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

Registrar: Adama Dieng

Date: 14 July 2010

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

DECISION ON DEFENCE APPLICATION FOR RECONSIDERATION OR CERTIFICATION TO APPEAL THE DECISION OF 24 JUNE 2010

Rules 73, 89(C) and 92 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

Drew White
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Yasmine Chubin

For the Accused:

Marie-Pierre Poulain
Kate Gibson

INTRODUCTION

1. The trial in this case commenced on 20 October 2009.[1] The Prosecution and Defence cases closed on 16 November 2009 and 29 March 2010, respectively. Closing arguments were originally scheduled to be heard on 2, and if need be, 3 August 2010 but on 6 July 2010, were postponed until further notice due to unavoidable circumstances.[2]

2. On 24 June 2010, the Chamber issued a decision denying Defence and Prosecution motions to admit written statements into evidence, and an alternative Defence request to hear further oral testimony, as well as a Defence motion to postpone the filing of closing briefs.[3] The Parties filed their closing briefs on 25 June 2010.

3. The Defence now moves for reconsideration of, or, in the alternative, for certification to appeal, the Impugned Decision.[4] The Prosecution filed a response on 5 July 2010.[5] The Defence filed a reply on 9 July 2010.[6]

DISCUSSION

Timing of the Defence Motion

4. As a preliminary matter, the Prosecution submits that the Defence Motion should be dismissed because it does not comply with Rule 73 (C) of the Rules of Procedure and Evidence ("Rules").[7] However, that Rule provides that requests for certification shall be filed within seven days of the filing of the impugned decision. It provides separate requirements where such decision was rendered orally. The Impugned Decision was rendered on 24 June 2010, and the Defence Motion was filed on 1 July 2010. The Motion was therefore filed within the seven-day period, and the Chamber may properly consider it.[8]

Request for Reconsideration

5. According to the Tribunal's established jurisprudence, the Chamber has inherent power to reconsider its own decisions.[9] However, reconsideration is an exceptional measure

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[1] *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

[2] Interoffice Memorandum from Judge Muthoga to Court Management Section, filed on 7 May 2010; Scheduling Order to Postpone Site Visit to Rwanda and Hearing of Closing Arguments, 6 July 2010.

[3] Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, 24 June 2010 ("Impugned Decision").

[4] Application for Reconsideration or Certification to Appeal the Decision of 24 June 2010, 1 July 2010 ("Defence Motion").

[5] Prosecution Response to Defence Motion, 5 July 2010 ("Prosecution Response").

[6] Defence Reply to Prosecution Response, 9 July 2010 ("Defence Reply").

[7] Prosecution Response, para. 6.

[8] See, for example, *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 8 (interpreting the language of Rule 73 (C), "within seven days of the filing of the decision" to mean seven days after the decision in question); *Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-AR73.3, Decision on Motion for Extension of Time (AC), 30 March 2004; *Nyiramasuhuko*, Decision on Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Motion for Recall of Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY or, in default, a Disjunction of Trial or a Stay of Proceedings against Nyiramasuhuko' (TC), 25 May 2004.

[9] Decision on Defence and Prosecution Motions for Reconsideration of the Chamber's Decision of 13 October 2009 and Scheduling of the Prosecution Case (TC), 19 October 2009 ("*Gatete* Reconsideration Decision"), para.

that is available only in particular circumstances.[10] These include when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; or (ii) new material circumstances have arisen that did not exist at the time of the original decision; or (iii) the decision was erroneous or constituted an abuse of the Chamber's discretion and has caused prejudice or injustice to a party.[11] The onus is on the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.[12]

6. The Defence submits that the Chamber should reconsider the Impugned Decision on the basis that it was erroneous or constituted an abuse of the Chamber's discretion and caused prejudice to the Defence.[13] It argues this based on the four grounds addressed below.

(i) Admissibility of the Statements under Rule 89 (C)

7. The Defence claims that the Chamber erred in holding that written statements can only be admitted under Rule 92 *bis*. According to the Defence, under more recent Appeals Chamber jurisprudence, statements such as those it tendered are admissible into evidence even if they do not fulfil the requirements of Rule 92 *bis*.[14] The Defence contends that, although the appellate jurisprudence it cites addresses only statements used during cross-examination, it is still applicable "by analogy" to the tendered statements because they were not available during the cross-examination of the Prosecution witnesses.[15]

8. The Prosecution responds that the cited appellate jurisprudence does not apply to the present case. The Defence statements were not used in cross-examination and no testimony

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8; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, 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), 26 April 2007 ("*Bizimungu* Reconsideration Decision"), para. 7 (citations omitted).

