

ICTR-96-3-A
14 May 2003
(9713/h = 9705/h)

9713/h
RMM



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before : Judge Claude JORDA, Presiding
Judge Mohamed SHAHABUDEEN
Judge Mehmet GÜNEY
Judge Fausto POCAR
Judge Theodor MERON

Registrar: Mr. Adama DIENG

Decision of: 19 February 2003

ICTR Appeals Chamber
Date: 14 May 2003
Action: PG
Copied To:

Concerned Judges,
Parties, Judicial Archives,
LOs, LSS
[Signature]

Georges ANDERSON NDERUBUMWE RUTAGANDA
(Appellant)

v/

THE PROSECUTOR
(Respondent)

Case n° ICTR-96-3-A

DECISION ON THE CONSOLIDATED DEFENCE MOTION FOR AN ORDER VARYING THE GROUNDS OF APPEAL, FOR THE REHEARING OF ORAL ARGUMENTS IN THE APPEAL AND FOR THE ADMISSION OF ADDITIONAL EVIDENCE, AND SCHEDULING ORDER

Counsel for the Appellant

M. David JACOBS
M. David PACIOCCO

Counsel for the Prosecutor

M. Norman FARRELL

JUDICIAL RECORDS/ARCHIVES
ICTR
2003 MAY 16 P 12:23
[Signature]

for filing 1

9712/h

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 (« Appeals Chamber » and « International Tribunal »),

NOTING the appeals lodged by Georges Anderson Nderubumwe Rutaganda (« Appellant ») and the Prosecutor on 5 and 6 January 2000 respectively, against the Judgement and Sentence rendered by Trial Chamber I on 6 December 1999;

NOTING that the oral hearing of the appeals was held in Arusha on 4 and 5 July 2002;

NOTING the « Decision on the Urgent Motion for Disclosure and Admission of Additional Evidence and Scheduling Order » rendered by the Appeals Chamber on 12 December 2002, which requested *inter alia* the Appellant to file a consolidated motion pursuant to Rule 115 of the Rules of Procedure and Evidence (« Rules ») specifying all the additional evidence which he intends to adduce;

BEING SEISED OF the « Consolidated Defence Motion for an Order Varying the Grounds of Appeal pursuant to Rule 107bis and Rules 114 and 116 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rules 115 (A) and (B) of the Rules of Procedure and Evidence, as well as a Request for Extension of the Page Limit Applicable to Motion » filed by the Appellant on 3 January 2003 (« Consolidated Motion »);

NOTING the « Prosecution Response to the Consolidated Defence Motion Pursuant to Article 24 of the Statute and Rules 114, 115 and 116 of the Rules » filed on 16 January 2003 (« Prosecutor's Response »);

NOTING the « Abridged Defence Reply to the Prosecution's Response to Consolidated Defence Motion Pursuant to Article 24 of the Statute and Rules 114, 115 and 116 and the Decision of the Appeals Chamber of January 23, 2003 » filed on 24 January 2003 (« Defence Reply »);

CONSIDERING that in his Consolidated Motion the Appellant seeks:

1. to obtain the admission of the following additional evidence pursuant to Rules 115(A) and (B) of the Rules :

