



UNITED NATIONS
NATIONS UNIES

ICTR-00-61-T
8-12-2009
(3314-3310)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3314
AM

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 8 December 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDICIAL RECORDS/ARCHIVES
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2009 DEC - 8 1 P 4: 00

**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL
THE CHAMBER'S DECISION OF 3 NOVEMBER 2009**

Office of the Prosecutor:

Richard Karegyesa
Adelaide Whest
Drew White
Didace Nyirinkwaya
Yasmine Chubin

For the Accused:

Marie-Pierre Poulain
Kate Gibson

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INTRODUCTION

1. On 15 October 2009, the Defence filed a motion requesting that evidence of pre-1994 events, as disclosed by the Prosecution through its witness statements, be declared inadmissible by the Chamber.¹
2. On 3 November 2009, the Chamber issued a Decision denying the Defence Motion on the Admissibility of Evidence ("Impugned Decision").²
3. On 9 November 2009, the Defence filed a Motion for certification to appeal the Impugned Decision.³ On 12 November 2009, the Prosecution filed its Response opposing the Defence Motion.⁴ The Defence filed its Reply on 17 November 2009.⁵

DISCUSSION

Applicable Law on Certification to Appeal

4. Pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("Rules"), leave to file an interlocutory appeal against a decision may be granted where: (i) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial; and (ii) immediate resolution by the Appeals Chamber may materially advance the proceedings. Even where these criteria are met, the decision to certify is discretionary and remains exceptional.⁶
5. Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.⁷ Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.⁸

¹ Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal, 15 October 2009 ("Defence Motion on the Admissibility of Evidence"). The Defence submitted that the targeted evidence did not fall within the criteria set by the jurisprudence regarding the admissibility of pre-1994 events and that this evidence had to be precluded before hearing it in order to avoid the prejudice which will arise to the Accused should this evidence be heard.

² Decision on Defence Motion on Admissibility of Allegations outside the Temporal Jurisdiction of the Tribunal, 3 November 2009.

³ Application for Certification to Appeal Decision on Defence Motion on Admissibility of Allegations outside the Temporal Jurisdiction of the Tribunal ("Defence Motion").

⁴ Prosecutor's Response to Defence Application for Certification to Appeal Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal ("Prosecution Response").

⁵ Reply to Prosecution Response to Defence Application for Certification to Appeal Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal ("Defence Reply").

⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-50-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, 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.

⁷ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.



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6. The correctness of the decision is a matter for the Appeals Chamber. Therefore, Trial Chambers do not need to consider the merits of an impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.⁹ Even though a 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.¹⁰

Should the Chamber Certify the Impugned Decision for Appeal?

7. The Chamber will first address whether the Impugned Decision involves an issue which would affect the fair and expeditious conduct of the proceedings, or outcome of the trial.

8. The Defence submits that the Impugned Decision involves the issue of admissibility of evidence of pre-1994 events which directly affects the fair and expeditious conduct of proceedings and outcome of the trial.¹¹

9. The Prosecution submits that the admissibility of evidence is a matter that falls within the Trial Chamber's responsibility and that the Appeals Chamber would not assume interlocutory responsibility.¹² The Prosecution further responds that the Defence merely submits a broad proposition that does not adequately demonstrate why and how the first criterion would be met. It alleges that the Defence only repeats the arguments set out in its

⁸ *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008 ("Ndindiliyimana Decision"), para. 7.

⁹ *Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009, para. 6; *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Bizimungu et al.*, 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, 22 August 2007, para. 4; *Bizimungu et al.*, 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, 23 July 2008 ("Bizimungu Decision"), para. 6 (citations omitted).

¹⁰ *Nshogoza*, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, para. 6; *Bizimungu Decision*, 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.

¹¹ Defence Application, paras. 7-8. In support, the Defence cites the Trial Chamber in the *Bagosora et al.* case where it was held that the admissibility of evidence of pre-1994 events is a question which significantly affects the fair and expeditious conduct of proceedings (*Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal on Admission of Testimony of Witness DP Concerning pre-1994 Events, 3 November 2003, para. 4) and the Trial Chamber in the *Nyiramasuhuko* case, where it was held that the issue of admissibility of testimonies of Prosecution witnesses could significantly affect the outcome of the trial against the accused, insofar as the issue as to whether the Trial Chamber will take into account the testimony of these witnesses for its final deliberation or not could significantly affect this deliberation (*Prosecutor v. Ntahobali and 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', 18 March 2004, para. 25).