[10] *Gatete* Reconsideration Decision, para. 8; *The Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, Joint Case No. ICTR-98-42-T, Decision on Pauline Nyiramasuhuko's Strictly Confidential Ex-Parte Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte Under-Seal-Motion for Additional Protective Measures for Defence Witness WBNM Dated 17 June 2005 or, Subsidiarily, on Nyiramasuhuko's Strictly Confidential Ex-Parte Under-Seal-Motion for Additional Protective Measures for Defence Witness WBNM (TC), 4 July 2005, para. 3, quoting *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis* (E)" (TC), 15 June 2004, para. 7.

[11] *Gatete* Reconsideration Decision, para. 8; *Bizimungu* Reconsideration Decision, para. 7; *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007 ("*Karemera* Reconsideration Decision"), para. 6; *Karemera et al.*, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY (TC), 28 September 2007, para. 10; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

[12] *Gatete* Reconsideration Decision, para. 8; *Bizimungu* Reconsideration Decision, para. 8; *Karemera* Reconsideration Decision, para. 6.

[13] Defence Motion, para. 9; Defence Reply, paras. 18-21.

[14] The Defence cites to the following Appeals Chamber finding: "statements of non-testifying individuals used during cross-examination may be admitted into evidence, even if they do not confirm to the requirements of Rules 90 (A) and 92 *bis* of the Rules, provided the statements are necessary to the Trial Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents." *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Appeal Judgement, 27 November 2007 ("*Simba* Appeal Judgement"), para. 20.

[15] Defence Motion, paras. 10-13; Defence Reply, paras. 9-17.

was elicited through their use; furthermore, they are being tendered to prove the truth of their contents.[16]

9. The Chamber considers that the *Simba* Appeal Judgement cited by the Defence, which concerns statements admitted during trial, is not directly relevant. The statements at issue in the present case were not used during any of the testimony in this trial.[17]

10. Moreover, the Defence statements were tendered to prove the truth of their contents.[18] Since the documents were not used during the testimony, they cannot be admitted solely to provide additional context to the witnesses' evidence.[19] Rather, the Defence sought to show that (i) Prosecution witnesses engaged in actions that cast doubt upon their credibility and (ii) a defamation campaign was waged against Gatete that continues in Rwanda to the present day. It also asserted that the material "indirectly contradict[s] prosecution evidence".[20] The claim that the contents of the statements themselves cast doubt upon the Prosecution evidence in this case cannot be made unless those contents are also claimed to be true.[21]

11. The Chamber further notes that the Defence mischaracterized the finding in the Impugned Decision in stating that the Chamber erroneously found that "Rule 92 *bis* provides specific procedure for the admission of [written statements] and that a party can only seek to introduce the latter under Rule 92 *bis*", and "erroneously concluded that statements could only be admitted under Rule 92 *bis*".[22] A complete reading of the Impugned Decision shows a finding that Rule 92 *bis* provides a specific procedure for the admission of written statements tendered by the Parties in "lieu of oral testimony" – a finding which is consistent with the cited appellate jurisprudence.[23]

12. The Defence has therefore not shown that the Impugned Decision was erroneous or constituted an abuse of discretion on this first ground, and the Chamber need not consider the question of whether prejudice or injustice was caused.

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[16] Prosecution Response, paras. 14-19.

[17] Defence Motion, para. 12.

[18] According to the Defence, it follows from the *Simba* Appeal Judgement that some statements, particularly those that were necessary to the Trial Chamber's assessment of the witness's credibility and that were not used to prove the truth of their contents, could be admitted notwithstanding the requirements of Rule 92 *bis* and that this reasoning was "applicable to the present case". Defence Motion, para. 13. In its Reply, the Defence underlined that it never expressly submitted that its statements should not be admitted to prove the truth of their contents, but that the "overall reasoning of the Appeals Chamber in Simba" was applicable in the present case. Defence Reply, para. 11.

[19] See *Simba*, Case No. ICTR-01-76-T, Decision on the Admission of Certain Exhibits (TC), 7 July 2005, para. 10.

[20] Defence Motion for the Admission into Evidence of Statements or, in the alternative, the Admission of Further Oral Testimony, 13 May 2010 ("Defence Original Motion"), paras. 5-12, 31.