9711/L

- the open and closed session transcripts of the testimony of Witness X given in the *Media* trial,¹ as the Appellant submits that the testimony of Witness X relates to the nature and role of the national committee of the *Interahamwe za MRND* and supports the evidence furnished by the Appellant at trial that the national committee of which he was a member was not involved in the atrocities; and the Appellant contends that this calls into question the findings of the Trial Chamber in this respect;²
 - a letter dated 28 June 2002 of Ms Alison Des Forges to the Prosecutor concerning the *Rusatira* case, as well as two letters dated 12 and 20 June 2002 of Professor André Guichaoua to the Prosecutor concerning the *Rusatira* case, on the basis of which, among other documents, the Prosecutor decided to withdraw the Indictment against General Rusatira (« Des Forges and Guichaoua Reports »); the Appellant submits that these reports cast serious doubt on the veracity and reliability of the testimony of key witnesses in the *Rutaganda* case, on whose basis he was found guilty of killings at ETO and Nyanza (paragraphs 13 to 16 of the Indictment);³
 - a Belgian Military Document -'KIBAT-11 Avril 1994'- which allegedly undermines the credibility of the testimony of key witnesses in the *Rutaganda* case in the same way as the Des Forges and Guichaoua Reports (« KIBAT document »); and
 - a 'Compte rendu d'enquête' dated 21 November 2002 written by an Investigator from the Prosecution Office, Mr. Seutcheu, which includes the following sentence allegedly stated by Professor Guichaoua : 'D'après mes informations, il [Rutaganda] n'aurait pas été plus présent à Kicukiro que Rusatira'⁴ (« Seutcheu Report »);
2. permission to amend his notice of appeal to include a new ground of appeal pursuant to Article 24 of the Statute of the International Tribunal and Rule 108 of the Rules, as the Prosecutor has offered inconsistent theories in the *Rutaganda* trial and the *Media* trial on the structure of the *Interahamwe za MRND* and the Appellant's position within that organisation;
 3. to obtain an order by the Appeals Chamber « for a rehearing of oral arguments in this appeal » pursuant to Rules 114 and 116 of the Rules and Article 24 of the Statute of the International Tribunal as, in light of the complexity of the issues raised in the Consolidated Motion, further oral submissions should be ordered in the interests of justice; and

¹ The case of the *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, Case No. ICTR-99-52-T, ICTR-96-11-T and ICTR-97-27-T.

² See paragraphs 10 to 35 of the Consolidated Motion.

³ See paragraphs 42 to 67 of the Consolidated Motion.

⁴ See paragraph 69 of the Consolidated Motion.

9710/16

4. to obtain an order extending the page limit applicable to motions;

RECALLING that in its Decision of 23 January 2003,⁵ the Appeals Chamber recognised as validly filed the Consolidated Motion;

CONSIDERING that the Prosecutor submits in the Prosecutor's Response that:

1. the transcripts of Witness X should not be admitted as additional evidence because the Appellant failed to demonstrate that the evidence of Witness X was not available at trial; furthermore this evidence has been misconstrued by the Appellant and does not meet the requirements of Rule 115(B);
2. the Des Forges and Guichaoua Reports as well as the KIBAT document should not be admitted as additional evidence because the Prosecutor's decision to withdraw the Indictment of General Rusatira does not show any loss of faith in the evidence given by Witnesses A, H and W in the *Rutaganda* trial; furthermore, the Appellant failed to show that the new evidence could affect the verdict by calling into question the credibility of the witnesses in question;
3. the statement made by Professor Guichaoua and contained in the Seutcheu Report should not be admitted as additional evidence because the conclusion reached by Professor Guichaoua is not sustained on the evidence presented, at least not such that the Appeals Chamber can overturn a verdict on that basis and that, if something were to be admitted, it should be the statements, notes or interviews by Professor Guichaoua or the testimony of the persons he interviewed; and
4. as to the amendment of the notice of appeal, the concept of 'inconsistent theory' is inapplicable to the facts of this case and therefore there is no factual basis supporting the request to amend the notice of appeal;

A. Admission of additional evidence on the basis of Rule 115 of the Rules

CONSIDERING that the proposed pieces of evidence are additional evidence of facts that were considered or put in issue at trial and that therefore Rule 115 is the appropriate basis to adduce this evidence on appeal;⁶

CONSIDERING that Rule 115 of the Rules provides that :

⁵ Décision concernant les demandes d'autorisation d'outrepasser les limites de pages applicables aux requêtes, *Rutaganda c. le Procureur*, Case No. ICTR-96-3-A, 23 January 2003, page 2.

⁶ See Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, 15 October 1998, paragraph 32 (« Tadić decision »); Appeal Judgement, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, 23 October 2001, paragraphs 48-49 (« Kupreškić Appeal Judgement »);

9709/1

- (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of hearing;
- (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require;

CONSIDERING that, in keeping with the case law of the International Tribunal, evidence is admissible under Rule 115 if it was unavailable at trial, and if it is relevant, credible and such that it could show that the conviction was unsafe;⁷

1. Open and closed session transcripts of Witness X's testimony

RECALLING that in its decision in this case dated 12 December 2002,⁸ the Appeals Chamber affirmed that, because the deliberations are at an advanced stage, the Appeals Chamber would consider a request for admission of additional evidence five months after the hearing of the case on appeal only in exceptional circumstances and that additional clarifications were necessary in order to establish whether such exceptional circumstances existed for admission of the open session transcript of the testimony of Witness X;

