



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

KTR-98-41-T
04-09-2006
(29274-29272)

29274
lwan

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 4 September 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gatien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 SEP -4 10 31 AM
JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

**DECISION ON KABILIGI MOTION FOR THE EXCLUSION OF PORTIONS OF
TESTIMONY OF PROSECUTION WITNESS ALISON DES FORCES**

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

lh

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the “Kabiligi Motion for the Exclusion of Evidence in the Testimony of Prosecution Witness Alison des Forges”, filed on 10 May 2006;

CONSIDERING the Prosecution Response, filed on 16 May 2006; and the Defence Reply, filed on 29 May 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. Dr. Alison Des Forges, an expert witness for the Prosecution, testified at the beginning of the present trial before any factual evidence had been heard or admitted. Portions of her testimony were based on, and provided a description of, an interrogation of the Accused Kabiligi by Prosecution investigators in July 1997. When the Prosecution subsequently sought to introduce transcripts of this interrogation, the Chamber found that Kabiligi had not been properly informed of his rights to the assistance of counsel and to remain silent. The remedy ordered was the exclusion of the transcripts.¹ The Defence argues that the expert testimony which is based on statements of the Accused during the interrogation must also be excluded. The motion requests the exclusion of eight specific excerpts of the expert’s testimony.²

DELIBERATIONS

2. This Chamber has already ruled that admission of the transcripts of the Kabiligi interview from July 1997 would be “antithetical to, and would seriously damage, the integrity of the proceedings”.³ The same logic must apply in respect of hearsay evidence as to the contents of the interview. Accordingly, the Chamber is of the view that expert testimony which describes the content of that interview must be excluded.

3. The Prosecution argues that objections to the admissibility of the testimony should ~~have been made contemporaneously~~, and that the present motion is untimely.⁴ The Chamber disagrees. The Defence did object to expert testimony being given before the factual basis for such testimony had been established by Prosecution evidence.⁵ The Chamber permitted the expert witness to testify over these objections, noting that the procedure “in no way

¹ *Bagosora et al.*, Decision on the Prosecutor’s Motion For the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004.

² Motion, para. 20.

³ *Bagosora et al.*, Decision on the Prosecutor’s Motion For the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004. The transcripts of the interview, conducted by ICTR investigators on 19 July 1997, are referenced as *Bagosora et al.*, Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89 (C) of the Rules of Procedure and Evidence, 28 April 2004, Appendix KABIGRA-01, KABIGRA-02 [“the Kabiligi Interview”].

⁴ Response, para 115.

⁵ *Bagosora et al.*, Defence Motion Seeking an Order from the Tribunal to Prevent Expert Witness Alison Des Forges from Testifying as First Prosecution Witness, filed on 26 August 2002, paras. 19-20. See also, T. 3 September 2002 pp. 9, 22, 28-29, 37, 53-54.

diminishe[d] [the Prosecution's] burden of proving all the facts substantiating the crime with which [it] has charged the Accused beyond a reasonable doubt".⁶ The Defence was entitled to defer its objection to the factual basis underpinning the expert's opinions until such time as the Prosecution sought to introduce the evidence upon which it was based.⁷

4. The parties disagree on the appropriate remedy. The Prosecution argues that the Chamber should not exclude expert opinions which are based partially on the Kabiligi interview and partially on other information.⁸ The complexity of drawing such a distinction, it argues, requires the Chamber to defer consideration of the weight of that testimony until the end of the case, rather than to categorically exclude certain parts thereof.⁹ The Defence responds that the expert gave specific conclusions based on the Kabiligi interview, and that no ambiguity or complexity exists which could justify allowing those conclusions, which are based on inadmissible evidence, to remain part of the record.¹⁰ Accordingly, the Defence requests that the Chamber exclude "all references ... to the 19 July 1997 interview ... including, but not limited to" eight distinct excerpts from the transcripts.¹¹

5. In the excerpts identified by the Defence, the expert witness gives clear indications as to the basis for her opinions or information. On occasion, her propositions are based not only on the Kabiligi interview, but also on some other source.¹² It would not be appropriate to categorically exclude propositions which are based, at least in part, on admissible evidence.¹³ As the basis for the expert opinions are evident from the record, the Chamber considers it unnecessary to categorically exclude specific sections of the expert's testimony. It is more convenient and equally effective to simply declare, as in the Chamber's previous decision, that statements by the Accused during his custodial interview in July 1997 are excluded. It follows, without the need for any specific order, that any opinions based exclusively on this interview will be accorded no weight by the Chamber.

⁶ T. 4 September 2002 p. 10.

⁷ The Prosecution did not attempt to introduce the transcripts of the Kabiligi interview through the expert. They were tendered by written procedure approximately 17 months after her testimony. *Bagosora et al.*, Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence, filed on 28 April 2004.

⁸ Response, para. 117

⁹ Response, para. 116.

¹⁰ Reply, para. 45.

¹¹ *Id.*, para. 46.

¹² E.g. T. 17 September 2002 p. 23 (indicating that Colonels Nsengiyumva, Bagosora and Nsabimana were members of a group called AMASASU).

¹³ *Bagosora et al.*, Decision on Motion for Judgement of Acquittal (TC), 2 February 2005, para. 10.

29272

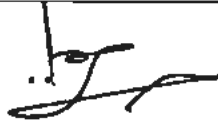
FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that the portions of the testimony of Witness Alison Des Forges which describe the content of statements of the Accused Kabiligi during an interview with Prosecution investigators in July 1997 are excluded.

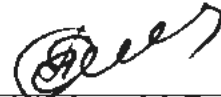
Arusha, 4 September 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

