UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
26-04-2005
(24512 - 24509)

24512
IVGH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 26 April 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MODALITIES FOR EXAMINATION OF DEFENCE WITNESSES

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

6h

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

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

BEING SEIZED OF the Prosecution "Motion Regarding Co-Accused Cross-Examination of Non-Adverse Defence Witnesses, Pursuant to Rules 73, 89 (B), and 90 (G)", filed on 15 March 2005;

CONSIDERING the Responses thereto of the Defences of Bagosora, Ntabakuze and Nsengiyumva, filed on 22 and 24 March 2005;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Prosecution requests the Chamber to adopt a series of rules whose purpose is said to be to limit the possibility of improper or duplicative questioning of Defence witnesses by Defence teams other than the one which formally called the witness. The party presenting a witness should be required to examine the witness first. "Subsidiary direct examination" would then be allowed by any Defence party which had formally declared that the witness was a "joint witness", and only through non-leading questions.[1] In the absence of such a declaration, a Defence party would not be permitted to examine a witness unless it could show that testimony had been given which was "adverse", so as to trigger a right of cross-examination.[2] Even if an advance declaration of joint presentation is not required, Defence parties should be precluded from asking leading questions to witnesses unless the testimony is genuinely adverse. The standard that should be applied is that leading questions may be used to challenge, but not to elicit, information. The Prosecution should be permitted to conduct its cross-examination after all the Defence teams have examined or cross-examined the witness.

2. The Defence argues that the motion lacks legal basis, is ambiguous and premature. The Rules of Procedure and Evidence ("the Rules") concerning examination and cross-examination provide sufficient guidance and need not be supplemented by additional rules. In the absence of a concrete controversy between the parties, the Chamber should not attempt to fashion rules to encompass the many different situations which may arise. Furthermore, the Prosecution has failed to adequately define its proposed categories of "favourable" and "adverse" evidence which, in any event, cannot usefully be defined by the Chamber in the abstract. The Chamber is quite capable of discerning and preventing improper questioning as the occasion arises and, accordingly, there is no need to prescribe a set of modalities for the questioning of witnesses. Restricting the right to examine witnesses as suggested by the Prosecution would undermine the right of the accused to a fair trial.

DELIBERATIONS

3. The Prosecution motion was filed on 15 March, whereas the Defence case commenced on 11 April 2005. The Defence has argued that the motion is premature and that the issues raised are best solved on a case by case basis during the presentation of the evidence.[3] The Chamber agrees with the Defence, and has already made oral rulings in

[1] Prosecution Motion, paras. 10-14.
[2] Prosecution Motion, paras. 9, 14.
[3] *See Kayishema and Ruzindana*, Decision (TC), 17 April 1997 p. 2; *Bagosora et al.*, Decision on the Defence Motion for Pre-Determination of the Rules of Evidence (TC), 8 July 1997, p. 3.

connection with objections on this issue, and will continue to do so whenever there is a dispute between the parties.[4] Consequently, there is no need for an order in the terms sought by the Prosecution in its motion. However, the Chamber will make some general observations in view of the submissions of the parties in order to avoid lack of clarity during the remainder of the proceedings.

4. Article 20 (4)(e) of the ICTR Statute provides that the accused has the right to examine, or have examined, the witnesses against him or her. It is based on Article 20 (3)(e) of the International Covenant on Civil and Political Rights, which applies to countries with different legal traditions. These provisions do not address the sequence and purpose of cross-examination in multi-accused trials. The Rules are also silent on these issues. Rule 85 establishes the distinction between examination-in-chief, cross-examination and re-examination. According to Rule 89 (C), a Chamber may admit any relevant evidence which it deems to have probative value. Under Rule 90 (F), the Chamber shall exercise control over the mode and order of interrogating witnesses in order to ascertain the truth and avoid needless consumption of time. Furthermore, Rule 90 (G) allows cross-examination to go beyond the scope of direct examination under certain conditions but does not directly solve the issues raised by the present motion.[5] Finally, Rule 89 (B) directs that, in cases not otherwise provided for by the Rules, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it.

