



ICTR-98-41-T
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
22-02-2006
(26509-26505)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 22 February 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 FEB 22 P 12:29
ICTR

**DECISION ON BAGOSORA REQUEST FOR CERTIFICATION CONCERNING
ADDITIONAL QUESTIONING OF WITNESS LE-1**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

26508

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

BEING SEIZED OF the "Amended Request for Certification of 21 October 2005 Decision on Request to Cross-Examine a Witness on New Evidence", filed by the Bagosora Defence on 7 November 2005;

CONSIDERING the Prosecution Response, filed on 9 November 2005;

HEREBY DECIDES the Request.

INTRODUCTION

1. The Bagosora Defence requests leave to appeal an oral decision of the Chamber on 21 October 2005 denying permission to ask additional questions to Defence Witness LE-1 after the Prosecution cross-examination of the witness. The entire context of the witness's testimony, and a prior ruling of the Chamber in respect of an earlier request for additional cross-examination, are relevant to the present motion and are set out below.

2. Witness LE-1 testified for three days, on 19, 20 and 21 October 2005. The Nsengiyumva Defence, as the party calling the witness, conducted the examination-in-chief. The Ntabakuze and Bagosora Defence teams followed with additional questions to the witness.¹ During the subsequent Prosecution cross-examination, the witness was asked about his request to re-join active military service in April 1994. In particular, he was asked about a written statement in which he had asserted that a condition of his reappointment was that he "be made part of the [army] command because the population was requesting ... clear and bold orders to put an end to massacres".² The Prosecution suggested to the witness that this indicated that he must have thought that the army command was in a position to stop the massacres of civilians, and that some of its members did not support stopping them. Furthermore, the Prosecution suggested that the rejection of his re-appointment showed that the Minister of Defence did not support stopping the massacres. The witness denied these propositions.³

3. Immediately following the Prosecution cross-examination, the Kabiligi Defence requested permission to ask questions concerning matters raised during the Prosecution cross-examination.⁴ After oral argument, the Chamber authorized the Kabiligi Defence to ask additional questions:

Now we are faced with a request for cross-examination to be limited to information that came up in connection with the Prosecution's cross-examination. We can only possibly allow such cross-examination within that framework, not anything beyond that scope, and we expect the Defence counsel now to concentrate on what came up, which is adverse to his client.⁵

¹ The Chamber has prescribed the modalities for additional questions in a written decision: *Bagosora et al.*, Decision on Modalities for Examination of Defence Witnesses (TC), 26 April 2005, paras. 5-6. As Witness LE-1 was not a Bagosora witness, the questioning conducted by the Bagosora Defence was not an examination-in-chief.

² T. 21 October 2005 p. 35; Exhibit DNS-117.

³ *Id.* pp. 36-38.

⁴ *Id.* p. 39 ("...we can cross-examine where things may be adverse to our position. And, accordingly, I feel that - just to give you an example, yesterday Mr. Rashid in his cross-examination asked questions about General Kabiligi. I wish to cross-examine on that. And there are things which the witness just said now which I wish to cross-examine him on now").

⁵ *Id.* p. 43.

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After a few questions had been asked, it became apparent that the Kabiligi Defence was embarking on a general inquiry about the military situation in Kigali in April 1994. When asked to explain the line of questioning, the Kabiligi Defence argued that its purpose was to show that the army was not in a position to stop massacres of civilians.⁶ After oral argument, the Chamber precluded any further cross-examination on this subject. Though acknowledging that the Prosecution questions had arisen from the previously undisclosed statement of the witness, the Chamber ruled that "this is a general issue which has been on the table throughout the proceedings".⁷ On 2 December 2005, the Chamber denied certification to appeal this decision.⁸

4. During the witness's re-examination, the Nsengiyumva Defence tendered the witness's statement as an exhibit, but did not ask specific questions about the capacity of the military to stop the massacres of civilians. The Ntabakuze Defence then asked additional questions about other, unrelated matters, which elicited no objection from the Prosecution.⁹

5. The Bagosora Defence then indicated that it wished to ask additional questions about "the document which was produced, and which I was not aware of at this time". After a Prosecution objection, the Chamber ruled orally that the Bagosora Defence was not entitled to ask additional questions:

The idea that one could be in this privileged position, first, to cross-examine the witness, and then to re-examine the witness would be a novel approach in this Tribunal. We have to stick to normal practice and not allow that.

When it comes to that particular situation, when it was mentioned in the immigration statement that the witness approached authorities, I note that two Defence teams have had the possibility to cross-examine on that immigration statement, and one of them even tendered it as an exhibit. So that's that.¹⁰

The Bagosora Defence now requests leave for an interlocutory appeal of that decision.

DELIBERATIONS

6. The Bagosora Defence requests certification of the decision, arguing that, as required by Rule 73 (B), it affects the "fair and expeditious conduct of proceedings or the outcome of the trial" and that "immediate resolution may materially advance the proceedings".