CONSIDERING that in explaining why the evidence in question was not available at trial, the moving party must show that it exercised due diligence at trial⁹ but also during the pre-appeal stage of the proceedings;

NOTING that Witness X testified in Arusha between 18 and 26 February 2002 and that the Counsel for the Appellant was present in Arusha for the hearing of the *Ntakirutimana* case on various dates during the months of February to May 2002;

⁷ See for example Decision, *Laurent Semanza v. the Prosecutor*, Case No. ICTR-97-20-A, 31 May 2000, paragraph 38 (« Semanza decision »); Décision sur la « Confidential Motion (i) To File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) To File the Statement of Witness II Served by the Prosecutor on 18 April 2001 and (iii) To File a Supplemental Ground of Appeal »; et Ordonnance portant calendrier, *Alfred Musema c. Le Procureur*, Case No. ICTR-96-13-A, 28 Septembre 2001, page 6 (« Musema decision »). For ICTY jurisprudence, see Tadić decision, paragraph 71; Kupreškić Appeal Judgement, paragraph 68; Scheduling Order, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, 31 October 2002, page 2 (« Blaškić decision »).

⁸ Décision relative à la requête urgente de la Défense en communication et admission de moyens de preuve supplémentaires et ordonnance portant calendrier, *Rutaganda c. le Procureur*, Case No. ICTR-96-3-A, 12 December 2002, page 7.

⁹ See Tadić decision, paragraphs 44-45 and Decision on the Motions of the Appellant Vaitko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, 26 February 2001, paragraph 15 « Kupreškić decision ».

9708/h

CONSIDERING that the Appellant does not proffer any specific explanation as to why the testimony of Witness X, whether in closed or open session, was not available to him before 4 November 2002;

CONSIDERING however that, even if the Appeals Chamber were to consider that the transcripts of the testimony of Witness X were unavailable, they are not evidence which could show that the Appellant's convictions were unsafe because the factual findings of the Trial Chamber to the effect that the Appellant participated in the killings were based on evidence of his personal participation and not on his position as vice-president of the *Interahamwe za MRND*, and because, to the extent that his role on the national committee of the *Interahamwe za MRND* influenced the Trial Chamber's finding that the Appellant possessed the discriminatory intent necessary for the conviction of genocide, the other evidence of his possessing the necessary intent, given his participation in the episodes of killing of which he was found guilty, was overwhelming;

FINDING that the open and closed session transcripts of Witness X's testimony do not satisfy the conditions of Rule 115 of the Rules and are therefore not admissible on appeal;

2. The Des Forges and Guichaoua Reports

CONSIDERING that the Des Forges and Guichaoua Reports were only communicated by the Prosecutor to the Appellant on 11 November and 9 December 2002 respectively, and that therefore they were not available at trial or during the pre-appeal stage of the proceedings;¹⁰

CONSIDERING that the withdrawal by the Prosecutor of the Indictment against General Rusatira does not necessarily call into question the credibility of Witnesses A, H and W at the *Rutaganda* trial;

CONSIDERING that, even if the Des Forges and Guichaoua Reports reveal discrepancies between them and the testimony of the above-mentioned witnesses regarding Rusatira, such discrepancies do not have the capacity to affect the evidence of these witnesses relating to the Appellant and as a result could not affect the findings of the Trial Chamber concerning the Appellant;

FINDING that the Des Forges and Guichaoua Reports do not satisfy the conditions of Rule 115 of the Rules and are therefore not admissible on appeal;

¹⁰ See Musema Decision, page 5 and Kupreškić decision paragraph 55.
Case n° ICTR-96-3-A

9707/h

3. KIBAT document

CONSIDERING that the KIBAT document was only communicated to the Appellant on 9 December 2002 and was therefore not available in this form at trial or during the pre-appeal stage of the proceedings;

CONSIDERING that the KIBAT document is not evidence which could show that the Appellant's convictions on counts 1 and 2 were unsafe for the same reasons as those expressed in relation to the Des Forges and Guichaoua Reports;

FINDING that the KIBAT document does not satisfy the conditions of Rule 115 of the Rules and is therefore not admissible on appeal;

