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(5623-5620)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 3 February 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDICIAL PROCEEDINGS / ARCHIVES
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**DECISION ON THE DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE CHAMBER'S DECISION ON VIDEO-LINK TESTIMONY**

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

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:
David Jacobs
Claver Sindayigaya
Marc Nerenberg

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INTRODUCTION

1. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence case began on 18 January 2010 and is scheduled to run until 12 February 2010.¹

2. On 4 January 2010, the Defence filed an extremely urgent confidential motion for leave to hear Witness KG15's testimony by video link.² The Defence argued that Witness KG15 is willing to testify before the Tribunal but is unable to travel to Arusha due to pre-existing professional commitments.³

3. On 13 January 2010, the Trial Chamber denied the Defence motion for video-link testimony, finding that Witness KG15's concerns could be addressed through appropriate planning and travel arrangements ("the Impugned Decision").⁴ In its Decision, the Chamber found that the Defence had failed to identify specific commitments that could prevent the witness from testifying in person and to suggest that others were incapable of performing these duties in the witness's absence.⁵

4. On 19 January 2010, the Defence filed a motion for certification to appeal the decision of the Trial Chamber.⁶ The Defence submits that the Chamber applied the wrong legal standard in denying the Defence motion for video-link testimony and that certification is warranted because Witness KG15's testimony could affect the fair and expeditious conduct of the proceedings and because an immediate resolution by the Appeals Chamber would allow the witness to testify during the current trial session.⁷

5. On 22 January 2010, the Defence also filed a confidential motion for reconsideration of the Chamber's decision of 13 January 2010.⁸

6. On 25 January 2010, the Prosecution filed a response to the motion for certification, arguing that the standard for certification to appeal is a high one, that the Defence has not shown 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 that the "exceptional circumstances" test under Rule 71 of the Rules of

¹ Scheduling Order Following the Status Conference Held on 17 September 2009, 28 September 2009, Order I.

² Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 4 January 2010.

³ Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 4 January 2010, paras. 5-6.

⁴ Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010.

⁵ Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010, para. 10.

⁶ Motion for Certification to Appeal the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 19 January 2010, paras. 1-4 ("Motion").

⁷ Motion, paras. 7-8.

⁸ Motion for Reconsideration of the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 22 January 2010.

Procedure and Evidence (the "Rules") applies to video-link testimony as well as depositions.⁹

7. On 29 January 2010, the Chamber denied the Defence request for reconsideration but, treating the motion as a new request, granted the request for video-link testimony for Witness KG15.¹⁰

DELIBERATIONS

8. Under Rule 73(B) of the Rules, the Trial Chamber may grant certification to appeal a decision of the Chamber "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." Certification may only be granted if both criteria are satisfied.¹¹ Certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.¹²

9. In this case, the Defence relies on two words in the Impugned Decision ("exceptional circumstances")¹³ to argue that the Trial Chamber applied the wrong legal standard in deciding the Defence motion for video-link testimony.¹⁴ As explained in its 29 January 2010 Decision¹⁵, the Impugned Decision was clear: the Defence did not provide adequate support for Witness KG15's unwillingness or inability to testify in Arusha and thereby failed to satisfy the "interests of justice" test for video-link testimony.

10. The Trial Chamber recalls that, under Rule 73(F), it may "impose sanctions against Counsel if Counsel brings a motion ... that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."

⁹ Prosecutor's Response to the Motion for Certification to Appeal the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 25 January 2010.

¹⁰ Decision on the Defence Motion for Reconsideration of the Chamber's 13 January 2010 Decision on Video-Link Testimony, 29 January 2010.

¹¹ See *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis (TC), 24 April 2007, para. 5.

¹² *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ndirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case (AC), 14 May 2008, para. 4 ("The Appeals Chamber has recognised 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. Eliézer Niyitegeka*, Case No. ICTR-95-14-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), 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.

¹³ Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010, para. 10.

¹⁴ Motion, paras. 2-3.

¹⁵ Decision on the Defence Motion for Reconsideration of the Chamber's 13 January 2010 Decision on Video-Link Testimony, 29 January 2010, para. 6.

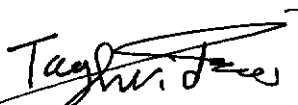
11. The Chamber finds that the Defence request in this case is not only without merit but also frivolous and a waste of judicial resources. Any fees or costs associated with this Motion should be denied.

FOR THESE REASONS, the Chamber

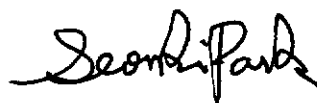
DISMISSES the Defence motion; and

ORDERS the Registry not to pay any fees or costs associated with the preparation and filing of this motion.

Arusha, 3 February 2010



Taghrid Hikmet
Presiding Judge



Seon Ki Park



[Seal of the Tribunal]



Joseph Masaniche
Judge