motion for Certification to Appeal the Decision on Mugenzi’s Motion for

C. Submissions

*Misconstrual of the Legal Standard for Certification*

11. In setting out the applicable law for certification to appeal, the Certification Motion incorrectly states that “the appropriate inquiry is whether a showing has been made that the appeal can succeed.”<sup>7</sup> This is a mischaracterization of the legal threshold. In fact, the appropriate inquiry is whether the criteria in Rule 73(B) are met, and these criteria do not include consideration of the merits of the impugned decision, and by extension the potential success or failure of an appeal.

12. The Certification Motion also incorrectly states that the claimed threshold is met by showing that the Trial Chamber made an error of law or fact or that the decision was an abuse of power,<sup>8</sup> yet at the same time the Application cites to jurisprudence that supports the opposite proposition stated in paragraph 8 of the Application: “[w]hether there was an error or (*sic*) law or abuse of discretion is irrelevant to the decision of whether to grant certification to appeal.”<sup>9</sup> The Prosecution agrees and submits that there are only two prongs to the Rule 73(B) threshold when considering whether to certify an appeal; all other considerations are irrelevant to the decision on whether or not to grant certification.

13. With respect, the Certification Motion confuses the legal threshold for certification with the applicable standard for reconsideration. The Prosecution submits that when considering an application for certification, the Trial Chamber should not reconsider its own decision; the correctness of the impugned decision is a matter for the Appeals Chamber.

14. The Certification Motion further ignores the discretionary and exceptional nature of the certification to appeal.

*Failure to meet the Requirements for Certification*

15. The Trial Chamber should deny the Certification Motion because the legal threshold for certification has not been met. Not only does the Application delve into an extensive and irrelevant discussion of the Chamber’s discretion and alleged errors, it also repeats arguments made in the original Defence Response to the Rebuttal Motion.

16. The Prosecutor submits that the burden of proving the requirements is not discharged by merely repeating arguments advanced in the original motion.<sup>10</sup> The main arguments in the Certification Motion simply recycle submissions presented in the Defence Response and in the recent Reconsideration Motion without demonstrating *further* how the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct or outcome of

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Further Certified Disclosure and Leave to Reopen His Defence, 23 July 2008, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.  
<sup>7</sup> Certification Motion, para. 9.  
<sup>8</sup> Certification Motion, para.9  
<sup>9</sup> Certification Motion, para. 8.  
<sup>10</sup> *Nshogoza*, Decision on Defence Motion for Certification to Appeal the Chamber’s Decision of 17 December 2008 on Defence Preliminary Challenges, para 6; *Ndindiliyimana et al.*, Decision on Nzuwonemeye’s Request for Certification to Appeal the Chamber’s Decision of 29 February 2008, 22 May 2008, para.7.

the trial and for which an immediate resolution may materially advance the proceedings. The Certification Motion makes broad and repetitive propositions, and in doing so, the Defence has failed to establish the standard for certification. With respect, the only issue at hand is whether the two certification criteria are met and here they are not.

*The First Requirements is not met*

17. The Certification Motion has not demonstrated how the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial.

*(a) The issue would not significantly affect the fair and expeditious conduct of the proceedings*

Fair Conduct of the Proceedings

18. The Certification Motion does not demonstrate how the issue raised would affect the fairness of trial.

19. The Certification Motion presents two arguments as to why the issue significantly affects the fairness of trial. Firstly, at paragraph 12, the Certification Motion argues that the Impugned Decision fails to address the jurisprudential criteria for admission of rebuttal evidence and as such affects the fairness of trial and applies the wrong legal standards for admission of rebuttal evidence.<sup>11</sup> In fact, the Impugned Decision, in paragraph 20, states that the proposed rebuttal evidence goes to “refute a new matter arising in the course of the Defence case that was not reasonably foreseeable.”<sup>12</sup> In paragraph 26, the Trial Chamber states that it “considers that the proposed evidence . . . has probative value” and that “it is in the interests of justice” to allow the proposed evidence.<sup>13</sup> That alone is sufficient to conclude that the Trial Chamber did in fact address the correct legal requirements for admission. The Certification Motion further adds that the Prosecution is not allowed to split its case, and that strict rules on rebuttal evidence “have been violated.”<sup>14</sup> The Certification Motion does not state *how* these rules have been violated nor how this affects the fair conduct of the trial. The Certification Motion instead reiterates arguments from its Response to the Rebuttal Motion. With respect, that issue has been litigated and the Impugned Decision took this Defence argument into account when granting the rebuttal and partially denying the reconsideration.

20. The second Defence argument as to fairness of trial is now moot as the Defence succeeded, through its Reconsideration Motion, in delaying the Rebuttal phase of the case by about two and a half months so there can be no argument as to the unfairness of timing.

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<sup>11</sup> Certification Motion, para. 12.  
<sup>12</sup> Impugned Decision, para. 20.  
<sup>13</sup> Impugned Decision, para. 26.  
<sup>14</sup> Certification Motion, para 12.