4. The Seutcheu Report

CONSIDERING that the Seutcheu Report was communicated to the Appellant on 9 December 2002 and that therefore it was not available at trial or during the pre-appeal stage of the proceedings;

CONSIDERING that, in light of the communication from Professor Guichaoua to the Prosecutor dated 10 November 2002 and filed with the Appeals Chamber on 14 February 2003,¹¹ the Seutcheu Report is relevant and credible and has the capacity to show that the Appellant's convictions on counts 1 and 2 were unsafe;

FINDING that the Seutcheu Report fulfils the conditions of Rule 115 of the Rules and is therefore admissible on appeal;

CONSIDERING that in order for the Appeals Chamber to determine whether this additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice, it is necessary to hear Professor Guichaoua as a witness in this case as soon as practically possible;

CONSIDERING that the Appellant has a right to be present during this hearing if he so wishes;

¹¹ Prosecution Filing Pursuant to the Appeals Chamber's Decision Dated 13 January 2003 filed confidentially and partly ex-parte on 14 February 2003.

B. The amendment of the notice of appeal

NOTING that the Appellant wishes to amend his notice of appeal on the basis of the newly discovered evidence contained in the testimony of Witness X in the *Media* trial;¹²

CONSIDERING that pursuant to Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal;

CONSIDERING that, to the extent the Appellant is raising a claim of legal error based on abuse of process, the Appellant has failed to show how any conflict between Witness X's testimony and the arguments and evidence presented by the Prosecution in the Appellant's trial could affect the verdict in the Appellant's case;

CONSIDERING that, to the extent the Appellant is raising a claim of factual error, it is the same as a ground already presented in the Appellant's notice of appeal and brief on appeal;

FINDING that, pursuant to Rule 108 of the Rules, the Appellant has not shown good cause to amend his notice of appeal;

C. Request for a re-hearing of certain arguments in the appeal

NOTING that the Appellant requests 'a rehearing of oral arguments in this appeal' pursuant to Rules 114 and 116 of the Rules and Article 24 of the Statute of the International Tribunal as, in light of the complexity of the issues raised in the Consolidated Motion, further oral submissions should be ordered in the interests of justice;

CONSIDERING that the Appeals Chamber understands this to be a request for a re-hearing of the grounds allegedly affected by the admission of the additional evidence;

FINDING that, as the testimony of Witness X is not admitted on appeal, there is no need to re-hear the ground related to the *Interahamwe za MRND* movement and that it is premature for the Appeals

¹² This new ground would read: « The Prosecution presented a theory in support of the conviction of Georges Rutaganda relating to the nature and role of the national committee of the *Interahamwe* of the MRND (commonly referred to in the Rutaganda trials as the *Interahamwe za MRND*) that is contrary to the theory that is relying on in an effort to secure the conviction of other persons accused before the International Criminal Tribunal for Rwanda, or an error in the presentation of facts that has occasioned a miscarriage of justice ». See paragraph 36 of the Consolidated Motion.

9705/h

Chamber to decide on a re-hearing of the ground relating to the ETO and Nyanza killings as it may be possibly affected by the admission on appeal of the Seutcheu Report;

FOR THESE REASONS

DISMISSES the motion for the admission of Witness X's testimony, the Des Forges and Guichaoua Reports and the KIBAT document as additional evidence as well as the motion for the amendment of the notice of appeal;

ADMITS the Seutcheu Report as additional evidence on appeal;

RESERVES its position as to a possible re-hearing of the grounds of appeal related to the admission of the Seutcheu Report on appeal;

ORDERS Professor Guichaoua, pursuant to Rule 98 read together with Rule 107 of the Rules, to appear as a witness before the Appeals Chamber and to produce all supporting material on which he relied in making the following conclusion : « *D'après mes informations, il [Rutaganda] n'aurait pas été plus présent à Kicukiro que Rusatira* »;

SCHEDULES the hearing at which Professor Guichaoua is to appear on Friday, 28 February 2003; and

STATES that another Scheduling Order providing more details on this hearing will be issued as soon as possible.

Done in English and in French, the English text being authoritative.

[Signed]

Judge Claude Jorda,
President

Done at The Hague, The Netherlands, 19 February 2003.