7. The applicant has not discharged its burden of showing that the decision affects the fair and expeditious conduct of proceedings. The witness denied the incriminating propositions put to him by the Prosecution. He denied unequivocally and repeatedly that his request to be appointed to the army command implied that it was not doing enough to stop the massacres. Reversal of the present decision, and recalling the witness for further cross-examination by the Defence, would be of marginal significance to the outcome or conduct of the present trial.

8. Further, immediate resolution of the present controversy could not, in the Chamber's view, materially advance the proceedings. Defence cross-examination after the Prosecution is

⁶ *Id.* p. 45 ("I want to show that when this witness says that – or leaves the impression that the army could put down the massacres, I want to go through with him, because my client's position is that the army could not put down the massacres").

⁷ *Id.* p. 48.

⁸ *Bagosora et al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005. A request for reconsideration of the certification decision was also denied: *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006.

⁹ An objection was made by the Prosecution about the scope of the questioning after a number of questions had been asked, but no objection was made at the outset of the questioning. T. 21 October 2005 pp. 52-55.

¹⁰ *Id.* p. 55.

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permitted where: (i) a new issue has arisen during the Prosecution cross-examination, which (ii) is adverse to the Accused who wishes to pose additional questions.¹¹ The Defence does not disagree with this standard.¹² The Bagosora Defence suggests, however, that the Chamber improperly considered the possibility that other Defence teams could pose questions to defend its interests. This is said to deprive the Accused of his right under Rule 82 "to be accorded the same rights as if he were being tried separately".¹³ The Bagosora Defence argues that the questions would have been allowed had this been a single-accused trial.

9. If the Bagosora Defence had shown that the testimony was adverse to the Accused, then it would have been entitled to pose additional questions to the witness. However, the submission by Lead Counsel failed to show that the subject-matter of the testimony in question was actually detrimental to the Accused Bagosora.¹⁴ The Accused was not mentioned in the document by name, and the witness had denied all of the incriminating propositions suggested by the Prosecution. The Chamber made a fact-specific determination based on the submissions before it, applying the correct legal standard.¹⁵ Leave to appeal this determination would not materially advance the proceedings.

10. The Bagosora Defence also suggests that the Chamber's decision in respect of Witness LE-1 is irreconcilable with its decision concerning Witness DM-25, of whom the Defence was permitted to ask questions after the Prosecution cross-examination. The Bagosora Defence had explicitly reserved the right to ask questions after the Prosecution cross-examination of Witness DM-25. The Bagosora Defence argues that this difference is immaterial.¹⁶

11. The Chamber did not rely on the absence of a reservation of rights as a reason for denying leave to ask additional questions. Nothing in the decision suggests that this was part of the Chamber's reasoning. Certification would not be justified on this basis. The assessment of whether to allow supplemental cross-examination or re-examination is a fact-specific inquiry involving a detailed evaluation of a variety of factors, including the efficient use of courtroom time, which falls squarely within the Trial Chamber's discretion. As the Defence agrees with the legal standard applied by the Chamber, reference of the present decision to the Appeals Chamber would not materially advance the proceedings.

¹¹ T. 11 April 2005, p. 67, concerning Witness DM-25 ("We understand the situation as follows: The Defence has not found that there is anything adverse coming out of this witness's testimony and will not ask any questions now, but reserve the rights if there should be new issues coming out by the cross-examination"); T. 12 April 2005 p. 37 ("[A]s we agreed earlier in this courtroom, there will be an opportunity to cross-examine this witness if adverse information is coming up from him. And that will then be the remedy for the other defence teams").

¹² Request, para. 8 ("a party cannot retake the floor after the Prosecution has completed its cross-examination unless the witness has provided new information detrimental to the accused).

¹³ Request, paras. 12-13, 25-26 ("It is respectfully submitted that Colonel Bagosora cannot rely on the Defence for two other Accused to defend his interests during the course of this trial").

¹⁴ T. 21 October 2005 p. 55 ("I want to cross this witness on the new element. I want to ask questions on this document ... which was produced, and which I was not aware of before this time").

¹⁵ Although the Chamber did not specifically recite the two-part test in response to the Bagosora application, the oral ruling was very soon after the ruling on the Kabiligi request for additional cross-examination, which did apply the two-part test. T. 21 October 2005 p. 43. Furthermore, the Chamber's use of the term "re-examine" rather than "cross-examine" is immaterial: the Chamber was simply referring to the additional questioning.

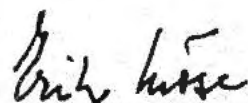
¹⁶ Request, paras. 13-14.

FOR THE ABOVE REASONS, THE CHAMBER

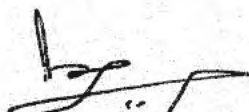
DENIES the request.

Arusha, 22 February 2006

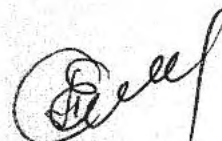
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Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

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