¹² See Prosecution Response para. 4.



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original motion.¹³ The Prosecution also submits that, according to the jurisprudence, the weight to be attached to evidence is to be determined at the stage of deliberations. The Prosecution accordingly considers the Defence Motion to be premature and contends that the issue is not susceptible to affect the fairness of the proceedings.¹⁴ The Prosecution further submits that the expeditiousness of the proceedings is not affected because the Prosecution case is closed¹⁵ and that the Defence does not show how the Impugned Decision would affect the outcome of the proceedings.¹⁶ Finally, the Prosecution considers that the second requirement of Rule 73 (B) is not met either.¹⁷

10. The Defence, in its Reply, submits that it has demonstrated that the two criteria of Rule 73 (B) are met. The Defence also makes additional submissions and points that the Prosecution is mischaracterizing the law on the issue at bar. It states that the Motion concerns the exclusion of particular evidence and is not premature. It further submits that the particular pre-1994 evidence in the case at bar is prejudicial to the Accused and that the general assessment of evidence at deliberation cannot replace the remedy of the actual exclusion of evidence.¹⁸

11. The Chamber recalls that the onus is on the moving party to specifically demonstrate how the issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial, as the test for certification requires.¹⁹ The Chamber notes that the Defence is merely citing jurisprudence supporting its contentions that both criteria required by Rule 73 (B) are met,²⁰ without discharging its burden in relation to the Impugned Decision in this case.

12. Further, the Chamber recalls that the Impugned Decision concerns the issue of whether particular evidence should be precluded from being heard. The Impugned Decision did not make any ruling on the issue of admissibility of evidence. Rather, it held that "[o]nce the Chamber has heard the evidence; it will be able to assess its relevance and probative value pursuant to Rule 89 (C) of the Rules. If such evidence is admitted, the exact weight to be attached to it will be determined at a later stage while assessing all the evidence as a whole."²¹ The Impugned Decision therefore neither admits nor rejects any evidence.

13. In addition, with regard to the Defence assertion that prejudice is caused to the Accused if the evidence has been heard by the Chamber, it is recalled that professional judges are able to properly treat the evidence and are mindful of the obligation to respect the rights of

¹³ Prosecution Response paras. 9-10.

¹⁴ Prosecution Response paras. 11-12.

¹⁵ Prosecution Response paras. 13-14.

¹⁶ Prosecution Response para. 15.

¹⁷ Prosecution Response paras. 17-18.

¹⁸ Defence Application, paras. 7-9.

¹⁹ See for example, Decision on the Defence Application for Certification to Appeal the Chamber's Decision on Defects in the Indictment, 19 August 2008, para. 8; *Prosecutor v. Siméon Nchamihigo*, Decision on Request for Certification of Appeal on Trial Chamber 1's Decision Granting Leave to amend the Indictment, 13 September 2006, para. 7.

²⁰ Defence Motion, paras. 7, 8, 11, 12.

²¹ Impugned Decision, para. 17.



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the Accused.²² The Chamber also recalls that the Defence will have the opportunity to raise any issue of prejudice in its final arguments.²³ Accordingly, the Chamber finds that the issues in the Impugned Decision do not affect the fair and expeditious conduct of the proceedings or outcome of the trial.

14. As the Defence has not satisfied the first criterion for certification under Rule 73 (B), the Chamber need not proceed to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber therefore finds that the Defence has failed to meet the criteria for certification under Rule 73 (B) of the Rules.

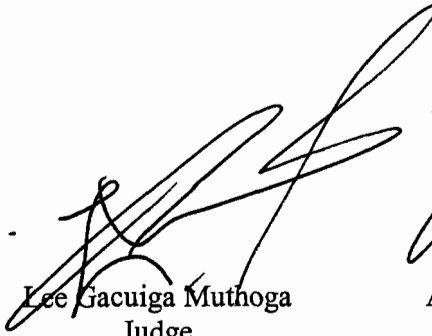
FOR THESE REASONS the Chamber,

DENIES the Defence Motion.

Arusha, 8 December 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]



²² See Impugned Decision, para. 19.

²³ Decision on Defence Motion for Exclusion of Evidence, 24 November 2009, para. 18.