

ICTR-00-55C-T
02-12-2010
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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: Lee Gacuga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 2 December 2010

THE PROSECUTOR

v.

Ildephonse Nizeyimana

CASE NO. ICTR-2001-55C-PT

JUDICIAL AUTHORITY
2010 DEC 2 10:00 AM
ICTR

DECISION ON PROSECUTION'S MOTION FOR CERTIFICATION TO APPEAL
DECISION ON PROSECUTOR'S MOTION TO ADMIT INTO EVIDENCE THE
STATEMENT OF GENERAL MARCEL GATSINZI

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

Office of the Prosecutor:

Drew White
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John Philpot
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INTRODUCTION

1. On 9 August 2010, the Prosecution filed a motion requesting admission into evidence of the statement of General Marcel Gatsinzi pursuant to Rule 92 *bis*.¹ On 6 October 2010, the Chamber issued its decision on the Original Motion denying the Prosecution's request ("Impugned Decision").²
2. On 13 October 2010, the Prosecution filed a motion for certification of the Impugned Decision.³ In particular the Prosecution requests certification of four alleged errors in the Impugned Decision.
3. On 17 October 2010, the Defence filed a response to the Prosecution Motion.⁴ The Defence submits that the Prosecution has failed to discharge its burden with regard to showing that the test for certification has been met.

DELIBERATIONS

4. According to Rule 73(B), 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 to appeal may be granted only if both criteria are satisfied.⁵ Even then, certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.⁶
5. In considering whether to grant certification for appeal, the Chamber does not need to determine whether the Impugned Decision is correct. Rather, the Chamber must determine whether the issue is one that merits certification under Rule 73(B).
6. In its motion, the Prosecution raises the following four grounds for appeal: the Chamber erred in finding that (i) the evidence in the affidavit is not cumulative; (ii) admission of the evidence will be highly prejudicial to the Accused given its pivotal nature; (iii) there is an

¹ Prosecution's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, 9 August 2010 ("Original Motion").

² Decision on Prosecution's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi (TC), 6 October 2010 ("Impugned Decision").

³ Application for Certification to Appeal "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi", filed on 13 October 2010 ("Prosecution Motion").

⁴ Defence Response to Prosecutor's Application for Certification to Appeal "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi", filed on 17 October 2010 ("Defence Response").

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

⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ndirumapatse'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.

overriding public interest in the evidence being presented *viva voce* and (iv) the Prosecution has not submitted a satisfactory reason for the witness' inability to testify in person.⁷

7. The Defence opposes the Prosecution Motion because it contends that the Prosecution failed to show that the Impugned Decision involves an issue that would affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that immediate resolution by the Appeals Chamber would materially advance the proceedings.⁸

8. The Chamber recalls that it found that General Gatsinzi's affidavit strikes at a pivotal and central element of the Prosecution's case and that there was an overriding public interest in having General Gatsinzi's evidence heard directly by the Trial Chamber.⁹ For these reasons, the Chamber finds that the Impugned Decision involves an issue that would significantly affect the fairness of the proceedings in this case. Moreover, the Chamber notes that if General Gatsinzi's affidavit is admitted, the number of witnesses the Prosecution would need to call would be reduced. Thus, the Chamber finds that the Impugned Decision also involves an issue that would affect the expeditious conduct of the proceedings.

9. Furthermore, the Chamber notes that the Impugned Decision relates to the evidence that the Prosecution is permitted to call and therefore has the potential to affect the outcome of the case. The Chamber considers that the question of outcome is not limited to the Chamber's final determination as to the guilt of the Accused but also encompasses the manner in which that determination is made, including the evidence considered. The Chamber therefore finds that the Impugned Decision may affect the outcome of the trial.

