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(17908— 17905)

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UNITED NATIONS
NATIONS UNIES

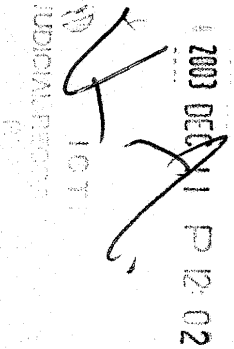
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 11 December 2003



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON CERTIFICATION OF APPEAL CONCERNING ADMISSION OF WRITTEN STATEMENT OF WITNESS XXO

The Office of the Prosecutor
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Request for Certification Under Rule 73 With Regard to the Trial Chamber's Ruling on the Admissibility of the Written Statement of Witness XXO as his Evidence in Chief", filed on 27 November 2003;

CONSIDERING the Defence Response filed on 2 December 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 19 November 2003, during the examination-in-chief of Witness XXO, the Presiding Judge asked the parties' views as to whether the statement could be admitted as evidence, on the basis of which cross-examination would then be conducted by the Defence.[1] On 20 November 2003, the Prosecution requested that Witness XXO's statement be admitted as evidence, in addition to matters on which oral testimony had been, and would be, given.[2] The legal basis for the request was said to be Rule 89 of the Rules of Procedure and Evidence ("the Rules"), and a recent decision of the Appeals Chamber in the case of *Prosecutor v. Milosevic* ("the *Milosevic* Decision") permitting the admission of a witness statement under Rule 89(F) of the Rules of Procedure of the International Criminal Tribunal for Yugoslavia.[3] Though the Rules of this Tribunal contain no counterpart of Rule 89(F), the Prosecution nonetheless requested that the procedure should be adopted and that the Chamber had an inherent jurisdiction to admit the statement as evidence under Rules 89(C).[4]

2. The Defence opposed the Prosecution request. Not only is there no equivalent to Rule 89(F) in the ICTR Rules, but Rule 90(A), whose equivalent had been deleted from the Rules of the Yugoslavia Tribunal, emphasizes the primacy of oral testimony: "Witnesses shall, in principle, be heard directly by the Trial Chamber unless a Chamber has ordered that the witness be heard by means of a deposition as provided for under Rule 71." These differences rendered the *Milosevic* decision irrelevant and, indeed, beyond the jurisdiction of a Chamber under the Rules.[5] The principle of legality would be violated by the admission of the witness's statement in the absence of an express change of the Rules.[6] Further, even if the Chamber did have jurisdiction to admit a witness's written statement, the Chamber should refrain from doing so as this witness's testimony, when viewed in the context of other testimony, impermissibly described the acts and conduct of the Accused.[7]

3. In an oral decision of 20 November 2003, the Chamber did not accept the statement under Rule 89, noting that the Appeals Chamber in the *Milosevic* decision had relied heavily on Rule 89(F) of the Yugoslavia Tribunal. Permitting admission of the evidence in the absence of a similar provision in the Rules of this Tribunal would be of doubtful legality and

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[1] T. 19 November 2003, pp. 52-54.
[2] T. 20 November 2003, pp. 2-3.
[3] *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements (TC), 30 September 2003.
[4] T. 20 November 2003, pp. 4-5.
[5] *Ibid.* pp. 7-8.
[6] *Ibid.* pp. 7, 11, 13.
[7] *Ibid.* p. 12.

should be avoided. However, the Chamber again asked the parties to attempt by mutual consent to reduce the volume of testimony-in-chief.[8]

SUBMISSIONS

4. In its motion seeking certification of appeal from that oral decision, the Prosecution has presented no further arguments concerning the merits of its legal position, but argued that the two conditions for granting certification of an appeal under Rule 73(B) are met. The inability to present evidence by means of written statements would slow the proceedings and might force the Prosecution to truncate the presentation of its case to comply with the timeframe in which it is expected to complete its case. This would affect both the fairness and the expeditiousness of proceedings. The Prosecution also argued that the proceedings would be materially advanced – the second requirement of Rule 73(B) – as this issue would arise again in respect of future Prosecution witnesses. As other methods for speeding the testimony of witnesses have not been accepted by the Defence, resolution by the Appeals Chamber of this issue would materially advance the proceedings.

5. The Defence argues that the Prosecution motion has no legal merit and that the Chamber should exercise its discretion and decline to certify an appeal. No real issue of expeditiousness or of fairness is raised. The timeframe for presenting the Prosecution case was not imposed by the Chamber but is, rather, a function of the Prosecution's own estimates. The Defence suggests that the Prosecution is less concerned with expeditiousness than with introducing evidence that curtails the efficacy of cross-examination. Further, the question at issue involves an intricate weighing of facts not amenable to legal review by the Appeals Chamber, which would simply lead to a reference back to the Trial Chamber for a determination of whether it should exercise its discretion to admit the written statement. This would not expedite proceedings.

DELIBERATIONS

6. Rule 73(B) of the Rules of Procedure and Evidence ("the Rules") provides that Decisions on motions are without interlocutory appeal unless certified by the Trial Chamber:

> ...which may grant such certification 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.

As this Chamber has previously held, whether the second prong of this test – that resolution by the Appeals Chamber may materially advance the proceedings – requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue.[9]

7. The *Milosevic* Decision does not raise such a serious doubt. The Decision rested on Rule 89(F) of the Rules of the Yugoslavia, which permits a Chamber to "receive the evidence of a witness orally or, where the interests of justice allow, in written form". That rule is absent from the Rules of this Tribunal and, indeed, may be contrasted with Rule 90(A) which declares that "[w]itnesses shall, in principle, be heard directly by the Chambers unless a

[8] T. 20 November 2003, p. 15.

[9] *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003.

Chamber has ordered that a witness be heard by means of deposition as provided for in Rule 71." While the Chamber need not here explore the limits of the wording of this Rule, it is clear that the legal framework governing the *Milosevic* Decision is significantly different from that governing this Tribunal. In light of Rule 90(A), and the absence of any argument raising a serious doubt as to the correctness of its oral decision of 20 November 2003, the Chamber does not believe that immediate resolution of the legal issue by the Appeals Chamber may materially advance the proceedings, as required by Rule 73(B).

8. Even assuming that there is doubt as to whether a Chamber has a general discretion under Rule 89(C) to admit written witness statements in lieu of oral testimony, the Chamber would not choose to exercise its discretion here. The Chamber wishes to avoid trial procedures of dubious legality and does not at this juncture see the need to pursue the method advocated by the Prosecution. The exercise of this discretion is primarily a matter for the Trial Chamber and, absent abuse, is not amenable to review by the Appeals Chamber. The Prosecution has made no suggestion that the Chamber has abused its discretion in declining to admit Witness XXO's statement. Granting an appeal on a discretionary decision in the absence of any suggestion of abuse of discretion would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 December 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]