[21] An example of an exhibit tendered to assess the credibility of a witness but not tendered to prove the truth of its contents is a prior statement of the witness. See, for example, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 6 (citing *The Prosecutor v. Akayseu,* Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 134).

[22] Defence Motion, paras. 12-13.

[23] Impugned Decision, para. 15. The Defence mischaracterized the *Simba* Appeal Judgement finding, in submitting that the "Appeals Chamber agreed (...) that written statements could *per se* be admitted even if they did not meet the requirements of Rule 92 *bis*." Defence Reply, para. 15. Rather, the Appeals Chamber noted specific conditions under which such statements could be admitted. See *Simba* Appeal Judgement, para. 20 and footnote 43.

(ii) Failure to Consider Relevance and Probative Value under Rule 89 (C)

13. The Defence submits that the Chamber should have considered whether the statements it tendered met the requirements of Rule 89 (C). In support of that claim, it cites to a *Bizimungu et al.* decision in which Trial Chamber II addressed the relevance and probative value of a statement before turning to the formal requirements under Rule 92 *bis*, in a situation that the Defence argues was similar to the present one.[24]

14. The Prosecution responds that, notwithstanding the substance or the timing of the Impugned Decision, the Defence could have prepared the statements in accordance with the requirements of Rule 92 *bis*.[25]

15. At the outset, the Chamber recalls that it is not bound by the jurisprudence of another Trial Chamber.[26] This notwithstanding, the Chamber notes that the cited *Bizimungu* Decision did not concern the admission of a written statement in lieu of oral testimony under Rule 92 *bis* (A). Rather, it addressed the admission of evidence from another proceeding pursuant to Rule 92 *bis* (D).[27] Thus, the requirements of Rule 92 *bis* (B) did not apply. The *Bizimungu et al.* Trial Chamber could therefore proceed to consider the requirements of relevance and probative value under Rule 89 (C) as the requirements of Rule 92 *bis* (D) were satisfied.

16. In the present case, the Impugned Decision did not examine the substance of the written witness statements under Rule 89 (C) because they did not meet the formal requirements of Rule 92 *bis* (B).[28] It was therefore not necessary for the Chamber to consider their content. In a situation where the Rule 92 *bis* criteria for admission of a written witness statement in lieu of oral testimony have not been satisfied, the Defence points to no obligation, either in the Tribunal's Statute, Rules or jurisprudence, requiring a Trial Chamber to nonetheless address whether those statements meet the conditions of Rule 89 (C).

17. The Defence has therefore not demonstrated that the Impugned Decision was erroneous or constituted an abuse of discretion on this second ground, and therefore the Chamber need not consider the question of whether prejudice or injustice was thereby caused.

(iii) Failure to Address the Defence Request for an Opportunity to take the Statements in Accordance with Rule 92 bis (B)

18. The Defence submits that the Chamber should not have made a decision on whether the statements were taken in accordance with Rule 92 *bis* (B), a matter that the Defence had neither raised nor requested. Rather, it argues, the Chamber should have addressed its request for "the opportunity" to take statements pursuant to Rule 92 *bis* (B) in the event that they were inadmissible under Rule 89 (C), in order for the Defence to plead on them in its closing brief.

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[24] Defence Motion, para. 15; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions for the Admission of Testimony given by Prosecution Witness GFA before the Karemera et al. Chamber (TC), 26 September 2008 ("*Bizimungu* Decision").

[25] Prosecution Response, paras. 20-21.

[26] *Georges Rutaganda v. The Prosecutor*, Case No ICTR-96-3-A, Appeal Judgement (AC), 26 May 2003, para. 188.

[27] The evidence tendered came entirely from testimony given by a witness in proceedings that were before the Tribunal in *The Prosecutor v. Karemera et al.*, as well as exhibits admitted during that testimony. See *Bizimungu* Decision, para. 15.

[28] *The Prosecutor v. Galić*, Case No. IT-98-29-AR73-2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 31.

