



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:** 9 May 2005

### THE PROSECUTOR

v.

**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*

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**ORAL DECISION 9 MAY 2005, T. 9 MAY 2005 pp. 27-28**

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**The**

Barbara  
Drew  
Christine  
Rashid Rashid

**Prosecution**

Mulvaney  
White  
Graham

**The**

Raphaël  
Paul  
René  
Peter  
André  
Kennedy  
Gershon Otachi Bw'Omanw

**Defence**

Constant  
Skolnik  
Saint-Léger  
Erlinder  
Tremblay  
Ogetto

(Court resumed at 1135H)

MR. PRESIDENT:

Mr. Witness, we will deal with procedural issues before your cross-examination continues, so you can just relax now for a couple of minutes.

Before the break, there were objections. The issue at hand is the position when a cross-examiner is putting to the witness that he or she may have committed acts or shown attitudes which may damage his or her credibility. Now, this is done in all jurisdictions and it is also allowed here, but the problem is how to draw the borderlines. The purpose of such questions is, of course, to assess the witness's credibility, and this has been allowed under the rules before the rule change of 2003 and after the rule change of 2003. Furthermore, this is something both parties do, both the Defence and the Prosecution. And we have had instances in this courtroom, for instance, when it has been argued that the witness is lying or telling untrue versions, and the Chamber has then tried to circumscribe such allegations and said the issue is that, "You, Mr. Witness, it's been put to you that you are not telling the truth." This is also one way of saying to the witness that is not telling the truth but without really a basis - or showing a basis at the point in time, except for the cross-examination itself.

The Chamber has as its role the task of establishing the truth and thereby assess the credibility of all witnesses, both for the Prosecution and the Defence. It's also an important task to avoid harassment of witnesses; and we certainly also wish to avoid needless consumption of time. It is in this field, with these various considerations, that the Chamber must exercise its discretion. It is recalled, as we already said, in connection with a previous witness which was being accused by the Prosecution of having acted in a particular way that such propositions or allegations are certainly not evidence and for that reason they are not prejudicial to the Defence case, in the sense that the Chamber will simply disregard them at the end of the day and there will be no need to strike it from the record -- that is not the system used here -- but they will simply be ignored if there is no basis for such propositions. There is agreement that there must be some substantiation for proposals of this kind. It has been formulated in this courtroom as the cross-examiner having a good-faith basis for putting such suggestions to the witness. Sometimes, the basis will be evidence during the present trial; other times, it may be documents which maybe after few introductory rounds will be put to the witness, thereby showing the basis for the Prosecution's question. That has happened previously in this trial. And sometimes there is nothing written as the basis, and then the cross-examiner will only be left with the option to come back at a later stage, in particular, during rebuttal, as it has often been said here; and the Chamber recalls that the rebuttal is not a right for any party.

It has been requested by the Chamber that we should give some kind of definition of what a good-faith basis is. Words may not be so important in this context; it can be formulated in many ways. But since many of the objections were formulated by common law lawyers, one of the colleagues at the Bench has kindly provided me with *Archbold*, where there are two useful formulations which I will read out. One being that one of these Law

Lords stated: "An advocate is entitled to use his discretion as to whether to put questions in cross-examination which are based on material which he is not in a position to prove directly." And then later, and this is a section concerning cross-examination as to credit only, "Questions which affect the credibility of a witness by attacking his character that are not otherwise relevant to the actual inquiry ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well founded or true." And this is one possible way of defining the good-faith basis of a question.

Leaving the exact wording as to the definition of this concept aside, one additional issue will be, as mentioned by the Defence, how precise the cross-examiner has to be in connection with his or her questions to a witness in this situation. The Chamber understands that it will be difficult at an early stage to reveal the strategy of the cross-examiner. On the other hand, the Chamber will also, if no basis is provided, easily get impatient if the questions continue and continue without getting to the point. And an example of that was the Chamber's ruling in connection with the previous witness which was accused of having performed acts in relation to Tutsi in a lake. We certainly want to avoid time consumption, or as the rule says, "Needless consumption of time."

So these are the parameters within which we operate. By necessity, the rulings will have to be concrete based on an evaluation of the situation at hand. What we are faced with now is that we are at the beginning of a line of questions. We do not see that we can stop Ms. Graham from continuing at this stage, but we are listening and we will be getting gradually more and more impatient.

MR. ERLINDER:

Mr. President, I hope I don't occasion your impatience by raising another issue. I understand the Court's ruling, and appreciate it. However, the question, I guess, is if there are these extraneous matters that go to issues of credibility that the Prosecution wishes to assert, it seems to me that perhaps there are some disclosure issues associated with that as well, because if this witness - if we were to have known, for example, that the Prosecution had evidence that would call into question the credibility of one of our witnesses, it would seem to me that in the interests of the Tribunal, to save time, perhaps, eliminate testimony even, it would be wise to have disclosure of these things so that we can make some reasonable determination about whether or not it is sufficient enough to even have the witness testify at all. At this point, it seems to me the disclosure issue is one that also should be of some concern.

MR. PRESIDENT:

And we may come back to that in a few seconds, Mr. Erlinder. But only Mrs. Graham's questions and the development now will show whether there is anything to disclose, but your point is well noted.