10. Lastly, the Chamber considers that immediate resolution by the Appeals Chamber will materially advance the proceedings. The Chamber recalls that in the Impugned Decision, it found that General Gatsinzi's affidavit concerned issues that are disputed between the Parties and that it would be highly prejudicial for this evidence to be admitted without allowing for oral interrogation of the witness.¹⁰ The Chamber held that, "[g]iven General Gatsinzi's rank, knowledge and nexus to the Accused, there is also an overriding public interest in the evidence being presented *viva voce*."¹¹ As such, the Impugned Decision impacts on the evidence that the Prosecution will present at trial as well as the manner in which that evidence is adduced (i.e., live, in-court testimony versus admission of a written statement pursuant to Rule 92 *bis*). As the trial in this case has not yet commenced, the Chamber is of the opinion that an immediate resolution by the Appeals Chamber could materially advance the proceedings by influencing the manner in which the Prosecution evidence is presented.

11. Accordingly, the Chamber is satisfied that both prongs of the test in Rule 73(B) have been met in this case.

⁷ Prosecution Motion, para. 2.

⁸ Defence Response, paras. 5-17.

⁹ Impugned Decision, para. 10.

¹⁰ Impugned Decision, para. 10.

¹¹ Impugned Decision, para. 10.

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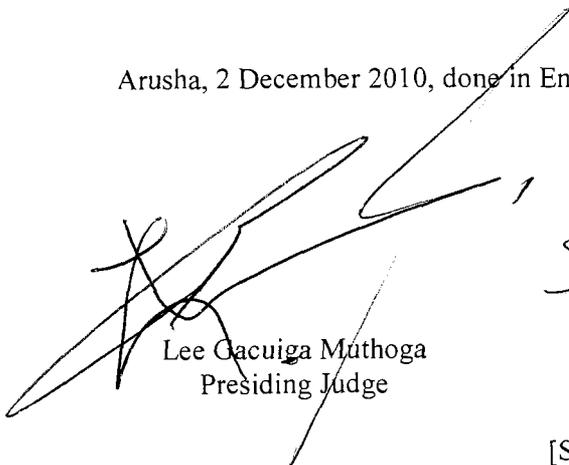
FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecution's Motion; and

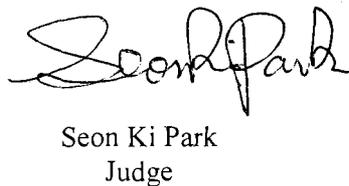
CERTIFIES the following issues for appeal:

- I. Whether the Trial Chamber was correct in holding that the evidence in General Gatsinzi's affidavit is not cumulative in nature because "General Gatsinzi was of high rank in the FAR and at the ESO and has knowledge of the FAR Rules of Discipline, positions and personnel" and that "none of the other witnesses enumerated in the Prosecution's list of witnesses are equivalent in rank or authority to General Gatsinzi or can submit similar information which will be cumulative to the affidavit."¹²
- II. Whether the Trial Chamber was correct in holding that because General Gatsinzi's statement goes to proof of a pivotal element of the Prosecution's case against the Accused and touches upon a live and important issue between the Parties, admission of the affidavit "without allowing oral interrogation to be conducted" would be highly prejudicial to the Accused.¹³
- III. Whether the Trial Chamber was correct in holding that "there is ... an overriding public interest in the evidence [of General Gatsinzi] being presented *viva voce*."¹⁴
- IV. Whether the Trial Chamber was correct in finding that "the Prosecutor has not submitted a satisfactory reason for [General Gatsinzi's] inability to testify in person."¹⁵

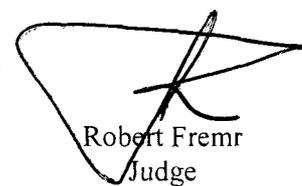
Arusha, 2 December 2010, done in English,



Lee Gacuga Muthoga
Presiding Judge



Seon Ki Park
Judge



Robert Fremr
Judge

[Seal of the Tribunal]



¹² Impugned Decision, para. 9.

¹³ Impugned Decision, para. 10.

¹⁴ Impugned Decision, para. 10.

¹⁵ Impugned Decision, para. 10.