The taking of statements in accordance with the requirements of Rule 92 *bis* (B) is a time-consuming, expensive and complicated option that the Defence would not undertake unless absolutely necessary. The Defence asserts that, because the Chamber denied the Defence request for an extension of time to file the closing brief, the opportunity has now been lost, resulting in irreparable prejudice to its case.[29]

19. The Prosecution argues that the Defence has suffered no prejudice because it could have tendered the statements in accordance with Rule 92 *bis* at any time, but did not.[30]

20. The Chamber considers that the Defence does not require, and should not waste judicial resources in seeking, permission to take statements for the purposes of admission under Rule 92 *bis*.[31] Moreover, the Impugned Decision did not prevent the Defence from taking the statements in accordance with Rule 92 *bis* (B) and seeking their admission in another motion. Indeed, the Defence remains at liberty to obtain the statements in accordance with the formal requirements of Rule 92 *bis* (B).[32] The Chamber also notes that the site visit and closing arguments have now been postponed, allowing additional time for the taking of any such statements.

21. The Chamber therefore finds that the Defence has not shown that the Impugned Decision was erroneous or constituted an abuse of discretion on this third ground. In the circumstances, the Chamber need not consider the question of whether prejudice or injustice was occasioned.

(iv) Failure to Address Relevant Factors

22. According to the Defence, the Chamber should have considered its submissions on the admissibility of the Prosecution statements. It claims that the Chamber should have concluded that the Prosecution statements were not admissible as rebuttal evidence under Rule 85 (A)(iii). As such, the Chamber abused its discretion by failing to address the factors relevant to its taking a fully informed and reasoned decision.[33] The Defence submits that, as a result, it has suffered prejudice.[34]

23. The Prosecution argues that the responsive statements tendered by the Prosecution were not part of a rebuttal but fall under the Chamber's discretionary powers. It submits that any form of relief granted with regard to the Defence statements should also apply to the Prosecution statements.[35]

24. Rule 85 (A)(ii) addresses the sequence for the presentation of evidence. The Impugned Decision did not address that sequence or analyse the contents of the Prosecution statements because they did not meet the formal requirements of Rule 92 *bis* (B). Should the Prosecution

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[29] Defence Motion, paras. 16-18; Defence Reply, paras. 18-21.

[30] Prosecution Response, paras. 20-21.

[31] The Chamber notes that the Defence may need permission to vary its witness list before statements from non-witnesses may be admitted. See Impugned Decision, para. 16; Rule 73 *ter* (E).

[32] See, for example, *Simba*, Decision on the Admission of Certain Exhibits (TC), 7 July 2005, para. 13 (since the deadline for submission of final trial briefs was already past at the time of the filing of the decision, the parties were allowed to address any issues arising from the documents admitted in the decision during the hearing of closing arguments).

[33] Defence Motion, paras. 19-20; Defence Reply, paras. 22-26.

[34] Defence Motion, para. 21.

[35] Prosecution Response, paras. 22-24.

decide to bring another motion to tender the statements in the appropriate form, the Chamber shall consider their admissibility at that time.

25. The Defence has therefore not demonstrated that the Impugned Decision was erroneous or constituted an abuse of discretion on this fourth ground, and the Chamber need not consider the question of whether prejudice or injustice was caused.

Request for Certification to Appeal

26. Rule 73 (B) states that leave to file an interlocutory appeal of a decision may be granted if the issue involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and where an 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.[36]

27. The Defence submits that the issue at stake would significantly affect the outcome of the trial. It claims that the tendered documents are relevant to the credibility of Prosecution witnesses or support a fundamental aspect of the Defence case, namely that there was a defamation campaign against the Accused. The Defence submits that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings because the denial of admission has a severe impact on the scope of the evidence in this case and the Chamber's judgement must be rendered on the basis of the totality of the evidence.[37]

28. The Prosecution argues that the Defence has not met the criteria for certification to appeal the Impugned Decision, and that certification is not warranted.[38]

29. The Chamber notes that the Impugned Decision does not prevent the Defence from obtaining the statements in the proper format for the purposes of admission under Rule 92 *bis* (B). The issues raised by the Defence with regard to the Impugned Decision therefore do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the Chamber need not address whether immediate resolution by the Appeals Chamber would materially advance the proceedings. Therefore, the Defence has not shown that certification is appropriate in this case under Rule 73 (B).

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[36] See, for example, Decision on Defence Application for Certification to Appeal the Chamber's Decision of 19 October 2009 (TC), 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 (TC), 22 May 2007, para. 6.

[37] Defence Motion, paras. 26-27.

[38] Prosecution Response, para. 12.

FOR THESE REASONS the Chamber hereby

DENIES the Defence Motion in all respects.

Arusha, 14 July 2010

For and with the consent of
Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Aydin Sefa Akay
Judge

[Seal of the Tribunal]