### Expeditious Conduct of the Proceedings

21. The Certification Motion does not demonstrate how the issue raised would affect the expeditiousness of trial.

22. The Defence argument in this respect appears to be that allowing rebuttal evidence lengthens the proceedings. The Certification Motion relies on two sub-arguments in this respect, neither of which can hold. The main two arguments, presented at paragraphs 14, 15 and 17 seem, to be centred on a complaint about the timing and the difficulty it poses for defence investigation.<sup>15</sup> As explained in paragraph 20 above, the Reconsideration Decision has now altered the timing of the hearing of the rebuttal evidence so that sub-argument is moot. The other sub-argument seems to be that rebuttal might lead to rejoinder and all this additional evidence lengthens the overall trial so the issue is one that affects the expeditiousness of proceedings. If that were the case, many more issues could qualify for certification for appeal. Rebuttal and rejoinder evidence, while not automatic, are listed in Rule 85(A)<sup>16</sup> as part of the sequence of a trial and can thus not be said to constitute an issue in itself that is contrary to the expeditious conduct of proceedings.

23. Moreover, the Defence request for a couple additional months to prepare for the cross-examination of three very limited rebuttal witnesses, as set out in the Reconsideration Motion and granted in the Reconsideration Decision, affects the expeditiousness of trial a great deal – especially in light of the Prosecutor’s offer to only conduct the examination-in-chief of these witnesses in June and allow the Defence the 10 weeks or so it needs to prepare these three cross-examinations, an offer that was “unequivocally” rejected.

24. Finally, the Defence has thrown in arguments under expeditiousness that don’t quite fit and need simple mention. First, the threat of rejoinder evidence is just that. Second, the Certification Motion claims that the Accused cannot decide if he can testify until the rebuttal issue is solved.<sup>17</sup> With respect, the Accused has now already decided he is not testifying in the defence phase. At best, he can now request authorization to testify but his testimony is no longer an automatic right.

*(b) The issue would not significantly affect the outcome of trial*

25. The Certification Motion claims in paragraph 20 that the outcome of trial would be affected by a decision without explaining *how* it would be affected. Instead the Application lists arguments that were made in the Response to the Rebuttal motion. The issues of alleged case splitting, whether the alibi was reasonably foreseeable and the timing of the alibi notice were all litigated by both Parties and considered by the Trial Chamber in rendering its Decision granting the Prosecutor’s Motion for Rebuttal. The Prosecution reiterates that arguments advanced in the original motion cannot form the basis of the certification to appeal.

26. The Certification Motion also claims that the absence of considering the Accused’s right to prepare will affect the outcome of trial. Again the Application does not state how the Accused’s

<sup>15</sup> Certification Motion, paras. 14, 15 & 17.

<sup>16</sup> Rule 85 (A) of the Rules of Procedure and Evidence.

<sup>17</sup> Certification Motion, para. 16.

right was not considered in the Impugned Decision. In fact, in paragraph 23, the Impugned Decision expressly considered fairness and the Accused's rights.<sup>18</sup>

27. Quite simply, as explained in the next section, the outcome of trial does not have to be affected. Exclusion of rebuttal evidence is always an option, albeit a drastic one, if an Appeals Chamber were ever to find on appeal that a Trial Chamber erred.

*The Second Requirement is not met: An immediate resolution by the Appeals Chamber would not materially advance the proceedings*

28. The Certification Motion has not demonstrated how the Impugned Decision involves an issue the immediate resolution of which would materially advance the proceedings. The Certification Motion claims that a resolution would advance the proceedings because (i) it's a core issue that should be decided during the trial process and not on appeal<sup>19</sup> and (ii) it would allow "the parties to proceed according to the Rules with legal certainty", for example Accused could decide whether or not he will testify.<sup>20</sup> Neither of these two sub-arguments holds ground. The Defence is not explaining how this immediate resolution would materially advance proceedings. In fact, an interlocutory appeal would most likely delay proceedings a great deal as the rebuttal would be delayed in waiting for filings of appeals and a decision by the Appeals Chamber. The solution that most advances proceedings, now that the alibi disclosure was late and piecemeal, is to proceed with the rebuttal case knowing that although extreme, exclusion of evidence is always a potential for evidence that may be erroneously admitted.

## **Conclusion**

29. Respectfully, the motion fails to establish the necessary elements for a Trial Chamber to certify an interlocutory appeal to the Appeals Chamber. The issue claimed in to arise from the Impugned Decision has not been shown to significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial. Nor does the motion establish that an appeal would materially advance the proceedings. Consequently, the threshold for certification has not been met.

30. For all of the foregoing reasons, the Prosecutor hereby respectfully requests the Trial Chamber DENY the Certification Motion in its entirety.

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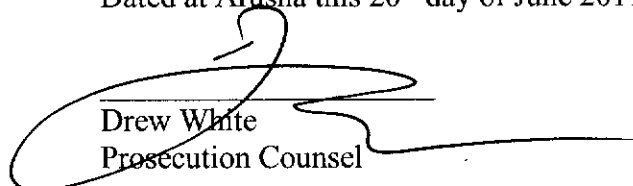
<sup>18</sup> Impugned Decision, para. 23.

<sup>19</sup> Certification Motion, para. 22-23.

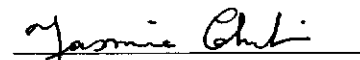
<sup>20</sup> Certification Motion, para. 24

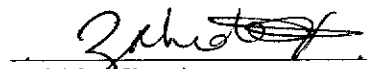
All of which is respectfully submitted.

Dated at Arusha this 20<sup>th</sup> day of June 2011.

  
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