5. There is agreement between the parties that the Defence team or teams calling a witness will conduct examination-in-chief and that the Prosecution will be the last party to cross-examine him or her, followed by re-examination. This is in conformity with established Tribunal practice.[6] The disagreement between the parties relates to the nature of the examination of the other Defence teams before the Prosecution's cross-examination. The Chamber recalls that in previous multi-accused trials, the Trial Chambers have applied the general principles concerning examination of witnesses in determining the scope of questioning permitted to Co-Accused who have not called the witness.[7] Although the terminology adopted by Trial Chambers has varied slightly, they have consistently affirmed the right of Co-Accused to ask questions after the examination-in-chief by the party presenting the witness.[8] No advance declaration that a witness is presented "jointly" has been required, nor has any Trial Chamber narrowly constrained the ambit of such questions to issues that are "adverse", as suggested by the Prosecution.[9]

---

[4] See e.g. T. 19 April 2005 pp. 28-30, 36-39.

[5] The requirement in Rule 90 (G)(ii) that cross-examining counsel identify the proposition which is "in contradiction of the evidence given by the witness" is not determinative. Rule 90 (G)(i) does not limit cross-examination to contradictory matters, and authorizes questions "relevant ... to the subject-matter of the case" of the cross-examining party.

[6] As, for example, in *Kayishema and Ruzindana*, *Ntakirutimana*, *Nahimana et al.*, *Ntagerura et al.*, and *Nyiramasuhuko et al.*

[7] *Nyiramasuhuko et al.*, T. 7 March 2005, pp. 7-8; *Ntagerura et al.*, T. 6 March 2002, p. 133 ("When [Counsel for Ntagerura] produces in evidence a witness, that witness has to be examined-in-chief. The order that we have now, is that [Counsel for Imanishimwe] will cross-examine that [witness]. [Counsel for Mr. Bagambiki] will cross-examine that witness and then the Prosecution will cross-examine that witness, and that is the procedure we will go through as the case goes along"); *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 15 ("In addition, the Trial Chamber is of the considered opinion that in a joint trial, where a witness is called by one of the accused, other accused persons also have the option to question the witness during the examination in chief").

[8] Chambers have sometimes referred to the questions by other Co-Accused as examination-in-chief (*Nyiramasuhuko et al.*, T. 7 March 2005, p. 8; *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 15), while others have referred to such questions as cross-examination (*Ntagerura et al.*, T. 6 March 2002, p. 133).

[9] Nor is support for such an approach to be found in national jurisdictions, particularly Canada, Australia and the United Kingdom. In the United States, the jurisdiction upon which the Prosecution relies heavily, the caselaw referred to seems principally to concern cross-examination of the Co-Accused, which may give rise to many

6. In conformity with established practice, this Chamber will apply the principles in Rule 90 (G) when deciding whether a party shall be allowed to go outside the examination-in-chief during cross-examination. To some extent, Defence teams other than the one calling a witness will be allowed to elicit evidence in its favour, even if this is not "cross-examination" in the narrow sense of the word. However, such evidence will only be admitted if it is relevant, contributes to the ascertainment of the truth and does not lead to needless consumption of time, as required by Rule 89 (C) and 90 (F). It is expected that when eliciting such evidence, Defence counsel will avoid asking leading questions to the witness as this will undermine the credibility of such testimony, and avoid repetitive questions. The exact extent and manner of questioning permitted by other Co-Accused will depend on the nature of the testimony which has been given by the witness and the purpose of the questioning. This will be decided on a case-by-case basis..

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 26 April 2005

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

[Seal of the Tribunal]

issues that are not relevant to other witnesses. Even in that case, the jurisprudence from the United States concerns the application of the constitutional right to cross-examine, and not the proper exercise of the judge's discretion as to whether to permit cross-examination.